Bulletin TAS
CAS Bulletin

1/2012

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

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Message of the ICAS President

The last season has been particularly busy with a significant number of high profile cases handled by the Court of Arbitration for Sport. Among the 'leading cases' selected for the Bulletin are several cases related to doping. The case UCI & WADA v. Alberto Contador and RFEC is of particular interest regarding the burden of proof in the context of doping whereas the case UCI v. Jan Ullrich & Swiss Olympic concerning blood doping in cycling deals particularly with the probative value of the evidence. Both cases have been extensively commented in the press. In the expected and notable case USOC v. IOC referring to the rule prohibiting doped athletes from participation in the next Olympic Games, the CAS has considered that the rule was not in compliance with the World Anti-doping Code and the Olympic Charter. Turning to football, the case Amadou Diakite v. FIFA is of interest with respect to unethical behaviour. The case UEFA v. FC Sion – Olympique des Alpes related to the eligibility of players for a UEFA competition contemplates developments regarding the competence of UEFA to review the qualification of players for participation in UEFA competitions. In another sporting field, the case Croatian Golf Federation (CGF) v. European Golf Association looks at the issue of expulsion of a member due to bankruptcy and at the right to be heard.

During the last two years and following the consultation of all major stakeholders and users of CAS, some important amendments to the Code of Sports-related arbitration have been adopted by the ICAS. Whereas some amendments concern the ICAS organization and the status of the arbitrators (structural amendments), other amendments aim at clarifying some procedural rules or at filling certain lacunas. Finally, some modifications have been adopted by the ICAS in order to facilitate and improve the CAS procedure and to reduce time limits. The last amendments of the Code entered into force on 1st January 2012. The article of Matthieu Reeb, CAS Secretary General, explains the relevant amendments made to the Code since 2010.

Twenty new arbitrators have been appointed in order to strengthen the current group of CAS members in view of the heavy workload placed on them and the increasing number of arbitrations (365 in 2011).

The ICAS has created a new CAS ad hoc Division for the Olympic Games in London. The CAS delegation will be headed by Judge Juan R. Toruella (Porto Rico) and Mr Gunnar Werner (Sweden); it will be composed of 12 arbitrators based in the Olympic City: Mr Efraim Barak (Israel), Mr Michele Bernasconi (Switzerland), Mr Massimo Coccia (Italy); Mr Ricardo de Buen (Mexico); Mr Thomas Lee (Malaysia), Mr Stuart McInnes (United Kingdom), Mr Graeme Mew (Canada), Mr Guédel Ndiaye (Senegal), Ms Maidie Oliveau (USA), Mr Sharad Rao (Kenya), Mr Martin Schimke (Germany), Mr Alan Sullivan (Australia). It is the ninth CAS ad hoc Division since the first one in Atlanta 1996.

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

John Coates

"Sports law": implications for the development of international, comparative, and national law and global dispute resolution**

Prof. Matthew J. Mitten & Prof. Hayden Opie

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I. Abstract

In this Article, we observe that legal regulation of national and international sports competition has become extremely complex and has entered a new era, which provides fertile ground for the creation and evolution of broader legal jurisprudence with potentially widespread influence and application. Our principal aim is to draw these developments to the attention of legal scholars and attorneys not necessarily familiar with sports law. Specifically, the evolving law of sports is having a significant influence on the development of international and national laws, is establishing a body of substantive legal doctrine ripe for analysis from a comparative law perspective, and has important implications for global dispute resolution. For example, the global processes used to establish an international sports antidoping code and to resolve a broad range of Olympic and international sports disputes (which is rapidly creating a body of global private law) provide paradigms of international cooperation and global lawmaking. In addition, judicial resolution of sports-related cases may develop jurisprudence with new applications and influence. Our objective is to generate greater awareness of the importance of sports, not only as a worldwide cultural phenomenon and a significant part of the twenty-first-century global economy, but as a rich source of international and national public and private laws that provide models for establishing, implementing, and enforcing global legal norms.

II. "*Lex sportiva*": lessons for global dispute resolution and the creation of international legal norms

A. Adjudication of Olympic and international sports disputes: the need for a specialized international tribunal

There are national Olympic committees (NOCs) in more than 200 countries or territories throughout the world that promote, sponsor, and oversee Olympic and international sports competitions. Each of them must comply with the IOC Charter and bylaws, as well as the laws of their respective countries. In addition, NGBs, which oversee and regulate a particular sport in their respective countries, are required to adhere to the rules of their respective IFs, which oversee and regulate the sport worldwide, as well as applicable national laws[1]. Thousands of athletes are members of the corresponding NGB for their respective sports, which provides them with various contractual rights and duties.

1. See generally Matthew J. Mitten *et al.*, Sports Law and Regulation: Cases, Materials, and Problems 278-80 (2d ed. 2009).

Each international or national sports governing body, as well as each individual athlete who participates in Olympic or other inter-national sports competitions, has a "home" country on account of incorporation, domicile, or residence therein and is both subject to and protected by its domestic laws. Because their respective home countries and national laws are different, resolution of Olympic and international sports disputes among two or more of these entities (e.g., IOC, IF, NOC, or NGB) and/or individual athletes by national courts is inherently problematic and raises complex jurisdictional and choice of law issues. For example, in Reynolds v. International Amateur Athletic Federation, the United States Court of Appeals for the Sixth Circuit held that an Ohio district court lacked personal jurisdiction over a London-based IF in litigation brought by a U.S. athlete domiciled in Ohio, who challenged a Paris laboratory's finding that a urine sample he provided in Monaco tested positive for a banned performance-enhancing substance and claimed that his suspension from competition violated Ohio state law[2].

Because the IOC and each IF seek to apply and enforce a set of uniform rules consistently worldwide, the prospect of different national courts reaching inconsistent conclusions on the merits of Olympic and international sports disputes is a significant problem[3]. A strong potential for conflicting judicial views exists because of the divergent approaches of the world's different legal systems (e.g., common law or civil law), possible biases stemming from nationalism and ethnocentrism, and the strength of the principles of judicial independence and rule of law in the relevant jurisdictions, as well as cultural differences concerning the role and importance of sports and different national and transnational models of sport (e.g., European, North American, and Australian)[4].

If national courts adjudicate these disputes, there is an inherent tension between internationalism (i.e., the need for international sports to operate under a consistent, worldwide legal framework), and nationalism (i.e., the desire of each nation to preserve its sovereignty and ensure that its athlete citizens are protected by its laws). Olympic and international sports competition requires uniform and generally accepted rules governing on-field competition that are interpreted, applied, and enforced by independent and impartial referees, umpires, or judges whose decisions are final. Similarly, the resolution of disputes arising out of Olympic and international sports competition also requires an off-field legal system pursuant to which an independent international tribunal or court with specialized sports law expertise renders final and binding decisions having global recognition and effect[5].

B. Court of Arbitration for Sport (CAS)

In 1981, Juan Antonio Samaranch, who was the then-current IOC president, envisioned a "*supreme court for world sport*"[6]. On April 6, 1983, the IOC established the CAS, a private international arbitral body based in Lausanne, Switzerland, to provide a forum for resolving sports-related disputes[7]. The CAS is the product of a 1982 working group chaired by Judge Kéba Mbaye, who was an IOC member and judge on the International Court of Justice[8]. Despite the first word of its name, the CAS is not an international court of law. Rather, it is an arbitration tribunal whose jurisdiction and authority are based on agreement of the parties.

The Code of Sports-Related Arbitration (Code)[9], which is drafted by the International Council of Arbitration for Sport (ICAS), a group of twenty high-level jurists, governs the organization, operations,

2. Reynolds v. Int'l Amateur Athletic Fed'n, 23 F.3d 1110 (6th Cir. 1994).

3. In addition, it is questionable whether national courts have the requisite expertise to resolve international sports disputes. Judge Richard Posner, a prominent federal appellate court judge, has observed: "[T]here can be few less suitable bodies than the federal courts for determining the eligibility, or the procedures for determining the eligibility, of athletes to participate in the Olympic Games". Michels v. U.S. Olympic Comm., 741 F.2d 155, 159 (7th Cir. 1984) (Posner, J., concurring).

4. Distinctive U.S. features: separate regulatory authority based on level of competition; "amateur" intercollegiate and interscholastic competition; closed professional leagues; no national sports ministry or direct federal government regulation; Olympic sports privately funded rather than state-sponsored training schools that financially support athletes. European features: central government funding, regulation, and encouragement of sports participation; club sport model rather than tie to educational institutions; open leagues and promotion and relegation; hierarchical vertical pyramid. See generally James A.R. Nafziger, A Comparison of the European and North American Models of Sports Organisation, in EU, Sport, Law and Policy: Regulation, Re-regulation and Representation 35-55 (Simon Gardiner, Richard Parrish & Robert C.R. Siekmann eds., 2009). Australian features: influenced by large geographic size and a smaller market with widely separated population centers; until relatively recently, entire semi-professional leagues located in each major center; national professional leagues now established; closed professional leagues; private ownership of professional teams either nonexistent or new; club sports model rather than university-based sports; strong government sports development policy; many professional leagues include a New Zealand based team. See Bob Stewart et al., Australian Sport: Better by Design? (2004).

5. See generally Matthew J. Mitten, Judicial Review of Olympic and International Sports Arbitration Awards: Trends and Observations, 10 Pepp. Disp. Resol. L.J. 51 (2009).

6. Daniel H. Yi, Turning Medals into Metal: Evaluating the Court of Arbitration of Sport as an International Tribunal, 6 Asper Rev. Int'l Bus. & Trade L. 289, 290 n.7 (2006) (quoting Ian Blackshaw, Sports Court Getting Right Results, Guardian, June 3, 2004, http:// www.guardian.co.uk/sport/2004/jun/03/ianblack (last visited Nov. 6, 2010)).

7. The CAS is recognized under the European Convention on the Recognition of the Legal Personality of International Non-Governmental Organizations. Ian S. Blackshaw, Introductory Remarks to The Court of Arbitration for Sport 1984-2004, at 4 (Ian S. Blackshaw et al. eds., 2006) ("CAS rulings are legally effective and can be enforced internationally.").

8. Matthieu Reeb, The Role and Functions of the Court of Arbitration for Sport (CAS), in The Court of Arbitration for Sport 1984-2004, at 31, 32 (Ian S. Blackshaw et al. eds., 2006).

9. Code of Sports-Related Arbitration, Court of Arbitration for Sport, http://www.tas-cas.org/d2wfiles/document/3923/5048/0/Code%202010%20(en).pdf (last visited Nov. 6, 2010) [hereinafter Arbitration Code].

and procedures of the CAS[10]. The Code empowers the CAS to resolve sports-related disputes in the first instance (i.e., ordinary arbitration, which usually involves commercial matters) and those arising out of the appeal of a decision of a sports governing body such as the IOC or an IF (i.e., appeals arbitration)[11]. The CAS operates an ad hoc Division at the site of each Olympic Games as well as other major international sports events to resolve disputes in connection with the event in an expedited manner[12]. It also is authorized to issue nonbinding advisory opinions on sports-related matters.

The ICAS appoints the CAS's member-arbitrators for four-year renewable terms and is obligated to "*wherever possible, ensure fair representation of the continents and of the different juridical cultures*"[13]. In appointing CAS arbitrators, the Code states that "*the ICAS shall respect, in principle, the following distribution*": one-fifth from among persons nominated by the IOC; one-fifth from among persons nominated by the IFs; one-fifth from among persons nominated by the NOCs; one-fifth from among persons independent of those sports governing bodies; and one-fifth "*with a view to safeguarding the interests of the athletes*"[14]. They must have legal training, recognized competence in sports law and/or international arbitration, and have good command of at least one CAS working language (i.e., English or French)[15]. In addition, CAS arbitrators must be objective and independent in their decisions and adhere to a duty of confidentiality. Presently, there are approximately 270 CAS arbitrators who generally sit in three-person panels to hear and adjudicate cases[16].

Regardless of its geographical location, the "*seat*" of all CAS arbitration proceedings is Lausanne, Switzerland[17]. This ensures uniform procedural rules[18], provides a stable legal framework[19], and facilitates efficient dispute resolution in locations convenient for the parties. The CAS panel issues a written award (majority vote governs) giving the reasons for the decision, which is final and binding on the parties. CAS appeals arbitration (unless the parties agree otherwise) and ad hoc Division awards are publicly disclosed.

Unlike common law judicial precedent, "*[i]n CAS jurisprudence there is no principle of binding precedent, or stare decisis*"[20]. Ironically, although the CAS is an arbitral tribunal and the majority of its arbitrators have a civil law background, the rapidly developing body of CAS awards collectively is forming a body of international sports law, which has been described as lex sportiva[21]. For consistency, although it is not bound to do so, "*a CAS Panel will obviously try, if the evidence permits, to come to the same conclusion on matters of law as a previous CAS Panel*"[22]. This is similar to the judicial process utilized by common law appellate judges. The CAS Code provides that a CAS award is final and binding on the parties[23], but is subject to limited judicial review by the Swiss Federal Tribunal (SFT), which has ruled that the CAS is sufficiently independent and impartial for its awards to have the same force and effect as judgments rendered by sovereign courts[24].

10. ICAS currently has two U.S. members, Michael B. Lenard and Judge Juan R. Torruella, and one Australian member, John D. Coates, who is the ICAS Vice-President.

11. Arbitration Code, supra note 9, para.20.

12. These include the FIFA World Cup, Commonwealth Games, and Union of European Football Associations (UEFA) European Football Championships.

13. Arbitration Code, supra note 9, para.16.

14. Id. para.14.

15. Id. para.14, r. 29.

16. List of CAS Arbitrators Per Nationality, Court of Arbitration for Sport, http://www.tas-cas.org/d2wfiles/document/452/5048/0/Liste%20nationalit%C21e%2 009.pdf (last visited Nov. 10, 2010).

17. Arbitration Code, supra note 9, r. 28.

18. See Gabrielle Kaufmann-Kohler, Identifying and Applying the Law Governing the Arbitration Procedure--The Role of the Law of the Place of Arbitration, in Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention 336, 348 (Albert Jan van den Berg ed., 1999) (noting that the objective of choosing Lausanne as the seat of CAS arbitrations is to provide the advantage of a "uniform procedural regime").

19. The Swiss Federal Code on Private International Law, reprinted in Court of Arbitration for Sport, Code of Sports-Related Arbitration and Mediation Rules app. 3, at 162 (2004) [hereinafter PIL], requires an arbitration tribunal to resolve a dispute pursuant to the rules of law chosen by the parties, or absent any choice, according to the law with the closest connection to the dispute. Article 187. The choice of law rules in the CAS Code are consistent with the Swiss PIL. See infra notes 128-130 and accompanying text.

20. Arbitration CAS 2004/A/628, Int'l Ass'n of Athletics Fed'n (IAAF) v. USA Track & Field, award of June 28, 2004, para.19.

21. Michael J. Beloff, Tim Kerr & Marie Demetriou, Sports Law 7-12 (1999); James A.R. Nafziger, International Sports Law 48-54 (2d ed. 2004). But see Allan Erbsen, The Substance and Illusion of Lex Sportiva, in The Court of Arbitration for Sport 1984-2004, at 441 (Ian S. Blackshaw, Robert C.R. Siekmann & Janwillem Soek eds., 2006) (concluding that it is inaccurate to describe collective body of CAS awards as lex sportiva). For additional discussion on lex sportiva, see Ken Foster, Is There a Global Sports Law? 2 Ent. L. 1 (2003); Ken Foster, Lex Sportiva and Lex Ludica: The Court of Arbitration for Sport's Jurisprudence, 3 Ent. & Sports L.J. (2006), available at http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2.

22. Arbitration CAS 2004/A/628, Int'l Ass'n of Athletics Fed'n (IAFF) v. USA Track & Field (USATF), award of June 28, 2004, §19. See also Arbitration CAS 2008/A/1545, Anderson et al. v. Int'l Olympic Comm. (IOC), award of July 16, 2010, para. 118 ("[A]lthough a CAS panel in principle might end up deciding differently from a previous panel, it must accord to previous CAS awards a substantial precedential value and it is up to the party advocating a jurisprudential change to submit persuasive arguments and evidence to that effect.").

23. Arbitration Code, supra note 9, r. 59. See infra notes 127-133 and accompany-ing text for a discussion of the nature and scope of the SFT's judicial review of CAS awards.

24. A. and B. v Int'l Olympic Comm. (IOC) and Int'l Ski Fed'n (FIS) (Lazutina), 4P.267-270/2002 (1st Civ. Ct., May 27, 2003) (translation), in Digest of CAS Awards III 2001-2003, at 674 (Matthieu Reeb ed., 1998); G. v Fédération Equestre Internationale, (1st Civ. Ct., Mar. 15, 1993) (translation), in Digest of CAS Awards 1986-1998 561 (Matthieu Reeb ed., 1998). Notwithstanding the SFT's ruling, some commentators question whether the CAS is sufficiently independent from the IOC and some members of the Olympic Movement. See, e.g., Antonio Rigozzi, L'Arbitrage International en Matière de Sport (2005); Andrea Pinna, The Trials and Tribulations of the Court of Arbitration for Sport: Contribution to the Study of the Arbitration of Disputes Concerning Disciplinary Sanctions, 1-2 Int'l Sports L.J. 8, 13-14 (2005); Michael Straubel, Enhancing the Performance of the Doping Court: How the Court of Arbitration for Sport Can Do Its Job Better, 36 Loy. U. Chi.

C. CAS: a fertile ground for academic study

The twenty-five-year history of the CAS demonstrates how civil and common law legal systems can function effectively together within an international tribunal to resolve a wide variety of complex, time-sensitive disputes between parties of different nationalities. CAS arbitration awards are globally respected adjudications, which generally are validated and enforced by national courts. The CAS offers guidance regarding the effective structure and operation of international and transnational dispute resolution bodies, which are increasing in number with globalization[25].

One commentator has observed that "*the CAS represents one of the world's more successful attempts at bringing order to transnational issues*"[26] and is a *"valuable example of how an international tribunal can succeed*"[27]. He notes, "*Through creativity and cooperation, sports officials have created a working, functioning international tribunal that can serve as an example for future efforts at transnational dispute resolution*"[28]. The CAS has been successful because it is a superior dispute resolution forum than available alternatives, and its decisions are generally accepted and will be enforced by national courts if necessary[29]. Alternative dispute resolution scholars would find it interesting to compare the structure and operation of the CAS to other international arbitral bodies such as the International Court of Arbitration (which resolves commercial disputes) and the ICANN Arbitration System (which resolves disputes regarding the ownership of internet domain names) and to evaluate their relative effectiveness in resolving disputes fairly, efficiently, and consistently.

For legal theorists, the evolving body of lex sportiva established by CAS awards is an interesting and important example of global legal pluralism without states, arising out of the resolution of Olympic and international sports disputes between private parties[30]. It is an emerging body of international law with some similarities to lex mercatoria, a much older and more well-established body of inter-national commercial law that has developed in the essentially private domain of commercial activity based on custom and arbitration awards[31]. However, the lex sportiva being developed by the CAS often is not recognized as an illustrative example of legal pluralism that appears to work well, even by those who staunchly advocate private adjudication of disputes[32].

Now that CAS appeals arbitration procedure and ad hoc Division awards are becoming more readily identifiable and accessible to the public[33], there are several broad issues worthy of in-depth academic study regarding the development of this body of international sports law by a diverse group of international arbitrators with civil law or common law backgrounds. For example, to gain a comparative perspective, alternative dispute resolution and international law scholars may want to study the following issues:

1. How do CAS arbitration panels decide cases, and does the panel's role vary according to the type of dispute[34]? Do CAS panels simply construe the parties' agreement and applicable rules, exercise "*equity jurisdiction*" as deemed appropriate, and/or perform other functions similar to a common law, civil law, or hybrid legal system? Is there discernable empirical evidence of any factors that significantly influence which party prevails in particular types of disputes?

L.J. 1203, 1231-32 (2005).

25. See The International Judiciary in Context, Project on Int'l Courts and Tribunals, http://www.pict-pcti.org/publications/synoptic_chart/synop_ c4.pdf (last visited Nov. 6, 2010) (listing several permanent arbitral tribunals).

26. Yi, supra note 6, at 290; see also Lisa B. Bingham, Control over Dispute-System Design and Mandatory Commercial Arbitration, 67 Law & Contemp. Probs. 221, 245 (2004) (observing that the CAS "has earned a reputation for independence and fairness, although it, too, is a mandatory arbitration program" and "is viewed as establishing a consistent body of arbitral authority, a kind of lex sportiva, because of its combination of expertise and trans-parency").

27. Yi, supra note 6, at 291.

28. Id.

29. See infra notes 76-77 and accompanying text.

30. [The] globalization of law creates a multitude of decentred law-making processes in various sectors of civil society, independently of nation-states.... They claim worldwide validity independently of the law of nation-states and in relative distance to the rules of international public law. They have come into existence not by formal acts of nation-states but by strange paradoxical acts of self-validation. Gunther Teubner, Global Law Without a State, at xiii (1997).

31. Arbitration CAS 98/200, AEK Athens v. Union of European Football Ass'n (UEFA), award of Aug. 20, 1999, para. 156:

Sports law has developed and consolidated along the years, particularly through the arbitral settlement of disputes, a set of unwritten legal principles--a sort of lex mercatoria for sports or, so to speak, a lex ludica--to which national and international sports federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided that they do not conflict with any national "public policy" ("ordre public") provision applicable to a given case.

But see Nafziger, supra note 21, at 48-49 (observing that "the association of the two terms may be somewhat strained" because "the status and general scope of the emerging lex sportiva are ... much less substantial than the lex mercatoria within their respective spheres of application").

32. See, e.g., Bryan Caplan & Edward P. Stringham, Privatizing the Adjudication of Disputes, 9 Theoretical Inquiries in L. 503, 528 (2008) (asserting that "[p]ublic courts should, as a matter of policy, respect contracts that specify final and binding arbitration," but failing to cite the CAS and its arbitration awards as an example, which would have strengthened their argument).

33. Recently, the CAS Secretary General began posting the full text of current CAS awards on the CAS Web site and is developing a searchable archive of past awards. Pursuant to an agreement with the United States Olympic Committee (USOC), the National Sports Law Institute (NSLI) of Marquette University Law School is developing an electronic summary and index of issues resolved by CAS awards that will be posted on both the USOC and NSLI Web sites.

34. See, e.g., Erbsen, supra note 21, at 452 (finding a "strong textualist theme in CAS [doping] opinions").

2. Considering the plenary power of monolithic Olympic and international sports governing bodies, which require athletes to submit to final and binding CAS arbitration as a condition of participation[35], what should be the appropriate role of the CAS? Should CAS arbitrators have a broad scope of equitable power and function more like a court by acting as an external regulatory constraint and ensuring that the legal rights of particular parties (e.g., Olympic and international sport athletes) are protected adequately[36]?

3. Is CAS jurisprudence functioning as a de facto body of common law legal precedent and, if so, what are its effects[37]? For example, is it reducing the volume of CAS arbitration proceedings in particular types of disputes as it establishes a body of lex sportiva?

4. Should the CAS Code be modified (and if so, how?) to improve the fairness and effectiveness of CAS arbitration as a method of international sports dispute resolution with global implications[38]?

Examination of these issues by academics other than sports law scholars may provide not only valuable research specific to the CAS, but it also may contribute some important insights regarding the development of alternative dispute resolution systems and/or international legal norms outside the context of sports.

III. International sports law, a form of global legal pluralism, and prospects for displacing national law[39]

In Part II.A, we identified an inherent tension between interna-tionalism and nationalism in the adjudication of sports disputes arising out of international athletic competition. The establishment and development of the CAS has provided an effective mechanism for resolving Olympic and international sports disputes in an expert and internationally coherent manner, thereby largely avoiding the problems of inconsistent rulings by national courts unfamiliar with international sports association governance and rules. In this Part, we will explore another aspect of the tension between internationalism and nationalism in sports, namely an actual or potential clash between a developing body of international sports law and national law[40]. This conflict arises primarily in two situations: (1) when international sports governing body agreements and rules are directly challenged in domestic courts as contrary to national law and (2) when CAS awards are challenged as inconsistent with national law in a judicial forum.

It is inevitable that sports governing body rules based on private international agreements and/

35. In X. (Cañas) v ATP Tour, 4P.172/2006 (2007) (Switz.), ATF 133 III 235, translated in 1 Swiss Int'l Arb. L. Rep. 65, 84-85, the SFT recently observed:

Sports competition is characterized by a highly hierarchical structure, as much on the international as on the national level. Vertically integrated, the relationships between athletes and organisations in charge of the various sports disciplines are distinct from the horizontal relationship represented by a contractual relationship between two parties .... This structural difference between the two types of relationships is not without influence on the volitional process driving the formation of every agreement.... [E]xperience has shown that, by and large, athletes will often not have the bargaining power required and would therefore have to submit to the federation's requirements, whether they like it or not. Accordingly, any athlete wishing to participate in organised competition under the control of a sports federation whose rules provide for recourse to arbitration will not have any choice but to accept the arbitral clause, in particular by subscribing to the articles of the sports federation in question in which the arbitration clause was inserted ...."

It ruled that mandatory arbitration provisions are enforceable because the CAS provides a swift, independent, and impartial means of resolving international sports disputes by a specialized tribunal. However, as a "counterbalance," an athlete must have a right to have an adverse CAS award judicially reviewed by the SFT to remedy "breaches of fundamental principles and essential procedural guarantees that which may be committed by the arbitrators called upon to decide in his case.". Id. at 86.

36. A CAS panel will not rewrite an international sports governing body's rules or second-guess its decisions or policies. Arbitration CAS 2006/A/1165, Ohuruogu v. U.K. Athletics Ltd., award of Apr. 3, 2007, at 11-12. On the other hand, one CAS panel has recognized the need for "general principles of law" to govern international sports federations in addition to their own rules or applicable national law. For example, procedural fairness should be required, and "arbitrary or unreasonable rules and measures" should be prohibited. Arbitration CAS 98/200, AEK Athens v. Union of European Football Ass'n (UEFA), award of Aug. 20, 1999, para. 156.

37. One scholar has suggested:

Consideration should also be given to an organizational structure whereby CAS can address the development of law in arbitral sporting decisions. CAS decision [sic] are increasingly cited by parties and arbitral panels as authority for rules upon which to decide cases, yet the persuasive effect of these citations to arbitral cases is unclear. For CAS to be a true "Supreme Court for Sport," it should institute a formal appellate body akin to a U.S. Supreme Court with discretionary review, to rule on conflicting interpretations of lex sportiva rendered by CAS panels. Maureen A. Weston, Simply a Dress Rehearsal? U.S. Olympic Sports Arbitration and De Novo Review at the Court of Arbitration for Sport, 38 Ga. J. Int'l & Comp. L. 97, 128 (2009).

38. For example, considering that Olympic sports organizations currently provide substantial funding for the CAS and appoint sixty percent of the members of the ICAS, which has the exclusive authority to appoint CAS arbitrators (many of whom have ties to Olympic sports governing bodies), is it appropriate to have a closed list of CAS arbitrators? In addition, scholarly analysis of the current CAS arbitrator conflict of interest rules and SFT rulings regarding the grounds for challenging a CAS arbitrator's independence is needed.

39. There are, however, some significant areas of law in which displacement is very unlikely to occur. For example, criminal laws generally apply to sports-related conduct within a country. The Italian government refused to honor the Turin Olympic Games Organizing Committee's promise that Italy's criminal sports doping laws would not be enforced during the 2006 Turin Olympics against foreign Olympic athletes. Rosie DiManno, A Gold in the Scandal Event; This Year It Goes to the Austrians, Toronto Star, Feb. 22, 2006, at A6; Phil Sheridan, Italy's Drug Laws Put IOC to the Test, Phila. Inquirer, Feb. 9, 2006, at H2. Visiting foreign athletes have been prosecuted for violating domestic criminal laws despite the assertion of a private sports league that player discipline for on-ice violence should be exclusively an internal governance matter. For example, in 2000, the Boston Bruins' Marty McSorley was convicted of assaulting Donald Brashear, a Vancouver Canucks' player, with a weapon (a hockey stick) during an NHL game. Mitten, et al. *S*ports Laws & Regulation: Cases, Material, and Problems, at 926-31 (2d ed. 2005), (discussing R v. McSorley, 2000 BCPC 116 (Can. B.C. 2000)). National tax laws also apply to income earned by foreign athletes within a county's borders, although it is important to avoid double taxation by multiple countries. See The International Guide to the Taxation of Sportsmen and Sportswomen (Rijkele Betten ed., 2004); Rijkele Betten, The Avoidance of the International Double Taxation of Sportspersons, 1-2 Int'l Sports L.J. 78 (2004).

40. Some other examples are cited in Alexandre Miguel Mestre, The Law of the Olympic Games 16-18 (2009).

or CAS awards at times will create tensions with national laws. Because sports are a microcosm of society[41], an examination of how these conflicts are being resolved and the corresponding effects is fertile ground for academic discourse. Sports are a crucible for consideration of important global legal issues and presents an opportunity to examine the intersection between global alternative dispute resolution, international law, and national sovereignty[42].

In their introduction to a recent American Journal of Comparative Law symposium issue on Beyond the State: Rethinking Private Law, the authors observe that "*it is precisely because globalization moves us 'beyond the state' that we are, more than ever, forced to rethink private law and its relation to the state*"[43]. One of the issue's fifteen articles recognizes--in a cursory and rather oblique manner--that inter-national sports federation ethical codes and disciplinary sanctions for violations are a form of global private law[44]. Another article briefly notes that rules regulating economic transactions among sports federation members, such as player transfers, also constitute global private law[45]. However, although Olympic and international sports competition gives rise to a paradigm example of global legal pluralism[46], neither article recognizes the two situations in which a developing body of international sports law arising primarily out of the resolution of disputes between private parties interacts with national law, much less considers or analyzes this phenomenon from a scholarly perspective[47].

A. Evolving judicial treatment of international sports agreements and rules: traditional vs. deferential approach

As the scope and detail of Olympic and international sports rules continue to expand, they may conflict with national laws, thereby motivating athletes and others to seek the aid of a national court to overturn the adverse effects of those rules, at least within their respective home countries. Unless doing so would contravene valid and applicable choice of law provisions, a domestic court generally will apply its substantive national law in resolving disputes within its jurisdiction. Therefore, Olympic and international sports agreements and rules must comply with national law, and some domestic courts have ruled accordingly. On the other hand, other courts have adopted a deferential approach by refusing to apply national law to the challenged rules or agreements.

The following 1988 case illustrates the traditional judicial approach. In Barnard v Australian Soccer Federation, the Federal Court of Australia ruled that the Australian Soccer Federation (ASF) violated Australian competition law by banning the plaintiff, who played both semiprofessional indoor and outdoor soccer, from competing in outdoor soccer competitions[48]. At the time, the Federation of International Football Associations (FIFA), the IF for soccer, and the Federaçao Internacional de Salao (FIFUSA) were rivals for governing authority

41. See generally Matthew J. Mitten, Foreword, 38 S. Tex. L. Rev. 999 (1997).

42. Almost twenty years ago, Professor James Nafziger, a leading international law and international sports law scholar, observed:

> The much-neglected field of international sports law is changing significantly.... The evolving legal framework has important implications for participants and spectators in both sports and the international legal process. Among students and practitioners of international law, the role of nongovernmental sports organizations in gaining governmental and intergovernmental support, in shaping a still immature body of law, in acquiring a measure of legal personality, and in responding to new issues is of general professional interest. Athletic competition is a fundamental human activity whose history has been replete with international problems. Understanding the peculiar blending of governmental, intergovernmental and nongovernmental authority over political and other consequences of sports activity is therefore significant.

James A.R. Nafziger, International Sports Law: A Replay of Characteristics and Trends, 86 Am. J. Int'l L. 489, 489 (1992) (footnote omitted); see also James A.R. Nafziger, International Sports Law as a Process for Resolving Disputes, 45 Int'l & Comp. L.Q. 130, 149 (1996) ("Normative trends thus confirm a growing commitment of national legal systems to the special processes of international sports law. The [CAS], in particular, is assuming a central position for avoiding, managing and resolving international disputes. What remains is for the legal profession throughout the world to take international sports law seriously.").

43. Nils Jansen & Ralf Michaels, Beyond the State? Rethinking Private Law: Introduction to the Issue, 56 Am. J. Comp. L. 527, 527 (2008).

44. Christiane C. Wendehorst, The State as a Foundation of Private Law Reasoning, 56 Am. J. Comp. L. 567, 593-95 (2008).

45. Jürgen Basedow, The State's Private Law and the Economy--Commercial Law as an Amalgam of Public and Private Rule-Making, 56 Am. J. Comp. L. 703, 709-11 (2008).

46. Legal pluralism is based on "the premise that people belong to (or feel affiliated with) multiple groups and understand themselves to be bound by the norms of these multiple groups". Paul Schiff Berman, Global Legal Pluralism, 80 S. Cal. L. Rev. 1155, 1169 (2007). "[M]any community affiliations ... may at various times exert tremendous power over our actions even though they are not part of an 'official' state-based system". Id. at 1170. Thus, "situations [arise] in which two or more state and non-state normative systems occupy the same social field and must negotiate the resulting hybrid legal space". Id. Conflicts arising out of overlapping legal rules created by Olympic and international sports private agreements and national laws must be resolved either by "reimposing the primacy of territorially-based (and often nation-state-based) authority or by seeking universal harmonization". Id. at 1162.

47. The tide, however, is changing. In his concluding remarks during the 60th Congress of the International Association of Legal Science, which was hosted by the Istanbul University Law Faculty Centre for Comparative Law, in Istanbul, Turkey, on May 13-14, 2010, Mauro Bussani, Professor of Comparative Law at the University of Trieste, Italy, observed that comparative sports law is a "very attractive scientific discipline." He stated:

> [C]onceiving sports law just as a legal specialization, in which national and international legal doctrines are subject to special deviations, exceptions, exclusions, would be inconsistent with reality. As my learned colleagues showed us during these two days, sports law can indeed be viewed as a legal system in itself.
>
> ....
>
> As any legal system, sports law has its own institutions, procedures, and rules. As most legal systems, it is made up of different layers, which present themselves as stratified one upon the other. Some of these layers are regionally fragmented, while others have been internationally harmonized by homogenous practices. Legal solutions often circulate from one region to the other ones, and frequently this circulation gives rise to legal transplants and legal borrowing.

Mauro Bussani, Professor of Comparative Law at the University of Trieste, Italy, Remarks at 60th Congress of the Int'l Ass'n of Legal Science (May 13-14, 2010) (transcript on file with authors).

48. Barnard v Australian Soccer Fed'n (1988) 81 ALR 51.

over the emerging game of indoor soccer. FIFA sought to extend its control to encompass indoor as well as outdoor soccer by directing its national affiliated bodies, including the ASF, to impose bans on players who played in FIFUSA-sponsored indoor soccer competitions. In turn, the ASF directed its regional affiliate, the Queensland Soccer Federation, to ban the plaintiff from playing in its outdoor competitions. Recognizing the primacy of Australian national law, the court rejected the ASF's defense that it was contractually obligated to follow FIFA's rules and may be disciplined by FIFA for failing to ban the plaintiff.

An analogous example of the traditional approach is the European Court of Justice (ECJ)'s 1995 ruling applying European transnational laws in Union Royale Belge des Sociétiés de Football Association ASBL v Bosman, perhaps the world's most famous sports law case[49]. It involved a successful challenge to the core labor market rules of soccer, the world's most widely played and followed sport. The plaintiff was an out-of-contract Belgian professional player who was offered a contract to play for a French soccer club. The rules of the defendant Belgian soccer governing body incorporated European Union of Football Associations (UEFA) regulations establishing a transfer fee system and limiting the number of nonnationals who could play for domestic professional clubs. Despite plaintiff's uncontracted status, he needed his former club's approval to play for a new club, which was conditioned upon the latter's payment of a prescribed player transfer fee. The player transfer fee requirement was part of an elaborate international system (of which FIFA and UEFA were the main proponents) governing the movement of soccer players between clubs--a system which an English court some years earlier had described as "*a united monolithic front all over the world*[50]". The ECJ held that these rules contravened article 48 of the then-European Community Treaty (now article 45 of the Treaty on European Union (EU Treaty)), which guarantees European workers freedom of movement between member countries and prohibits discrimination on grounds of nationality[51]. Bosman generated a "*welter of publicity*"[52], but it was an unsurprising result to informed observers[53] because the court ruled that international sports rules and agreements are subject to applicable transnational laws; here, a regional international treaty is given domestic application[54].

In contrast to the foregoing traditional view is the deferential approach of some courts, which demonstrates a judicial reluctance to apply national laws to Olympic and international sports rules and agreements. For example, some national courts have refused to apply national laws protecting human rights to international sports competitions held within their respective country's borders.

United States courts generally have rejected claimed violations of federal or state law in connection with Olympic Games hosted by American cities. For example, in Martin v. International Olympic Committee, the United States Court of Appeals for the Ninth Circuit affirmed the denial of a preliminary injunction to require the organizers of the 1984 Los Angeles Summer Olympic Games to include 5,000- and 10,000-meter track events for women, which already existed for men[55]. The court rejected plaintiffs' claims that the failure to include these events constituted illegal gender discrimination, even

49. 1995 E.C.R. I-4921 (E.C.J.). The case and its consequences have generated a voluminous literature in books and articles. See, e.g., Roger Blanpain & Rita Inston, The Bosman Case: The End of the Transfer System? (1996); David McArdle, From Boot Money to Bosman: Football, Society and the Law (2000); Stefaan van den Bogaert, Practical Regulation of the Mobility of Sportsmen in the EU Post Bosman (2005); Braham Dabscheck, The Globe at Their Feet: FIFA's New Employment Rules--I, Sport in Soc'y, Spring 2004, at 1, 69; Braham Dabscheck, The Globe at Their Feet: FIFA's New Employment Rules--II, Sport in Soc'y, Jan. 2006, at 1, 1; P.E. Morris, S. Morrow & P.M. Spink, EC Law and Professional Football: Bosman and Its Implications, 59 Mod. L. Rev. 893 (1996); Jens Pelle Van den Brink, E.C. Competition Law and the Regulation of Football: Part I, 21 Eur. Competition L. Rev. 359 (2000); Jens Pelle Van den Brink, E.C. Competition Law and the Regulation of Football: Part II, 21 Eur. Competition L. Rev. 420 (2000).

50. Eastham v. Newcastle United Football Club Ltd., [1964] Ch. 413 at 438 (Eng.).

51. The ECJ considered it unnecessary to adjudicate plaintiff's claim that the rules contravened articles 85 and 86 (now articles 101 and 102) relating to freedom of economic competition.

52. Morris, Morrow & Spink, supra note 108, at 902.

53. Courts in other countries had long recognized the contrariness of such transfer systems to laws protecting freedom of economic competition and employment. See, e.g., Mackey v. NFL, 543 F.2d 606 (8th Cir. 1976); Buckley v Tutty (1971) 125 CLR 353 (Austl.); Blackler v N.Z. Rugby Football League, Inc. [1968] NZLR 547. In Europe, serious doubt existed as well. See, e.g., Eastham v. Newcastle United Football Club Ltd., [1964] Ch. 413 (Eng.); Janssen Van Raay, Report of the Committee on Legal Affairs and Citizens' Rights on the Freedom of Movement of Professional Footballers in the Community (European Parliament, Session Documents Series A, Mar. 1, 1989).

54. Bosman demonstrates that court rulings which apply national laws to interna-tional sports rules and agreements can prove to be problematic because they do not accommodate the special circumstances and needs of international sports. FIFA responded to the ruling by amending its transfer regulations, which caused some Belgian trade unions to file a complaint with the European Commission alleging contravention of competition law (articles 85 and 86 of the EC Treaty--now articles 101 and 102 of the EU Treaty). Following protracted negotiation and political lobbying, during which FIFA and UEFA were able to convince the Commission of the special economics and social status of soccer, an agreement was reached on new Regulations for the Status and Transfer of Players to apply worldwide. See Braham Dabscheck, The Globe at Their Feet: FIFA's New Employment Rules--I, Sport in Soc'y, Spring 2004, at 1, 69. The development of the new rules was strongly influenced by European perspectives and it is an issue worthy of scholarly investigation as to whether the socioeconomic and legal perspectives of Asia and the Americas have been sufficiently considered in adopting these worldwide rules.

55. Martin v. Int'l Olympic Comm., 740 F.2d 670 (9th Cir. 1984). American courts also have rejected state discrimination law claims by foreign athletes seeking to march in opening ceremonies in Olympic Games held in the United States under flags of countries not recognized by the IOC. See Ren-Guey v. Lake Placid 1980 Olympic Games, Inc., 424 N.Y.S.2d 535 (N.Y. App. Div. 1980), aff'd, 429 N.Y.S.2d 473 (1980); Spindulys v. L.A. Olympic Org. Comm., 220 Cal. Rptr. 565 (Cal. Ct. App. 1985).

though "*the women runners made a strong showing that the early history of the modern Olympic Games was marred by blatant discrimination against women*"[56]. The majority explained:

[W]e find persuasive the argument that a court should be wary of applying a state statute to alter the content of the Olympic Games. The Olympic Games are organized and conducted under the terms of an international agreement--the Olympic Charter. We are extremely hesitant to undertake the application of one state's statute to alter an event that is staged with competitors from the entire world under the terms of that agreement[57].

Consistent with Martin, the British Columbia Court of Appeal rejected a similar gender discrimination claim under Canadian law in connection with the 2010 Vancouver Olympic Games. In Sagen v. Vancouver Organizing Committee for the 2010 Olympic & Paralympic Games, the court ruled that the IOC's decision not to include women's ski jumping as an event in the Vancouver Games (while including men's ski jumping events) did not violate the Canadian Charter of Rights and Freedoms (Charter)[58]. The court held that the Charter, which regulates only government conduct, did not apply to the IOC's selection of events for the 2010 Olympics because it is considered private party conduct. Although the Canadian government, province of British Columbia, and cities of Vancouver and Whistler were parties to an agreement with the IOC to host the 2010 Olympics, none of these government entities or the Vancouver Organizing Committee for the 2010 Olympic and Paralympic Games (VANOC), a federally chartered nonprofit corporation, had the authority to determine which events are part of the Vancouver Olympics. Rather, "*The Host City Contract stipulates that it is the IOC that sets the Programme*"[59], and VANOC is subject to the "s*upreme authority of the IOC*".[60] The court concluded, "*[T]he IOC's decision not to hold a women's ski jumping event at the 2010 Games is a decision that has not been endorsed by VANOC, or by any Canadian government body*"[61].

It is important for comparative and international law scholars to be aware of and analyze the underlying jurisprudential issues raised by Barnard and Bosman[62], which reflect, on the one hand, the traditional judicial view recognizing that private international sports federation agreements and rules are subject to national and transnational public laws, and Martin and Sagen, which, on the other hand, represent a deferential judicial view. For example, are Martin and Sagen simply aberrations from the traditional judicial view, or do these cases constitute the "*camel's nose under the carpet*" or the "*thin end of the wedge*", thereby signaling an increasing willingness of courts to defer to private international agreements such as the rules of international and Olympic sports organizations that may conflict with national law?[63] If the latter, are there sound public policy reasons for this judicial approach, and what are the future implications for the development of global law based on other agreements between private parties (including those involving governmental participation or acquiescence)?

B. CAS awards, lex sportiva, and the displacement of national law

The Code establishes the following rules regarding the substantive "*law*" to be applied by a CAS arbitration panel. In CAS ad hoc Division arbitration, the governing law is "*the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*"[64]. For CAS

56. Martin, 740 F.2d at 673.

57. Id. at 677. The dissenting judge argued:

The IOC made concessions to the widespread popularity of women's track and field by adding two distance races this year. The IOC refused, however, to grant women athletes equal status by including all events in which women compete internationally. In so doing, the IOC postpones indefinitely the equality of athletic opportunity that it could easily achieve this year in Los Angeles. When the Olympics move to other countries, some without America's commitment to human rights, the opportunity to tip the scales of justice in favor of equality may slip away. Meanwhile, the Olympic flame--which should be a symbol of harmony, equality, and justice--will burn less brightly over the Los Angeles Olympic Games.

Id. at 684 (Pregerson, J., dissenting).

58. Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games (2009), 98 B.C.L.R. 4th 141 (Can. B.C.). On December 22, 2009, the Supreme Court of Canada refused appellants' leave to appeal. Sagen v. Vancouver Org. Comm. for the 2010 Olympic & Paralympic Winter Games, 2009 CarswellBC 3468 (Can. S.C.C.) (WL).

59. Sagen (2009), 98 B.C.L.R. 4th para. 21.

60. Id. para. 9.

61. Id. para. 56.

62. See also U.S. Olympic Comm. (USOC) v. Intelicense Corp., 737 F.2d 263, 268 (2d Cir.), cert. denied, 469 U.S. 982 (1984) (stating that the Amateur Sports Act, a federal statute, "*cannot be overborne by the terms*" of IOC Charter, which "*is not a treaty ratified in accordance with constitutional requirements*").

63. This is a current high-profile controversy, of particular interest to scholars studying the application of national and transnational civil liberties and personal privacy laws in an era of increasing globalization, which provides an illustrative example of the ongoing dispute concerning the primacy of national laws versus the need for uniform international sports rules and agreements. In Part II.A, we observed that the international antidoping regime has several features invasive of athletes' privacy interests. On January 1, 2009, WADA adopted a "*whereabouts rule*" requiring all elite athletes to provide three months' advance notice of their location one hour each day, seven days a week, from 6a.m.-11p.m., so they can be tested out-of-competition by WADA without any warning. European Union Sports Commissioner Jan Figel has demanded that WADA revise this rule to comply with European privacy laws because "*WADA rules do not supersede [the] laws of countries*". Raf Casert, EU Sports Chief Demands WADA Changes, Associated Press, Apr. 27, 2009. In response, WADA president John Fahey claimed that doing so "*could potentially undermine the fight against doping in sport*". Id. In January 2010, a Spanish court rejected a Spanish professional cyclist's claim that the Union Cycliste Internationale (UCI) (the IF for cycling)'s whereabouts rule, which was based on WADA's rule, breached his individual rights guaranteed by the Spanish Constitution. See Press Release, Union Cycliste Internationale, The Appeal by Carlos Roman Golbano Is Rejected (Jan. 27, 2010), available at *http:// www.uci.ch/* (use "*search*" box, search "*Golbano rejected*" hyperlink) (last visited Nov. 8, 2010).

64. Arbitration Rules for the Olympic Games, Court of Arbitration for

appeals arbitration proceedings, absent agreement of the parties, it is "*the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the [CAS] Panel deems appropriate*" [65].

Despite having express authority to do so, the CAS rarely relies on national law other than Swiss law (the IOC, WADA, and most IFs are domiciled in Switzerland) to invalidate Olympic and international sports governing body agreements and rules[66]. For example, recognizing the need for a uniform body of global sports law, CAS panels generally have refused to rule that athlete doping rules and sanctions violate the national laws of an athlete's home country[67]. Similarly, in appeals arbitration resolving other types of disputes, the CAS generally has declined to apply national laws other than the domestic law of an international sports governing body's home country[68].

The Swiss Federal Code on Private International Law provides for judicial review of a CAS arbitration award by the SFT on very narrow grounds[69]. The SFT is authorized to vacate an arbitration award if the CAS panel was constituted irregularly, erroneously held that it did or did not have jurisdiction, ruled on matters beyond the submitted claims, or failed to rule on a claim[70]. An award also may be vacated if the parties are not treated equally by the CAS panel, if a party's right to be heard is not respected, or if the award is incompatible with Swiss public policy[71].

To date, the SFT has uniformly rejected all challenges to the substantive merits of a CAS panel's decision[72]. A CAS award may be challenged on the ground that it is incompatible with Swiss public policy, but such a claim has not been successful. The SFT has explained that this defense "*must be understood as a universal rather than national concept, intended to penalize incompatibility with the fundamental legal or moral principles acknowledged in all civilized states*"[73]. The SFT has ruled that "*even the manifestly wrong application of a rule of law or the obviously incorrect finding of a point of fact is still not sufficient to justify revocation for breach of public policy of an award made in international arbitration proceedings*"[74]. It has characterized this standard as "*more restrictive and narrower than the argument of arbitrariness*"[75].

Because the "*seat*" of all CAS arbitrations is designated as Lausanne, Switzerland, regardless of the geographical location of the hearing, a CAS award is a foreign arbitration award in all countries except Switzerland. Thus, CAS arbitration awards require judicial recognition by national courts to be legally enforceable outside of Switzerland. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), a treaty to which the United States, Australia, and more than one hundred other countries are signatories, provides for judicial recognition and enforcement of foreign arbitration awards, including CAS awards, by national courts[76].

Article V(2)(b) of the New York Convention states that a national court may refuse to recognize and enforce an arbitration award if doing so "*would be contrary to the public policy of that country*"[77]. Consistent with the SFT, U.S. courts have strictly construed the "*public policy*" defense and have uniformly recognized the validity of foreign sports arbitration awards,

Sport, art. 17, *http://www.tas-cas.org/adhoc-rules* (follow "Arbitration Rules for the Olympic Games" hyperlink) (last visited Sept. 11, 2010).

65. Arbitration Code, supra note 9, r. 58.

66. On the other hand, CAS arbitrators have expressed a willingness to rely on (or to at least survey) national laws when developing a rule of law to govern a dispute that cannot be resolved solely by applying a sports governing body's internal rules. See, e.g., Arbitration CAS 2004/A/704, Yang Tae Young v. Int'l Gymnastics Fed'n, award of Oct. 21, 2004 (considering the extent to which courts have been willing to judicially review and interfere with a referee's application of the rules of the game or field of play decision).

67. See, e.g., Arbitration CAS 2007/A/1312, Adams v. CCES, award of May 16, 2008 (finding no violation of Ontario Human Rights Code); Arbitration CAS 2006/A/1149 and 2007/A/1211, World Anti-Doping Agency (WADA) Federación Mexican de Fútbol (FMF) & Alvarez, award of May 16, 2007 at para. 35 (rejecting athlete's claimed violation of Mexican law); Arbitration CAS 2006/A/1102, Eder v. Ski Austria, award of Nov. 13, 2006 (refusing to use Austrian law to invalidate challenged World Anti-Doping Code rules or their application to Austrian athlete by Austrian national governing body); Arbitration CAS 2005/A/951, Cañas v. ATP Tour, award of May 23, 2007 (finding no violation of Delaware, U.S. antitrust, or European Union law).

68. Arbitration CAS 2006/A/1110, PAOK FC v. UEFS, award of Aug. 25, 2006 (rejecting Greek football club's request to apply Greek law to club licensing dispute with UEFA).

69. See PIL, supra note 19.

70. In X. (Cañas) v. ATP Tour, 4P.172/2006 (2007) (Switz.), ATF 133 III 235, translated in 1 Swiss Int'l Arb. L. Rep. 65, the SFT vacated and remanded a CAS award because it violated an athlete's right to a fair hearing by not providing reasons for rejecting arguments that his doping sanction violated Delaware, U.S., and European Union laws. The SFT ruled that CAS arbitrators must discuss all of the parties' arguments in their legal analysis of the relevant issues in dispute, including claims that applicable national or transnational laws have been violated. The panel must explain "if only briefly" their reasons "so that the petitioner could be satisfied upon a perusal of the award that the arbitrators had considered all of his arguments which had objective relevance, even if it was to dismiss them ultimately". Id. at 39.

71. See PIL, supra note 19, art. 190. See generally Antonio Rigozzi, Available Remedies Against CAS Awards, in Sport Governance, Football Disputes, Doping and CAS Arbitration (M. Bernasconi & A. Rigozzi eds., 2009).

72. Rigozzi, supra note 71, at 134-41.

73. N., J., Y., W. v. Fédération Internationale de Natation (FINA), 5P.83/1999 (2d Civil Court, Mar. 31, 1999) at 779.

74. Id.

75. G. v Fédération Equestre Internationale, (1st Civ. Ct., Mar. 15, 1993) (translation) in Digest of CAS Awards 1986-1998, at 561, 574 (Matthieu Reeb ed., 1998).

76. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter New York Convention]; Abbas Ravjani, The Court of Arbitration for Sport: A Subtle Form of International Delegation, 2 J. Int'l Media & Ent. L. 241, 251 (2009) ("*CAS has had success in having its judgments that arise from contractual disputes enforced, while [International Court of Justice] judgments arising out of treaties often have trouble being enforced.*").

77. New York Convention, supra note 76, art. V(2)(b).

including CAS awards, if the parties had agreed in writing to be bound by it or participated in the arbitration proceeding[78].

Judicial recognition and enforcement of CAS awards under the New York Convention has the potential to legitimize the development of a body of lex sportiva thereby supplanting conflicting national laws in 144 countries that have signed this treaty[79]. The *lex sportiva* established by the collective body of CAS awards is accorded important legal international standing pursuant to the New York Convention's requirement that the integrity of foreign arbitral awards generally be respected and enforced by national courts. This is a very significant development, especially given the following factors: the monolithic global governing authority of IFs; required consent to CAS jurisdiction as a condition of a NOC's recognition by the IOC or athlete's eligibility to participate in Olympic and other international sports competitions; and potential conflicts with national laws that may provide greater substantive legal protection to individuals than are recognized by a CAS award[80].

Gatlin v. United States Anti-Doping Agency, Inc., illustrates how international law may enable a CAS award to effectively displace otherwise applicable national laws of an athlete's home country by precluding a court from remedying their alleged erroneous interpre-tation or application by an arbitral tribunal[81]. In Gatlin, a federal district court ruled it did not have jurisdiction to consider Justin Gatlin's claim that his four-year suspension imposed by CAS for a 2006 doping offense violated the Americans With Disabilities Act (ADA)[82]. In an arbitration proceeding held in the United States, the CAS panel determined that Gatlin's 2006 positive test for exogenous testosterone was his second doping offense (thereby subjecting him to an eight-year suspension pursuant to an IF's antidoping rule) because he previously tested positive for amphetamines in 2001, which was his first doping violation. Gatlin asserted that characterizing his 2001 positive test, which resulted from taking prescription medication for his attention deficit disorder, as his first doping offense (even though the IAAF had restored his eligibility because he was taking it for a legitimate medical reason) violated the ADA, which the CAS panel rejected[83]. However, the CAS panel reduced Gatlin's suspension to four years based on its finding that the circumstances surrounding his 2001 doping offense constituted exceptional circumstances justifying a reduction from the rule's prescribed eight-year duration.

The court characterized the CAS panel's rejection of Gatlin's ADA claim as an "*arbitrary and capricious*" decision[84]. The court found this error did not "*rise to the level of moral repugnance*" required by the New York Convention's public policy exception, which would justify judicial refusal to recognize a CAS award[85]. Rather, the court effectively recognized and enforced the CAS arbitration award by refusing to permit Gatlin to relitigate its merits under the ADA[86]. Expressing concern that its ruling "*is quite*

78. Slaney v. Int'l Amateur Athletic Fed'n (IAAF), 244 F.3d 580 (7th Cir.), cert. denied, 534 U.S. 828 (2001); Gatlin v. U.S. Anti-Doping Agency, Inc., No. 3:08-cv-241/LAC/EMT, 2008 WL 2567657 (N.D. Fla. June 24, 2008). These cases are consistent with nonsports cases rejecting claims that a foreign arbitral award should not be enforced because it violates public policy. Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH, 141 F.3d 1434, 1445 (11th Cir. 1998) (finding no "violation of public policy of the sort required to sustain a defense under ... Convention"); Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) ("Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice"). But see Dynamo v. Ovechkin, 412 F. Supp. 2d 24 (D.D.C. 2006) (refusing to enforce Russian arbitration award finding that Alexander Ovechkin is contractually obligated to play for Moscow Dynamo during the 2005-06 hockey season and banning him from playing for any other club because Dynamo did not prove Ovechkin agreed in writing to arbitrate the parties' dispute).

79. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, United Nations Treaty Collection (Sept. 9, 2010), *http:// treaties.un.org/pages/participationstatus.aspx* (follow "Chapter XXII" hyperlink; follow "1. Convention on the Recognition and Enforcement of Foreign Arbitral Awards" hyperlink) (listing countries ratifying the Convention).

80. The CAS does provide two important procedural rights to athletes, namely the right to be heard before an independent and impartial panel of arbitrators, and de novo review of international sports governing body decisions, which is not constrained by national laws that would preclude a domestic court from providing the same scope of judicial review. See, e.g., Arbitration CAS 2008/A/11574, D'Arcy v. Australian Olympic Comm., award of July 7, 2008.

81. Gatlin, 2008 WL 2567657.

82. Id. However, U.S. domestic sports law generally does not provide athletes with greater legal rights than the developing body of lex sportiva. Strict liability for Olympic sports doping violations is permissible. See, e.g., Walton-Floyd v. U.S. Olympic Comm., 965 S.W.2d 35 (Tex. App. 1998). Monolithic private sports governing bodies may establish "take it or leave it" terms applicable to their members and athletes as a condition of eligibility to participate in competitive sports. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 939 P.2d 1049 (Nev.), cert. denied, 522 U.S. 1028 (1997). U.S. courts refuse to allow state law to directly regulate the internal affairs of national sports governing bodies. See Flood v. Kuhn, 407 U.S. 258 (1972); Nat'l Collegiate Athletic Ass'n v. Miller, 10 F.3d 633 (9th Cir. 1993); Partee v. San Diego Chargers Football Co., 668 P.2d 674 (Cal. 1983). Moreover, the CAS's de novo review of international sports governing body rules and conduct exercised is more exacting than the very deferential arbitrary and capricious standard of review that U.S. courts generally exercise in reviewing domestic sports governing body rules and conduct. See generally Matthew J. Mitten & Timothy Davis, Athlete Eligibility Requirements and Legal Protection of Sports Participation Opportunities, 8 Va. Sports & Ent. L.J. 71 (2008).

83. Arbitration CAS 2008/A/1461, Gatlin v. USADA, award of June 6, 2008. In rejecting Gatlin's ADA claim, the CAS panel stated:

The Panel agrees with the IAAF's argument that there was no discrimination on the basis of a disability in this instance. The Panel is of the view that in order to constitute a violation, Mr. Gatlin must have been prevented from competing by virtue of his disability.... The Panel notes from Mr. Gatlin's own submissions that "[h]is ADD affected his ability to focus in the classroom .... While Mr. Gatlin's disability admittedly put him at a disadvantage in the classroom, it in no way put him at a disadvantage on the track. Indeed, until recently, he was the reigning 100m Olympic champion.

Id. para. 32.

84. Gatlin, 2008 WL 2567657, at *1.

85. Id.

86. The Gatlin court cited and relied upon Slaney v. Int'l Amateur Athletic Fed'n (IAAF), 244 F.3d 580 (7th Cir.), cert. denied, 534 U.S. 828 (2001), in which the United States Court of Appeals for the Seventh

troubling because . . . United States Courts have no power to right the wrong perpetrated upon one of its citizens," the court observed that Gatlin's only judicial recourse was to request that the Swiss Federal Tribunal vacate the CAS award[87].

Gatlin is consistent with the general refusal of U.S. courts to review the merits of claims resolved by arbitration awards[88]. Of interest to comparative and arbitration law scholars is the apparent conflict between U.S. courts and the European Court of Justice (ECJ) regarding public international law and its relation to the state, specifically whether a final and binding arbitration award should preclude judicial reconsideration of the merits of the dispute it resolves[89].

In Meca-Medina & Majcen v. Commission of European Communities, the ECJ allowed two professional swimmers (a Spaniard and a Slovenian) to relitigate the merits of their claim that the Fédération Internationale de Natation (FINA)'s rule regarding the minimum level of nandrolone (a banned substance) in one's system sufficient to establish a doping offense violated European Union law[90]. A CAS panel had previously rejected their contention[91], but reduced on other grounds the four-year suspension imposed on both swimmers by FINA, the Swiss-based IF for swimming, for testing positive for nandrolone during the 1999 World Cup swimming competition in Brazil[92]. Rather than appealing the CAS panel's award to the SFT, the swimmers brought separate litigation alleging that the subject antidoping rule contravened European Union competition and freedom to provide services laws.

The ECJ ruled that European Union law applied because FINA's doping rules have the requisite effect on economic activity by regulating professional swimming. However, it rejected the swimmers' claims on their merits because they failed to prove that the rule regarding the minimum level of nandrolone sufficient for a doping violation was not disproportionate to FINA's legitimate objectives of ensuring that athletic competitions are conducted fairly and protecting athletes' health. However, it is remarkable that the ECJ did not consider that their European Union law claims had been expressly rejected by a prior CAS award, which the swimmers had agreed would be final and binding, or whether the fact that Switzerland, Spain, and Slovenia are parties to the New York Convention should preclude relitigation of their merits. Although the ECJ's decision effectively upheld the CAS award, Meca-Medina establishes precedent that permits future judicial challenges to the merits of CAS awards based on European Union law.

The potential for a CAS award to displace otherwise applicable national laws of an athlete's home country is also illustrated by an Australian court's decision in Raguz v Sullivan[93]. Citing irregularities in an Australian NGB's application of the selection criteria, the CAS ruled that Raguz's selection for the Australian Olympic Team should be revoked and that another competitor should be selected instead. The New South Wales Court of Appeal rejected Raguz's request that it reverse the CAS ruling because the court lacked jurisdiction to do so. Curiously, the court did not base its ruling on the New York Convention, to which Australia is a party, or the federal legislation that implements it[94]. Instead, it relied on nationally uniform arbitration laws enacted by Australian state legislatures[95]. Raguz contracted with the Australian Olympic Committee to resolve any disputes by CAS arbitration rather than litigation in an Australian court, which is permitted by the uniform state arbitration laws for an arbitration "*in a country other than Australia*"[96]. Because the seat of all CAS arbitrations is Lausanne, Switzerland, irrespective of where the arbitration proceeding is conducted, the court held that state arbitration law precluded it from considering the merits of Raguz's claims[97]. The

Circuit held that a U.S. athlete's state law claims seeking to relitigate the same doping dispute issues decided by a valid foreign arbitration award are barred by the New York Convention. It concluded, "Our judicial system is not meant to provide a second bite at the apple for those who have sought adjudication of their disputes in other forums and are not content with the resolution they have received". Id. at 591. See Weston, supra note 37, at 103-04 ("The United States has implicitly assigned the protection of the rights of its [athletes] to a private international tribunal seated in a foreign nation.").

87. Gatlin, 2008 WL 2567657, at *1-2. In April 2009, Gatlin settled his claims against all defendants (USOC, USA Track and Field, the United States Anti-doping Agency, and the International Association of Athletics Federations) on terms that were not publicly disclosed. Gatlin Settles Suit with USADA, USOC and Others, Universal Sports, Apr. 14, 2009, *http:// www.universalsports.com/news/article/newsid=284396.html.*

88. Thomas E. Carbonneau, The Revolution in Law Through Arbitration, 56 Clev. St. L. Rev. 233, 239-41 (2008).

89. See Mitten, supra note 65, at 64-67.

90. Meca-Medina v. Comm'n of European Cmtys., 2006 E.C.R. I-6991.

91. Arbitration CAS 99/A/234 and 99/A/235, Meca-Medina & Majcen v. Fédération Internationale de Natation Amateur (FINA), award of Feb. 29, 2000, paras. 4.4-.10; see also Arbitration CAS 2005/A/951, Cañas v. ATP Tour, award of May 23, 2007 (concluding that WADA antidoping rules and sanctions do not violate European law); Massimo Coccia, Applicable Law in CAS Proceedings: What To Do with EU Law?, in Sport Governance, Football Disputes, Doping and CAS Arbitration, supra note 130 (discussing the relationship between CAS proceedings and EU law).

92. Arbitration CAS 2000/A/270, Meca-Medina & Majcen v. Fédération Internationale de Natation (FINA), award of May 23, 2001.

93. Raguz v Sullivan (2000) 50 NSWLR 236 (Austl.); see also Damian Sturzaker & Kate Godhard, The Olympic Legal Legacy, 2 Melb. J. Int'l L. 241 (2001) (analyzing the Raguz decision).

94. International Arbitration Act 1974 (Cth) (Austl.).

95. Commercial Arbitration Act 1984 (NSW) s 40 (Austl.).

96. International Arbitration Act 1974 (Cth) s 3(1) (Austl.).

97. Raguz v. Sullivan (2000), 50 NSWLR 236, 257 (Austl.).

implication of this case is that, provided the parties to a CAS arbitration agreement properly invoke the Australian state arbitration laws, the lex sportiva being developed by the CAS has the potential to displace contrary Australian laws.

Because one of the primary objectives of establishing a private legal regime to resolve international sports disputes is to create a uniform body of lex sportiva that is predictable and evenly applied worldwide[98], it is problematic if CAS awards are not judicially reviewed pursuant to a generally accepted international standard[99]. Because Olympic and international sports competition occurs on a global basis and involves consensual (and often long-term) relationships, universally accepted rules and dispute resolution methods appear to be necessary[100].

On the other hand, the displacement of sovereign national law by lex sportiva raises important issues worthy of scholarly study[101]. For example, is a very limited scope of judicial review of CAS arbitration awards appropriate based on public policy considerations, including the need for an international legal regime that effectively protects all parties' respective rights and interests? Should an international treaty formally designate the CAS as the world court for sport with a permanent bench of judges, and would it likely function better than a private international arbitral tribunal? Although these are sport-specific issues, they may have broader implications for the resolution of conflicts between national laws and the developing body of decisions of international tribunals established by private agreement as well as the identification and establishment of a legal system for developing a global body of uniform law in particular areas that will be universally respected.

98. See, e.g., Arbitration CAS 2007/A/1298, Wigan Athletic FC v. Heart of Midlothian, award of Jan. 30, 2008, para. 64 ("[I]t is in the interest of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country ....").

99. Yi, supra note 6, at 301-02 ("Olympic institutions, as a practical matter, simply cannot defend its myriad of decisions in the courts of every single member nation."). In 2005, a Swiss court in the canton of Vaud granted a preliminary injunction that suspended a CAS award upholding a two-year disciplinary suspension imposed by the International Cycling Union (UCI) on Danilo Hondo, a German cyclist, for his usage of a banned stimulant. Hondo owned a home in the canton of Vaud, and his lawsuit was based on an obscure Swiss law that permitted a Swiss resident to challenge judicially a Swiss arbitration award (e.g., a CAS award) in the canton in which he resided. He asserted that the UCI's strict liability doping rules, which provided for an automatic two-year suspension for a first offense, violated Swiss law. Yi, supra note 6, at 337-39. The Appeals Chamber of the Court for the Canton of Vaud, as well as the SFT, ultimately upheld the CAS award, which required Hondo to serve a two-year suspension for his doping violation. Decision X [Danilo Hondo] v. AMA et consorts & TAS, 4P.148/2006 of 10 Jan. 2007, ASA Bull. 2007, p. 569 (English translation available at *http://translate.google.com/translate? hl=en&sl=fr&tl=en&u=http%3A%C2F%C2Fwww.polyreg.ch%C2Fd%C2Finformationen%C2Fbgeunpubliziert%®Jahr_2006%2FEntscheide_4P_2006%2F4P.148__2006.html*). Nevertheless, it is problematic to give a Swiss local court judicial authority to nullify a CAS award affecting Swiss residents based on its application of Swiss law; whereas, non-Swiss residents are required to seek vacation of a CAS award by the SFT on much narrower grounds.

100. See generally Mitten, supra note 5, at 64-67. In his book, How Soccer Explains The World, Franklin Foer hypothesizes that Americans' like or dislike of soccer, Europe's most popular sport, reflects their differing views regarding globalization. Franklin Foer, How Soccer Explains the World (2004). Those who like soccer believe "in the essential tenets of the globalization religion as preached by European politicians, that national governments should defer to institutions like the UN and WTO". Id. at 245. Those who do not believe "that America's history and singular form of government has given the nation a unique role to play in the world; that the U.S. should be above submitting to international laws and bodies". Id. Ironically, U.S. courts have taken a global view that facilitates a uniform body of lex sportiva; whereas, the ECJ's Meca-Medina decision threatens its worldwide uniformity and application. Although U.S. courts have recognized and enforced international arbitration awards that conflict with national law (albeit reluctantly), it raises the possibility that, in the future, U.S. judges may apply the New York Convention's "public policy" defense more broadly in an effort to protect U.S. athletes' rights under domestic law if other courts use national or transnational law to engage in de facto review of the merits of a CAS award.

101. A Greek law professor suggests that "public international law could lay down a regulatory framework for international sporting bodies." Dimitrios P. Panagiotopoulos, The Application of THE LEX SPORTIVA in the Context of National Sports Law, 9 J. Comp. L. 123, 131 (2008). He proposes that the institutional autonomy of international sports federations and consequently the Lex Sportiva, and the corresponding jurisdictional order, should be placed under international scrutiny as to its legitimacy by what one might call a sports united nations. States must adopt an international sports charter to establish a truly international Lex Sportiva, a framework supporting the institutional autonomy and operation of international sporting bodies.

Id. at 139-40 (footnotes omitted).

La médiation : processus et application dans le domaine sportif

Me Jean Gay

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I. Préambule

La gestion du litige a grandement évolué au fil du temps.

La préhistoire ne connaissait comme seul moyen que la force. La raison du plus fort était l'unique solution de mettre fin à une querelle.

L'avènement de la civilisation amène une première évolution : à la violence se substitue l'autorité publique. La raison du plus fort n'est plus le fait de l'individu mais celui de la collectivité. Nous entrons progressivement dans l'ère de la règle de droit.

Trancher le litige devient "*dire le droit*" et l'Etat s'assure rapidement le monopole de ce "*marché*".

A l'aube du troisième millénaire, force est de constater que ce monopole a la vie dure, en Europe continentale notamment. Hormis le développement de l'arbitrage, l'issue d'un conflit demeure essentiellement le fait du prince, une décision autoritaire du pouvoir public.

La volonté d'une évolution est manifeste. Elle a pris un essor considérable dans les pays anglo-saxons où les nouveaux processus de gestion sont connus sous le vocable ADR (Alternative Dispute Resolution), traduit en Français par MARC (Mode Alternatif de Résolution des Conflits).

Ces alternatives visent toutes à transférer le pouvoir de gestion de l'autorité publique à un tiers privé. Certaines, au nombre desquelles l'arbitrage, conservent la règle de droit comme "*outil*". D'autres, la médiation en particulier, lui substituent des instruments modernes dont la psychologie n'est pas le moindre.

Mais, en réalité, qu'est ce que la médiation, qu'est ce qui différencie ce mode de résolution de l'arbitrage ? Ce seront nos premiers propos avant d'examiner plus attentivement le mécanisme de ce processus et d'en voir les applications actuelles et possibles dans le futur en matière de conflit sportif.

II. Définition

La définition la plus exhaustive nous apparaît être celle donnée par Folberg et Taylor[1] : la médiation est une procédure par laquelle les parties au litige analysent, avec l'aide d'un ou plusieurs tiers neutre(s), systématiquement leur conflit en vue de découvrir toutes les facettes de celui-ci et de trouver sur cette base des options et alternatives pour aboutir à un accord qui satisfera leurs besoins (traduction libre).

Ajoutons afin d'être exhaustif que ces tiers neutres n'ont pas de pouvoir décisionnel. Ils ont, pour reprendre l'analyse du juge honoraire Jean Mirimanoff[2], vocation de faciliter la négociation tandis que le juge a le devoir de trancher.

En d'autres termes, le médiateur assiste les parties, facilite leur échange sans prendre partie. Il est au milieu (*mediare*, étymologiquement être au milieu).

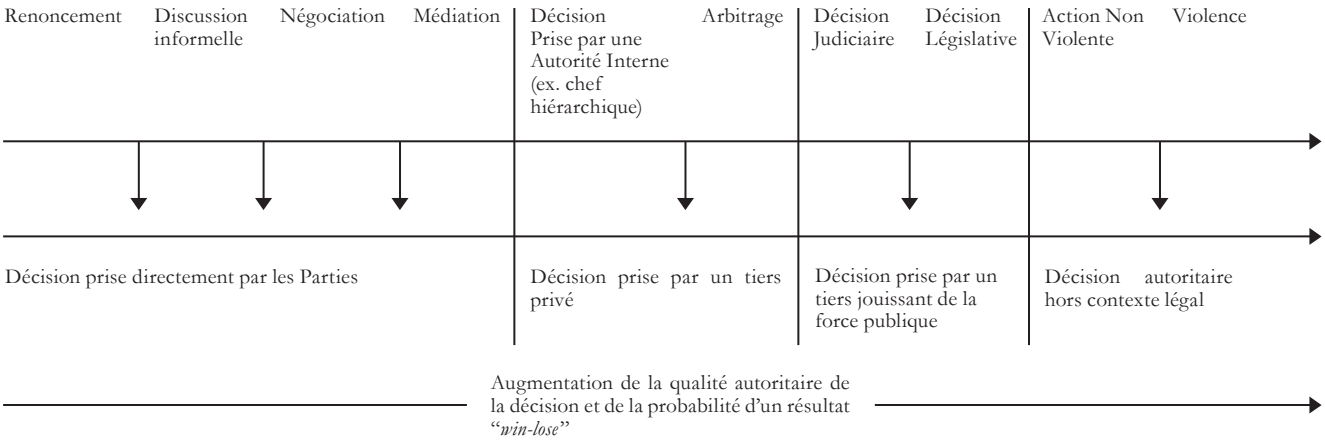
Cette assistance se fera au moyen de techniques de communication qui permettent de sortir des positions pour découvrir les besoins des antagonistes. En ce sens, la médiation se distingue de la conciliation, à tout le moins celle connue par nos codes de procédure civile. Le cadre de la première est en effet non juridique contrairement à la seconde. La médiation se concentre par ailleurs sur les personnes alors que la conciliation reste attachée aux faits[3].

III. Médiation versus Arbitrage

Dans son ouvrage de référence[4], Christopher Moore passe en revue les différentes méthodes de résolution en les classifiant selon leur degré de coercition.

Le tableau 1 ci-dessous illustre son propos. Plus l'on se dirige vers la droite du graphique, plus la décision est imposée.

Tableau 1



1. Jay FOLBERG/Alison TAYLOR, "*Mediation: a Comprehensive Guide to Resolving Conflict without Litigation*", Jossey-Bass, San Francisco, 1988, p.7.

2. Jean A MIRIMANOFF, "*Mort ou Renaissance de la Conciliation Judiciaire en Suisse ?*", Revue de Droit Suisse, 5/2004, p.530.

3. Dominique BROWN-BERSET, "*La médiation commerciale : le géant s'éveille*", Revue de droit suisse 4/2002, p.329.

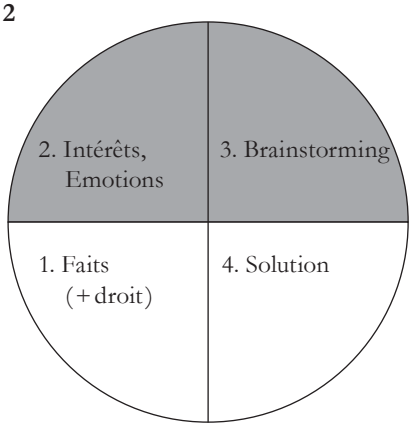
4. Christopher W. MOORE, "*The Mediation Process, Practical Strategies for Resolving Conflict*", Jossey-Bass Publishers, San Francisco, 2e ed, 1996, p.7.

Ainsi, la solution au conflit émane t'elle d'un tiers ou des parties elles-mêmes selon que celles-ci aient choisi de régler leur différend par la voie arbitrale ou par celle de la médiation. Il y a donc, pour le premier processus, une décision basée sur une procédure contradictoire et pour le second, une résolution du conflit dont la source est la consensualité (cf. tableau 3).

La deuxième distinction essentielle a trait à l'importance de la règle de droit pour vider le litige. L'approche arbitrale, tout comme l'approche judiciaire peut se résumer très sommairement sous forme d'un syllogisme juridique : "*Faits + Droit Applicable à ceux-ci = Solution*". La médiation ne s'intéresse que peu ou prou aux faits : il lui suffit de connaître brièvement les positions des parties[5]. En utilisant les techniques modernes de communication, la médiation va permettre aux médiés de trouver, au delà de leurs positions, leurs intérêts véritables ; elle le fera par un travail composé essentiellement de reformulation et de questions ouvertes ainsi que par le traitement des éventuelles émotions qui pourraient affecter la rationalité des parties. Celles-ci, une fois apaisées et mieux au fait de ce qu'elles veulent vraiment, travailleront ensuite sur leurs différentes options visant à une décision consensuelle selon la méthode du brainstorming.

Le tableau 2 ci-dessous permet une meilleure compréhension de ces différences. L'arbitrage ne travaille que sur les quarts se trouvant en bas de la roue alors que la médiation ajoute deux autres étapes composant le sommet de cette roue, étapes numéros 2 et 3.

Tableau 2



Citons deux autres distinctions liées aux processus. Contrairement à l'arbitrage, la médiation laisse l'entier du contrôle de la procédure aux parties et son déroulement n'est empreint d'aucun formalisme.

5. cf. infra chapitre IV, 1.2

Aucun code ne vient entraver la liberté des médiés qui décident eux-mêmes au fur et à mesure du processus comment ils entendent gérer celui-ci.

Tableau 3

Arbitrage	Médiation
Contradictoire	Consensuel
Absence de contrôle des parties	Contrôle
Formalisme	Absence de formalisme

IV. Les Caractéristiques essentielles de la Médiation

A. La négociation raisonnée ou méthode de Harvard

La négociation sur intérêts ou négociation raisonnée[6] a été mise au point par Fisher, Ury et Patton dans leur célèbre ouvrage *Getting to Yes* [7].

Cette méthode privilégie la satisfaction des intérêts – souvent cachés voire même ignorés par les parties elles-mêmes – à la négociation "*traditionnelle*" sur positions, soit au marchandage visant à obtenir une prestation aussi proche que possible de la demande initiale.

Pour ce faire, les auteurs préconisent une procédure en quatre étapes.

1. Traiter séparément les questions relatives aux personnes de celles relatives à leur litige.

2. Se concentrer sur les intérêts des parties plutôt que sur leurs positions

3. Cerner diverses options procurant un bénéfice mutuel.

4. Utiliser des critères objectifs.

1. Traiter séparément les questions relatives aux personnes de celles relatives à leur litige.

Tout être humain exposé à un problème réagit en fonction de nombreux critères qui lui sont propres. L'échelle des valeurs d'un individu varie en fonction de son origine, de son éducation, de l'âge et du vécu pour ne prendre que quelques éléments.

6. Selon la terminologie en vigueur au Québec et aujourd'hui adoptée par tous les pays francophones.

7. Fisher/Ury/Patton, "*Getting to Yes, Negotiating Agreement without Giving in*" 2e ed, Penguin, New York, 1991

Traduit en français sous le titre "*comment réussir une négociation*" Editions du Seuil, Paris Vie, 1982.

Le caractère influence également la perception du conflit. Un "*battant*" et une personne réservée apprécieront à l'évidence de manière différente un élément donné. L'expression de ce problème sera différente selon que l'individu est introverti ou extraverti.

Une différence sociale ou financière entre les parties sera également à même d'influencer leur manière de contracter.

Que dire également des précédents qui ont pu en d'autres circonstances déjà diviser les antagonistes ? Les parties pourront aussi se distinguer par un côté plus ou moins vindicatif, une plus ou moins grande aversion au risque.

L'émotion, la rancœur ou encore la colère auront enfin une influence évidente sur la capacité de contracter. Bref, la liste des éléments subjectifs dont le négociateur devra tenir compte est longue et sa tâche ardue.

Fisher, Ury et Patton suggèrent à juste titre de traiter ces éléments inhérents à la personne en priorité. L'élément émotionnel, en particulier, devra être traité avant le "*travail de fond*"[8]. Le négociateur fera donc bien de s'inspirer en quelque sorte du chirurgien dont la première tâche est de nettoyer la plaie avant de réduire une fracture.

2. Se concentrer sur les intérêts des parties plutôt que sur leurs positions.

Qu'est ce qu'une position, qu'est ce qu'un intérêt ? La position est ce que veut une partie, plus précisément ce qu'elle déclare vouloir. Les intérêts sont en revanche la ou les raisons pour lesquelles cette volonté existe.

Une infirmière d'un hôpital X est licenciée par son employeur après plus de vingt ans de collaboration. L'employeur justifie sa décision au motif que sa collaboratrice, victime d'un grave accident, n'est plus à même de remplir sa tâche correctement. L'infirmière réclame une indemnité financière (POSITION). Se cachent ou peuvent se cacher derrière cette revendication différentes craintes et demandes: avenir professionnel en péril, perte de confiance en soi, sentiment d'injustice, etc.

Une décision arbitrale ou de justice, ou encore une transaction basée sur la position, aboutira à l'octroi d'une somme d'argent. Une convention tenant compte des intérêts pourra en revanche faire abstraction de toute indemnité financière, les parties se mettant par exemple d'accord sur un reclassement de la salariée dans un service adapté à son handicap.

Ainsi donc, la position d'une partie est la demande qu'elle exprime ; la satisfaction de cette demande ne solutionne pas forcément le conflit. Les intérêts de cette même partie sont ses besoins, ce à quoi elle tend réellement, consciemment ou inconsciemment[9].

En amont du problème que ressent un justiciable et de "*la*" solution qu'il exprime pour le résoudre, se cachent le ou les vrais problèmes, le fond du conflit.

Alors que la négociation sur position se focalisera sur le problème formulé, la négociation raisonnée tentera de résoudre ledit problème dans son entier.

La méthode d'Ury, Fisher et Gordon ne vise donc plus à solutionner le litige mais bien de traiter le conflit dans sa globalité.

L'image suivante, un iceberg, illustre cette différence fondamentale entre le litige, soit les positions exprimées par les parties (partie au dessus de la ligne de flottaison) et le conflit qui englobe tous les côtés cachés et/ou subjectifs de celui-ci (partie immergée).

Tableau 4

Côté "objectif" du litige.

Côté "subjectif" du litige.

Christopher Moore distingue trois catégories d'intérêts [10]:

1. *Les intérêts concrets* : La partie désire un résultat matériel. Ce peut être la fin d'une atteinte illicite ou encore une indemnité pour rupture de contrat, tort moral, etc.

2. *Les intérêts "procéduraux"* : Le besoin est formel. La partie souhaite un traitement particulier. Citons notamment le besoin d'être écouté, celui d'être traité avec considération, celui enfin de

8. La littérature anglo-saxonne l'exprime ainsi : "*to vent the emotion*".

9. Le psychologue parle de consciemment et de "*moins consciemment*" ou "*non consciemment*".

10. Christopher Moore, note 4, p.71.

voir sa demande profonde comprise : Une simple excuse sincère, un pardon peut souvent être la posologie miracle[11].

3. *Les intérêts psychologiques et émotionnels* : L'on trouve à ce stade le besoin d'être respecté et/ou de voir son activité reconnue - besoins à la base de tant de conflits familiaux et professionnels- et celui de ne pas perdre la face.

Si, de manière générale, la première catégorie d'intérêts peut être diagnostiquée sans trop de difficultés, il n'en est pas de même pour les deux autres. La plupart du temps en effet, les parties n'expriment pas ces besoins. Elles peuvent ainsi estimer que le moment de les " *ventiler*" n'est pas opportun[12]. Elles en ignorent parfois même jusqu'à l'existence.

3. Cerner diverses options procurant un bénéfice mutuel.

La médiation se distingue à nouveau sur ce point de la procédure judiciaire et arbitrale. Elle se focalise en effet sur l'avenir des relations des parties en conflit plutôt que sur le passé.

C'est à ce stade que prend toute sa valeur l'analyse détaillée préalable des besoins respectifs. En fonction de ceux-ci, mais aussi du caractère des antagonistes (aversion ou non au risque, esprit plus ou moins vindicatif, etc.) et des circonstances particulières du cas (volonté ou non de poursuivre des relations commerciales, professionnelles ou amicales, principes, etc.) une option ou une combinaison d'options pourra être privilégiée.

Fisher et Ury[13] insistent toutefois sur le fait que ces options doivent procurer aux parties un bénéfice mutuel. C'est là que la tâche du médiateur se complique.

La négociation raisonnée tient compte de deux intérêts et non d'un seul. Elle doit tenter de les faire coïncider ou à tout le moins de découvrir une solution procurant un bénéfice mutuel[14].

4. Utiliser des critères objectifs

La négociation raisonnée, au contraire de la négociation sur position, fait abstraction de la seule volonté des parties. La négociation intervient sur la base de critères objectifs.

Fisher et Ury illustrent leur propos par un exemple tiré des négociations dans le cadre de la Conférence sur le droit de la mer[15] :

L'Inde, représentant le bloc du Tiers Monde, proposa à un moment donné la somme de 60 millions de dollars, montant de la redevance initiale que chaque compagnie d'extraction devrait acquitter pour tout emplacement exploitable. Les Etats-Unis rejetèrent cette proposition, condamnant quant à eux l'idée d'une redevance initiale. Les deux parties durcirent leurs positions et l'affaire se transforma en un affrontement de volontés.

C'est alors que quelqu'un s'avisa que le Massachusetts Institute of Technology (MIT) avait mené une étude approfondie sur l'économie de l'extraction des nodules non ferreux ; cette étude, dont les deux parties finirent par reconnaître l'objectivité, permettait d'évaluer les conséquences du paiement d'une redevance initiale sur l'organisation économique de l'exploitation des fonds sous-marins. Quand le représentant indien voulut savoir quels seraient les effets de sa proposition, on lui démontra que l'énormité de la somme demandée – payable cinq ans avant que l'extraction n'apportât le moindre dollar – enlevait pratiquement aux entreprises toute possibilité de se lancer dans l'extraction. Ebranlé, le représentant du Tiers Monde annonça qu'il allait reconsidérer sa proposition.

De l'autre côté, l'étude du MIT contribua à l'édification des représentants américains qui s'étaient contentés de se documenter sur le sujet auprès des seules entreprises intéressées. L'étude signalait que ces dernières pouvaient supporter économiquement de payer une redevance initiale. De ce fait, les Etats-Unis durent également modifier leur position. Personne n'eut à céder, on ne put taxer personne de faiblesse, tout le monde fut raisonnable. Après de longues négociations, les parties aboutirent à un accord provisoire dont tous eurent lieu d'être satisfaits.

5. " *Win-Win*" et " *Win-Lose*" solution

En résumé, l'on peut à ce stade poser comme principe que plus l'on se dirige vers une décision autoritaire, soit donc plus l'on se dirige vers la droite du tableau de Christopher Moore[16], plus la solution sera prise en tenant compte de la position des parties.

11. Il y a lieu à cet égard de se référer aux résultats souvent positifs de la justice restauratrice dont l'une des méthodes est la médiation pénale.

12. Confronté à une procédure judiciaire ou arbitrale, un justiciable sera très réticent à verbaliser certains de ses intérêts, craignant de passer pour faible aux yeux de l'autre partie ou encore de dévoiler à celle-ci un élément qui pourrait se retourner contre lui.

13. Fisher/Ury/Patton, note 7, p. 59ss. (version française: p. 127ss.).

14. Pour un aperçu des techniques à disposition du médiateur, cf. infra, chap. V, B.

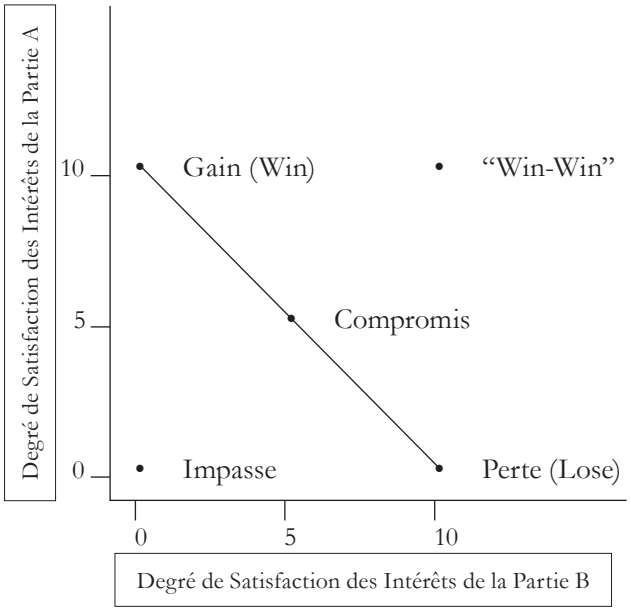
15. Fisher/ Ury/Patton, note 7, p. 87 (version française, p.131).

16. Supra, chap.III, tableau 1.

A l'inverse, plus le choix se porte sur une des solutions proposées par Moore dans la gauche de son tableau[17], plus les intérêts des antagonistes pourront être pris en compte, le système de négociation raisonnée pouvant être utilisé.

Clark et Cummings illustrent ce raisonnement par le tableau suivant :

Tableau 5: Résultats Possibles du Litige Tels que vus par les Parties A et B



Ainsi peut-on conclure qu'un accord raisonné est susceptible d'aboutir à une solution satisfaisante pour les deux parties ("*win-win solution*"[18]) tandis qu'un accord ou une décision sur position aura pour effet un résultat insatisfaisant à tout le moins pour un justiciable ("*win-lose solution*").

B. Les "outils" spécifiques utilisés en médiation

Les outils du médiateur sont nombreux. Il serait fastidieux dans cette approche générale de les passer tous en revue. Nous nous bornerons ainsi à citer trois d'entre eux, à nos yeux essentiels.

1. L'écoute empathique

L'écoute en médiation se distingue de l'écoute, souvent dirigiste, utilisée en procédure contentieuse. L'on a coutume de parler d'écoute empathique.

Le médiateur ne recherche pas le jugement et la solution mais encourage les médiés à se raconter, à dévoiler ce qui est important pour eux, en d'autres termes à aller au-delà de leurs positions initiales et à dévoiler leurs véritables intérêts[19].

Ce changement de paradigme s'explique par le but fondamental du processus, celui d'effectuer avec les parties un travail visant à leur permettre de trouver une solution commune tenant compte de toutes les facettes de leur différend.

2. Le questionnement ouvert

Le questionnement dit "*ouvert*" sera ainsi privilégié. Il s'oppose au questionnement fermé, plus communément utilisé en procédure, et qui n'a d'autre but que de rechercher rapidement et précisément un élément purement factuel.

Ainsi, à une question directe où la seule réponse est "*oui*" ou "*non*", préfèrera t'on une interrogation plus générale permettant l'échange, la recherche de la compréhension mutuelle et la créativité.

A l'interpellation "*êtes-vous d'accord avec cette proposition ?*", le médiateur choisira de s'adresser à l'une des parties en ces termes : "*quel est votre point de vue sur ce problème ?*", "*qu'est ce qui est important pour vous ?*"…

3. La reformulation

La reformulation consiste à reprendre l'idée exprimée en la mettant en évidence avec des mots légèrement différents et en évitant la question piège du "*pourquoi*". "*Si je comprends bien, vous vous sentez dans une impasse?*"

Le but de cette technique est double : permettre la relance et l'approfondissement d'un élément souvent émotionnel et s'assurer mutuellement d'une bonne compréhension.

Par pudeur ou simple difficulté de communication, de nombreuses personnes sont incapables de formuler leur ressenti dont le traitement peut être efficace, sinon essentiel, à la solution de leur conflit. Une simple réflexion telle "*j'entends que vous souffrez de cette situation*" est souvent le déclencheur qui permet enfin d'entrer dans le "*vrai*" vif du sujet.

Cette reformulation permet aussi au médiateur de vérifier qu'il a bien saisi le propos et elle est essentielle

17. A l'exception bien sûr du désistement qui relève à nos yeux plus de l'inaction que de la gestion proprement dite d'un conflit.

18. Ce terme "*win-win*", très en vogue dans les pays anglo-saxons, heurte de nombreux chercheurs francophones. Ceux-ci lui reprochent, à juste titre selon nous, son caractère très optimiste. Il est rare en effet que la solution n'emporte que des avantages pour les deux parties. Parler de "*Solution bi-satisfaisante*" semblerait donc plus réaliste.

19. Sur la notion des intérêts et des positions, cf. supra chapitre IV, 2.

pour les parties elles-mêmes. Celle qui s'exprime se sentira rassurée d'être entendue et son interlocuteur grâce à cette répétition formulée par le tiers neutre entendra souvent pour la première fois un point de vue ou un élément de fait. A chaque médiation ou presque, le médiateur que nous sommes entend son interlocuteur s'exprimer à un moment donné plus ou moins en ces termes : " *c'est la première fois que quelqu'un, enfin, me comprend*". Et à chaque médiation ou presque, l'adverse partie rétorquera : " *mais tu ne me l'avais jamais dit*".

La nature humaine est ainsi faite que l'on ne peut pas entendre, notamment sous l'empire de l'émotion, le reproche de son adversaire, occupé que nous sommes à la préparation de la réplique.

Le lecteur constatera donc que nous sommes loin du prétoire pour s'approcher grâce à ces outils du domaine de la psychologie. C'est à ce stade qu'intervient l'art du médiateur : savoir diriger quand même son processus et canaliser ces flux émotionnels, ne pas perdre de vue que son but est de faire avancer une négociation et non d'entamer une psychanalyse !

4. Les accords de Camp David : une illustration de négociation raisonnée aboutie[20]

En octobre 1978, le président des Etats-Unis, Jimmy Carter, invita le président de l'Egypte, Anouar Sadate et le Premier ministre israélien, Menahem Begin, dans sa résidence de Camp David en vue d'aider les belligérants à trouver un accord de paix. Tâche à priori impossible dans la mesure où la position des parties semblait à l'évidence irréconciliable. L'Egypte exigeait en effet le retrait immédiat de son voisin du Sinai tandis qu'Israël – qui occupait le territoire depuis la guerre de 1967 - le refusait absolument pour de multiples raisons.

Toutes les négociations sur position, visant notamment à un retrait partiel des troupes d'occupation ou à un partage plus ou moins équitable du Sinai, échouèrent rapidement. Examinant alors les intérêts des parties, Jimmy Carter et son équipe réussirent à cerner les besoins réels des deux pays. Alors que l'Egypte entendait recouvrer sa souveraineté sur un territoire faisant de tout temps partie de son histoire, Israël de son côté entendait avant tout préserver sa sécurité. Aux yeux de l'Etat Juif, celle-ci ne pouvait être garantie autrement qu'en conservant les terres occupées.

Une option s'imposa dès lors sans autre difficulté, à la satisfaction des deux antagonistes : le retour du Sinai à l'Egypte en échange d'un accord de démilitarisation de la zone.

20. Exemple tiré de Rubin/Pruitt/Kim, "*Social conflict, escalation, stalemate and settlement*", McGraw-Hill, In, 2e édition, 1994

V. La Médiation : Un Processus Efficace

A. Avantages pratiques

1. Le temps

Il ressort d'une récente étude hollandaise portant sur la médiation commerciale[21] que le temps moyen nécessaire à la résolution d'un conflit est de quatre sessions et demi. Le quinze pour cent des médiations passées en revue ont abouti à un accord en moins d'une journée de négociation.

La fédération suisse de médiation arrive aux mêmes conclusions dans son enquête de 2008 puisque la durée moyenne est de quatre séances un tiers[22]. Cette enquête de l'organisation faîtière suisse précise encore que le laps de temps total, de l'initiation de la procédure à son terme, est en moyenne de trois mois.

Il n'est pas besoin d'épiloguer pour constater que la célérité du processus est bien supérieure à celle des procédures traditionnelles, fussent-elles menées avec le maximum d'efficience à l'instar des procédures arbitrales du TAS.

2. Le coût

La même étude hollandaise[23] fait ressortir une valeur litigieuse moyenne de cinq millions d'euros pour un coût moyen de trois mille euros par partie[24].

Ces chiffres, là également, se passent de tout commentaire.

3. Autre coût: le coût psychologique

Nous touchons là à l'un des inconvénients majeurs de la procédure judiciaire ou arbitrale. Les caractéristiques essentielles de la justice traditionnelle sont ses aspects autoritaires et contradictoires. Une autorité tenant ses pouvoirs de la loi décide souverainement sur la base de textes légaux du sort des litiges qui lui sont soumis. Cette décision est prise sur la base de l'examen du dossier tel que présenté contradictoirement par les parties en litige.
L'on devine immédiatement sur la base de cette

21. ACB research mediations 2006, http://www.mediation-bedrijfsleven.nl/english.shtml

22. SDM/FSM : Enquête Médiation Suisse 2008, résultats détaillés, http://www.infomediation.ch/cms/index.php?id=179&L=1

23. ibidem 20

24. L'usage en médiation (auquel les parties ne dérogent que peu) veut que le coût de la procédure soit réparti entre les parties par égales parts entre elles.

définition volontairement sommaire le coût humain d'une telle procédure. Pour présenter sa cause sous ses meilleurs auspices, chaque justiciable ne se contentera pas de mettre en avant les points forts de son dossier. Il tentera de mettre à néant les arguments de son adversaire quand ce n'est pas de démolir l'adversaire lui-même.

Résumée de manière à peine caricaturale, la tâche de l'avocat est essentiellement de mettre en forme les deux arguments immuables de toutes les parties saisissant la justice: j'ai raison et il a tort; voyez comme je suis bon et comme il est malhonnêteté [25].

Rancœur quand ce n'est haine pure et simple sont à la porte de chaque prétoire. Et la décision de justice, toute autoritaire et attributive qu'elle soit, sera toujours incapable de mettre fin à cet état psychologique qu'elle a engendré. En tentant – car même là les tribunaux sont souvent impuissants - de rendre justice, le système très souvent détruit une relation, familiale, amicale ou d'affaires.

En somme, la Justice peut être comparée à la médecine. Il s'agit d'un médicament aux effets secondaires nombreux et souvent dangereux.

4. Décision souvent décevante sinon même choquante

Ce médicament peut enfin s'avérer incapable de soigner le mal lui-même sinon l'aggraver.

La raison est bien compréhensible. Les lois sur la base desquelles toute décision de justice se doit d'être rendue sont évidemment abstraites; elles sont faites pour être applicables au plus grand nombre et, de ce fait, ne sont pas toujours – sinon jamais – adaptées au cas particulier. Par ailleurs, ces lois sont le reflet de la conception d'une société à un certain moment et il est bien connu que celle-ci évolue souvent plus rapidement que celle-là. Le juge tentera certes de faire "*jouer*" au mieux la loi avec le cas qui lui est soumis mais il restera toujours soumis à cette loi qu'il ne peut manipuler à l'envi (sous peine de voir sa décision être portée devant une autorité supérieure par la partie s'estimant lésée).

A ces problèmes liés à l'abstraction de la loi, s'ajoute son caractère "*attributif*", caractère dont nous avons déjà parlé. Cette caractéristique équivaut souvent à l'adage "*c'est blanc ou noir*". Après des mois, voire des années d'efforts, l'un des antagonistes verra souvent ses espoirs basculer en quelques secondes, le temps pour le juge de lire le dispositif du jugement. C'est le "*tout ou rien*" qui fait souffrir tant de justiciables… et poussent tant d'autres, à l'esprit plus spéculatif, à tenter leur chance devant les tribunaux.

Enfin, et c'est bien connu, loi et équité ne sont pas synonymes et la clause d'équité en matière arbitrale peu souvent retenues par les deux parties. La victime de cette dernière dichotomie gardera de la Justice une impression douloureuse même si, par chance, son procès n'a pas d'autre conséquence que l'altération de ses rapports avec sa partie adverse.

B. Avantages substantiels : Potentiel de solutions créatives, tendant à un « win-win »

Les chercheurs ont développé différents types de solutions alternatives, possibles en médiation. Nous en citerons cinq, les plus courantes, pour illustrer notre propos.

1. L'augmentation des ressources à disposition

Cette alternative est connue dans les pays anglo-saxons par la formule "*expanding the pie*" (agrandir le gâteau).

L'exemple le plus prisé de la doctrine est celui de l'orange. Deux antagonistes se disputent la propriété de l'orange. Une négociation sur position ne pourrait aboutir qu'au partage de l'orange (solution "*lose-lose*", ou "*tout le monde est mécontent*") ou encore à l'attribution du fruit à l'une des deux parties, soit à une solution "*win-lose*". La négociation raisonnée tentera, grâce à la recherche des intérêts par une communication appropriée[26], de découvrir les réels intérêts des parties. En l'espèce, A désire l'orange pour la manger tandis que B l'exige pour sa pelure qu'il destine à la décoration d'un plat. Sur ces bases, une "*win-win*" solution est aisée à mettre en place !

Rubin, Pruitt et Kim illustre cette théorie par l'exemple suivant[27]. Une dispute intervient entre mari et femme concernant la destination de leurs prochaines vacances, de quinze jours. Le premier privilégie la mer tandis que la seconde est tentée par la montagne. Le compromis – une semaine dans chaque lieu – n'est pas possible pour des questions de réservation. La solution suggérée par l'auteur est d'augmenter la période de vacances à quatre semaines. La solution du gâteau peut être efficace dans les cas où les parties s'accordent sur la base d'une solution (principe des vacances dans notre exemple) mais

25. Et cette argumentation ne changera pas une fois le jugement rendu puisque, selon la décision, le justiciable considérera invariablement que ladite décision est "*normale*" ou que le juge et/ou l'avocat a mal fait son travail!

26. Supra Chap. IV, 2.

27. Rubin/Pruitt/Kim, supra note 20, p.174.

divergent sur l'exécution (mer/montagne).

Bien évidemment, le gâteau doit pouvoir être agrandi sans frais disproportionnés[28].

2. Compensation d'une concession

La demande d'une partie est satisfaite. En contrepartie, elle indemnise la deuxième partie par une prestation d'une autre espèce.

Dans notre exemple, l'épouse accepte finalement les vacances au bord de la mer. En contrepartie, son conjoint accepte une nouvelle répartition des tâches ménagères et familiales qu'il refusait jusqu'alors[29].

3. Satisfaction d'un seul élément de la demande mais de manière extraordinaire

Les Anglo-saxons parlent de "*logrolling*".

En cas de demandes multiples, la partie sollicitée accepte l'une des exigences en l'augmentant, l'autre partie acceptant de renoncer à sa deuxième prétention. C'est la solution que la direction de Volkswagen AG et les syndicats ont finalement adoptée il y a quelques années. Confronté à une double demande des syndicats, augmentation de salaires et réduction de la durée de travail, le directoire de VW a tout d'abord refusé en bloc ces revendications avant d'accepter une réduction massive, beaucoup plus importante que celle demandée du temps de travail. Cette solution, qui a finalement eu l'aval des salariés, a prévalu jusqu'il y a peu.

4. Réduction des "*nuisances*"

La littérature américaine parle de "*cost cutting*".
L'une des parties accepte la demande mais le coût qu'a pour lui cette concession lui est crédité d'une façon ou d'une autre.

Reprenons notre exemple. L'épouse accepte finalement de se rendre au bord de la mer mais, contrairement au projet initial du mari, le couple louera une villa à distance respectable de l'eau, l'odeur de celle-ci et les moustiques étant en réalité les raisons des réticences de Madame[30].

Plus sérieusement, l'entreprise A, actionnée pour malfaçon par B, accepte finalement la demande de Dommages et Intérêts, B s'engageant à maintenir dans ces conditions leurs relations commerciales.

5. Solution autre que les demandes initiales des parties

Les auteurs anglo-saxons parlent ici de "*bridging*".

Dans cette alternative, aucune des demandes initiales des parties n'est satisfaite mais celles-ci trouvent une autre solution qui satisfait leurs intérêts.

Reprenons une dernière fois l'exemple de Rubin et de ses coauteurs[31]. Le refus de l'épouse de se rendre à la mer est en réalité dû à son désir de faire du cheval. Le mari rejette la montagne au motif qu'il entend avant tout nager. Un lac de montagne fera peut être l'affaire !

L'on constate au travers de ces exemples volontairement sommaires et quelque peu enfantins qu'un travail en amont de la demande des parties, de leurs positions donc, en vue de la recherche de leurs réels intérêts et la recherche d'alternatives peut aboutir à une solution gagnant-gagnant.

C. Limites de la médiation

L'optimisme des tenants de la médiation est sans limite. Il ne se passe pratiquement pas un jour sans qu'une des nombreuses revues consacrées à la médiation ne fasse état de résultats d'enquêtes de satisfaction, toutes plus positives que les précédentes. La réalité nous apparaît plus nuancée.

Tout d'abord, le processus de médiation est délicat. Il nécessite une formation de longue haleine et une expérience dont peu de gestionnaires de conflit disposent, dans nos contrées en tous les cas. Beaucoup de "*médiateurs*" n'ont encore de médiateurs que le nom[32].

Et, surtout, la médiation est une alternative qui ne sied pas à tous les litiges ni au demeurant à toutes les parties en litige.

Ainsi, ce processus est à même de donner de bons résultats notamment dans les litiges commerciaux. Il n'est en revanche d'aucune utilité dans certains dossiers. notamment lorsqu'un principe (de droit, moral) est en jeu, lorsque le litige ne peut être résolu que par l'acceptation ou le rejet pur et simple de la demande, lorsque enfin le problème demande une solution urgente et autoritaire, mesures provisionnelles par exemple.

28. Ce qui n'est pas forcément le cas de l'exemple.

29. Rubin/Pruitt/Kim, supra note 20, p.175, exemple remanié.

30. Ibid.

31. Ibid.

32. Cet état de fait change heureusement rapidement. En Suisse pour ne citer que cet exemple, de nombreuses formations approfondies et sérieuses sont aujourd'hui en effet offertes.

Ces limites objectives s'expliquent principalement en raison du caractère consensuel de la médiation. Le médiateur, dépourvu de toute autorité d'adjudication, ne peut en effet remplir le rôle dévolu au juge ou à l'arbitre dans un domaine où la sanction est une de ses attributions. De même, cette absence d'autorité rend-elle le processus inefficace lorsqu'une solution provisoire urgente est nécessaire par exemple pour la sauvegarde des droits de l'une des parties ; certes un accord est théoriquement envisageable sur ce point ; encore faut-il toutefois que les parties aient le temps de négocier.

Les différends liés exclusivement à une question purement juridique, ou encore à une question de principe ne sont à priori pas non plus des domaines médiables.

Enfin, le choix entre cette méthode alternative et la voie judiciaire ou arbitrale nous apparaît devoir être examiné avec la plus grande attention lorsqu'il s'avère que l'une des thèses a en principe toutes les chances de succès en matière juridique. Il tombe sous le sens qu'en pareille hypothèse, la partie "*forte*" n'aura que peu d'intérêts à d'éventuelles concessions à moins qu'une solution consensuelle élargie telle celles passées en revue plus haut[33]puisse offrir aux deux parties une solution "*win-win*".

Les incompatibilités subjectives, soit celles liées aux parties elles-mêmes sont souvent plus difficilement cernables d'emblée. Citons, sans qu'encore une fois cette liste n'aie la prétention d'être exhaustive, la mauvaise foi, un déséquilibre important dans l'autonomie respective des parties, la partie "*risque-tout*", les problèmes culturels et/ou ceux liés à l'éducation[34].

Un examen préalable et minutieux du dossier sous ce double angle objectif et subjectif est donc absolument nécessaire avant d'entamer une procédure de médiation en vue d'éviter que celle-ci n'aboutisse à rien sinon à des frais et à une perte de temps inutile. A notre sens, cette analyse préalable devrait être faite systématiquement[35].

33. cf. Supra, chapitre V, B.

34. En raison de leur éducation, de leur culture ou simplement de leur caractère, certaines personnes refusent l'autonomie que sous-entend la médiation, préférant en tout état de cause voir leur problème trancher par une autorité. De nombreuses études identifient une réticence liée à la religion, les régions influencées par le catholicisme semblant selon celles-ci plus réfractaires à soumettre leur litige à une médiation que les contrées protestantes.

35. Certains pays obligent ou recommandent une telle "*early evaluation*". Le code de déontologie de l'état du Queensland en Australie oblige ainsi les avocats à examiner avec leurs clients et avant toute procédure toutes les alternatives possibles à l'action judiciaire et d'en apprécier l'éventuelle utilité.

VI. Tendances actuelles dans la Médiation

Science jeune s'il en est, la médiation évolue rapidement surtout sous l'impulsion des pays anglo-saxons.

L'examen de cette évolution sort du cadre de cette étude qui se veut une seule approche sommaire de ce processus. Il nous apparaît néanmoins utile de distinguer deux grands courants[36].

A. La médiation facilitative

La médiation facilitative est le processus couramment utilisé en Europe.

Le médiateur recherche avant tout à faciliter la communication entre les parties en litige. Il les conduira à une meilleure écoute et les guidera, après le traitement des émotions qui polluent éventuellement leur débat, vers tout d'abord la recherche de leurs intérêts réels puis, une fois ceux-ci mis sur la table et mutualisés, vers la recherche de solutions tenant compte desdits intérêts.

Le cheminement se fait pas à pas, par étapes progressives. Le médiateur est donc garant et maître d'un processus, les participants ayant quant à eux la maîtrise du fond et des solutions.

B. La médiation évaluative

La médiation évaluative est plus souvent utilisée dans les pays anglo-saxons.

A son rôle initial de facilitateur de la communication, le médiateur ajoute ici une deuxième mission, celle d'évaluer avec les parties leur litige et de les guider vers une solution, le cas échéant en leur proposant une ou des solutions.

Ainsi, le tiers n'est plus seulement un facilitateur de la communication mais bien un expert qui, en fonction de son expérience de la vie ou/et encore de la règle de droit, conseillera les parties et les orientera.

Notons afin d'éviter toute équivoque que le médiateur se bornera à une proposition mais n'imposera pas celle-ci, auquel cas il se transformerait en arbitre[37].

36. Il existe un troisième grand courant dénommé "*médiation transformative*". Celui-ci ne nous apparaît pas être digne d'intérêt dans le cadre de la présente étude.

37. Il existe en matière commerciale notamment une procédure dite "*MED/ARB*" où, moyennant l'accord des parties, le médiateur devient à l'issue du processus, lorsque celui-ci n'aboutit pas, arbitre et va donc décider du sort du litige. Diverses procédures de résolution peuvent être proposées.

Ces deux grands courants font l'objet de larges discussions et les chapelles sont nombreuses. Passion et émotion ne sont donc pas étrangères au petit monde de la médiation !

Ces querelles nous semblent toutefois largement excessives.

Si, certes, le courant évaluatif s'éloigne de la médiation "*pure*", il a dans de nombreux cas l'avantage de l'efficacité. Il peut ainsi permettre une solution certes dictée par un tiers mais sur la base d'un examen du dossier plus large et consensuel que celui offert par la procédure contentieuse. La médiation évaluative permet donc souvent d'offrir une solution plus "*win-win*" que la procédure judiciaire et ce, dans un laps de temps et à un coût défiant toute concurrence

VII. Médiation et le TAS

Le domaine du sport est devenu au fil des années conflictuel voire très conflictuel. Il n'est qu'à songer pour s'en convaincre au nombre toujours plus élevé de dossiers que traite aujourd'hui le TAS.

Il est une autre évidence : le conflit sportif a très souvent, et peut-être plus que dans d'autres domaines, une composante émotionnelle importante. En d'autres termes, le processus de médiation peut être un processus efficace de traitement, hors bien sûr le domaine purement disciplinaire où, comme rappelé précédemment, un pouvoir décisionnel s'impose.

Notre institution l'a bien compris et dispose ainsi d'un règlement de médiation[38].

Celui-ci, après avoir défini la médiation et son processus, en rappelle les règles essentielles. Il précise le rôle du médiateur et les effets de l'aboutissement ou de l'échec du processus.

Il nous apparaît intéressant de s'arrêter sur ces deux derniers points avant d'examiner sommairement l'importance actuelle de cette procédure au TAS et, enfin, son évolution potentielle.

A. La médiation au TAS : une médiation évaluative

L'article 9 du règlement de médiation définit le rôle du médiateur en ces termes :

"Le médiateur favorise le règlement des questions en litige de la manière qu'il estime appropriée. Pour ce faire, il :
a. identifie les questions faisant l'objet du litige ;
b. facilite la discussion entre les parties sur ces questions ;
c. propose des solutions.

Toutefois, le médiateur ne peut imposer une solution du litige aux parties".

Ainsi, le règlement rappelle t'il d'emblée le rôle essentiel du tiers, soit celui de faciliter la communication et lui laisse toute liberté de mener son processus à sa guise. S'il interdit à juste titre au médiateur d'imposer sa solution aux parties, il l'engage toutefois à proposer des solutions.

L'influence anglo-saxonne rappelée plus haut est donc évidente. La médiation du TAS adopte à l'évidence la voie évaluative[39].

B. Médiation aboutie et non aboutie

L'article 12 du règlement examine l'hypothèse d'une médiation réussie tandis que l'article 13 se penche sur les conséquences de son échec.

Il est intéressant de noter que la première disposition citée semble imposer la forme écrite pour toute transaction et obliger le médiateur à assumer sa rédaction. L'on peut se poser la question de savoir si cette formulation n'est pas trop restrictive. L'expérience montre en effet que, dans certains cas, tout ou partie de l'accord intervenu ne trouvera pas forcément son plein "*épanouissement*" dans un texte et pourrait avantageusement être remplacé par un simple constat d'accord. Ces mêmes directives nous semblent par ailleurs omettre que, dans nombre de médiations, les parties sont assistées de leurs conseils. Leur concours à la rédaction du texte final voire leur responsabilité exclusive à la confection de celui-ci ne doit pas être perdu de vue[40].

C'est en revanche de manière tout à fait pertinente que le règlement donne à la transaction un effet exécutoire[41].

L'article 13 du règlement interdit quant à lui, de manière tout à fait justifiée à notre sens, que le médiateur puisse fonctionner comme arbitre dans une éventuelle procédure arbitrale qui serait introduite ensuite de l'échec de la médiation.

38. Code de l'arbitrage en matière de sport et Règlement de médiation , édition 2010, pages 105ss.

39. Pour la notion de médiation évaluative, cf. supra, chapitre VI, B.

40. Dans la grande majorité des médiations commerciales, les parties sont aujourd'hui assistées de leurs avocats. Ce concours permet en règle générale au médiateur de se libérer de toutes les tâches juridiques au nombre desquelles celle de la rédaction des accords et, partant, de se consacrer plus exclusivement à la recherche de la communication idéale. Il en résulte généralement une meilleure dynamique.

41. Cette absence de caractère exécutoire est un des inconvénients de la transaction obtenue dans une médiation ouverte avant procédure, inconvénient heureusement atténué aujourd'hui, en Suisse, par l'article 347 du nouveau code de procédure civile unifié

Cette disposition, tout comme au demeurant l'article 9 in fine, ne devrait toutefois pas, nous l'espérons en tout cas, limiter les possibilités du médiateur de convaincre les parties d'aboutir à un accord. L'expérience démontre que nombre d'accords "*bloquent*" à la toute dernière difficulté. Les Anglo-saxons parlent du "*last gap*" et attribuent souvent sinon dans la quasi totalité des cas cette dernière résistance à la peur qu'ont les antagonistes de perdre la face. De nombreuses solutions ont été mises au point au nombre desquelles le jeu du hasard et celui du "*base-ball game*"[42]. Il serait dommage qu'une interprétation trop restrictive de ces dispositions de notre règlement interdisent ces alternatives de la dernière chance si celles-ci ont l'adhésion des parties.

C. L'avenir de la médiation au TAS

Depuis la mise en vigueur du règlement de médiation du TAS, soit depuis 1999, seule une trentaine de médiations ont été initiées. Et sur ces trente médiations, seules six médiations ont à notre connaissance abouti à un accord.

Ces chiffres, décevants, méritent qu'on s'y arrête.

L'opportunité de la médiation en matière sportive ne nous apparaît pas devoir être mise en doute. L'importance du facteur émotionnel dans le domaine sportif, le besoin pour de nombreux acteurs de devoir trouver une solution rapide et peu onéreuse ainsi que la nécessité pour beaucoup d'antagonistes de pouvoir continuer à l'avenir des relations, contractuelles notamment, sont des éléments parmi d'autres qui devraient plaider pour un recours plus systématique à cette méthode de résolution des conflits.

Les raisons de ce désintérêt sont à notre sens de deux ordres.

La méconnaissance du processus tout d'abord. Peu d'avocats sont au fait de celui-ci. Et c'est bien connu, crainte et méconnaissance vont de pair. Le conseil ne risque t'il pas de perdre la maîtrise de son dossier ? Quel rôle va t'il jouer dans cette ou ces séances bien éloignées du prétoire ? N'est-ce pas pour son client un aveu de faiblesse que de donner son aval à ce genre de négociations assistées ? En bref, ne vaut-il pas mieux en rester au confort, même aléatoire, d'une procédure claire et bien connue ?

Ces craintes sont évidentes. Elles sont bien connues des autres institutions et organisations désireuses de promouvoir le recours à cette méthode alternative[43].

Et ces craintes somme toute légitimes ne pourront être dissipées que par une orientation exhaustive des parties qui pourraient tirer avantage de ce processus et bien sûr de leurs avocats. Cette orientation passe à la fois par un examen comparatif dossier/processus à disposition et par une orientation exhaustive du ou des conseils des parties. L'examen est l'étape préalable ; il pourrait se faire par le TAS lui-même qui examinerait dans le cadre du dossier qui lui est soumis sa "*potentialité*" à être envoyé en médiation : Le coût, le temps à disposition sont ils des éléments importants pour les parties en litige? Y a t'il un facteur émotionnel, des intérêts derrière les positions affichées ? etc. Des listings énumérant tant les éléments objectifs que subjectifs peuvent être élaborés pour faciliter la "*vente*" du processus.

Une fois le processus alternatif accepté dans son principe, il reste à en définir la procédure pour le cas donné. C'est un travail préparatoire que le médiateur désigné se devrait d'élaborer avec les conseils avant que la médiation proprement dite ne débute. Quel rôle est dévolu aux conseils et comment, à quel(s) moment(s) ceux-ci l'exécuteront ? Quid de la partie factuelle ? Comment la présenter ? Quid de la recherche des intérêts ? Comment la travailler ? Quid de la ventilation des éventuelles émotions ? Comment éviter que cette ventilation puisse être préjudiciable au client en cas de procédure ultérieure ? La liste est longue. Une fois encore, elle devrait se travailler dans le cadre d'entretiens préalables pour tout à la fois traiter d'éventuelles craintes et rendre le processus le plus efficace possible.

Il y a un second écueil.

Ne s'improvise pas médiateur qui veut. Le sens de la négociation tout comme l'empathie sont des traits de caractère que nombre de personnalités exercent naturellement et avec efficacité. C'est toutefois insuffisant. Il existe des techniques, il y a des processus à respecter et des pièges à éviter sous

42. Dans une récente médiation commerciale, les parties sont arrivées à résoudre leur différend de 4 millions d'euros à…50'000 Euros avant un blocage qui risquait de devenir définitif. Une décision à pile ou face a finalement prévalu. Le sort a donc tranché un dernier écueil qui n'était autre qu'une crainte, de part et d'autre, de perdre la face en faisant le premier un dernier effort !

Dans une autre affaire où deux clubs de base-ball étaient en conflit, l'impasse finale a pu être résolue par la mise sur pied d'un arbitrage particulier. Le médiateur a proposé aux parties de consigner chacune dans une enveloppe scellée leur dernier chiffre ; l'accord prévoyait que, une fois les enveloppes remises au médiateur, les parties tenteraient encore durant une heure la voie négociée. En cas d'échec, le médiateur trancherait en acceptant soit le montant figurant dans l'enveloppe A, soit le montant consigné dans l'enveloppe B ; le médiateur ne pouvait en aucun cas décider d'un autre montant que le montant A ou B. Les parties ont trouvé un accord dans l'heure ! Cette "*procédure*" est aujourd'hui largement appliquée aux USA. Dans près de 80% des cas, les parties trouvent un accord consensuel durant l'heure restante ; dans le 20% des cas restants, les chiffres soumis au médiateur/arbitre sont quasiment identiques !

43. Nous en voulons pour preuve les difficultés rencontrées par les assurances de protection juridique dont la plupart prévoient la médiation dans leurs conditions générales mais peinent à la mettre en pratique.

peine de retomber rapidement dans une négociation sur positions. La meilleure volonté du monde est insuffisante. La médiation ne s'improvise pas, elle s'apprend et s'exerce.

Nous plaidons en d'autres termes pour une médiation menée par des gens formés à cet exercice[44].

VIII. Conclusions

La gestion du conflit s'apparente encore une fois à nos yeux à celle de la maladie. La médecine a aujourd'hui compris en grande partie que le recours à la chirurgie ou encore aux médicaments lourds devait être l'ultima ratio, les effets secondaires étant souvent pires que le mal.

Il nous semble qu'à cet égard, les gestionnaires des conflits aient pris du retard.

Si, comme l'on vient de le voir, la médiation (et les autres systèmes "*ADR*") ne sont, loin s'en faut, pas la panacée universelle, il est toutefois regrettable que ce système soit encore à ce point méconnu, tant il est manifeste que, pour certains dossiers tout au moins, son efficacité est remarquable.

Les raisons, à notre sens, sont au nombre de deux :

- Une formation lacunaire des médiateurs, jusqu'il y a peu de temps en tout cas.

- Une absence quasi totale de formation (à nouveau !) des avocats et des institutions appelées à orienter les personnes en conflit à cette nouvelle voie de résolution des litiges.

Si le premier problème est en voie d'être résolu, le second mérite encore une attention particulière.

44. Cf également en ce sens supra chapitre V, C.

Les modifications essentielles apportées au Code de l'arbitrage en matière de sport entre le 1er janvier 2010 et le 1er janvier 2012

Me Matthieu Reeb, Secrétaire Général du Tribunal Arbitral du Sport (TAS)

Introduction

Entre janvier 2010 et janvier 2012, le Conseil International de l'Arbitrage en matière de Sport (CIAS) a procédé à plusieurs révisions importantes du Code de l'arbitrage en matière de sport. Ces modifications sont de différente nature. Il y a tout d'abord les modifications de nature structurelle portant sur l'organisation du CIAS et sur le statut des arbitres du TAS. Il y a ensuite les modifications ayant pour but de clarifier certaines règles de procédure du TAS ou de combler certaines lacunes. Enfin, il y a les modifications adoptées par le CIAS dans le but de rendre la procédure du TAS plus rapide et efficace.

Les modifications essentielles du Code, entrées en vigueur le 1er janvier 2010, ont été décrites et commentées lors de la Conférence du mois de septembre 2010. Pendant la période de préparation du recueil de textes de ce séminaire, deux autres révisions du Code ont eu lieu. La première série d'amendements est entrée en vigueur le 1er juillet 2011 et la deuxième série le 1er janvier 2012.

Le présent article traitera tout d'abord des modifications essentielles intervenues en 2010. Un deuxième chapitre est consacré aux modifications ultérieures, comprenant les dispositions précises du Code ayant été modifiées, en français et en anglais, ainsi qu'un bref commentaire lié à ces dernières modifications.

Modifications entrées en vigueur le 1er janvier 2010

Article S6 para. 9: assistance judiciaire
Le CIAS a souhaité maintenir le système de l'assistance judiciaire au TAS, voire même le renforcer. Il désire établir des directives officielles afin que la procédure de demande d'assistance judiciaire et les critères d'octroi soient rendus publics. La question de l'alimentation du fonds d'assistance judiciaire doit toutefois être examinée par le CIAS de concert avec d'autres questions financières touchant les procédures du TAS. A l'heure actuelle, c'est le Président du TAS qui décide ou non de l'octroi de l'assistance judiciaire. A l'heure actuelle, pour obtenir cette assistance, il faut être une personne physique, avoir besoin d'un avocat, ne pas avoir les moyens financiers nécessaires pour procéder devant le TAS et que la demande d'arbitrage ou l'appel ne soit pas dénué de toute chance de succès.

Article S18 : interdiction de la double casquette arbitre-avocat
Dorénavant, les arbitres et médiateurs du TAS ne peuvent plus agir comme conseil d'une partie devant le TAS. Si malgré tout un membre du TAS agissait comme conseil devant le TAS, sa qualité de conseil ne pourrait néanmoins pas être remise en cause dans l'arbitrage en question. Cette personne s'exposerait alors aux sanctions prévues par l'Art. S19 du Code (retrait provisoire ou définitif de la liste des arbitres/médiateurs).

La nouvelle formulation de l'Art. S18 du Code vise essentiellement à gommer les critiques négatives dues à certaines apparences causées par cette double activité arbitre-conseil.

Article S19 : violation du Code
Avec le nouvel article S19 du Code, le CIAS pourra prendre des mesures particulières à l'encontre d'un membre du TAS ayant commis une violation du Code, y compris en cas de violation des règles de confidentialité.

Article S20 : changement de procédure
Sous certaines conditions, il sera possible pour le TAS de transférer une procédure d'arbitrage de la Chambre ordinaire à la Chambre d'appel et vice versa. Il s'agit là d'un assouplissement des anciennes règles mais son impact sera moindre étant donné que les règles sur les frais d'arbitrage ont changé et que le transfert d'une chambre arbitrale à l'autre n'a pas d'effet sur la composition de la Formation arbitrale.

Article R29 : langue
Le CIAS a voulu préciser dans cette disposition les conditions liées au choix d'une langue de l'arbitrage autre que l'anglais ou le français. Le choix d'une telle "*autre*" langue est normalement possible, à condition que la Formation arbitrale soit d'accord avec la langue proposée par les parties. Le CIAS a toutefois souhaité maintenir un contrôle, effectué par le Greffe du TAS, afin que le choix d'une langue inhabituelle pour le TAS n'entraîne pas de complications ou de frais supplémentaires pour l'institution.

Article R31 : notifications
Le dépôt et la communication de pièces jointes à des

mémoires déposés par les parties peut désormais se faire par courrier électronique.

Article R32 : suspension de la procédure
Une nouvelle disposition permet à la Formation arbitrale de suspendre une procédure d'arbitrage en cours pour une durée limitée.

Article R37 : mesures provisionnelles
Dans le cadre de mesures provisionnelles, le Président de Chambre, si la Formation arbitrale n'est pas encore constituée, peut mettre fin à une procédure d'arbitrage s'il constate que le TAS n'est manifestement pas compétent pour juger l'affaire en question.

L'examen de la compétence du TAS se fait désormais à trois niveaux différents : (i) le Greffe examine d'abord s'il existe une convention d'arbitrage au moment de l'ouverture de la procédure; (ii) le Président de Chambre, saisi d'une demande de mesures provisionnelles, peut clôturer une procédure s'il constate que le TAS n'est manifestement pas compétent; (iii) la Formation arbitrale peut statuer sur sa compétence à titre préliminaire.

Articles R39 et R55 : dépôt de la réponse
Le défendeur/intimé peut demander que le délai pour le dépôt de la réponse soit fixé après le paiement par le demandeur/appelant de l'avance de frais.

Article R41.3 : intervention
Le délai pour permettre à un tiers de déposer une demande d'intervention a été prolongé: autrefois, il coïncidait avec le délai pour le dépôt de la réponse; dorénavant une demande d'intervention peut être déposée jusqu'au moment de l'audience ou au moment de la clôture de la procédure écrite si aucune audience n'a lieu, mais pas plus de 10 jours après avoir eu connaissance de l'existence de la procédure en question.

Article R41.4 : tiers intéressés
La Formation arbitrale dispose d'une plus grande liberté pour déterminer le statut des éventuels tiers intéressés et pour définir leurs droits dans la procédure d'arbitrage. En outre, les Formations arbitrales disposent maintenant d'une base réglementaire pour autoriser le dépôt de mémoires *amicus curiae*.

Articles R44.1 et R51 : témoins et experts
Dans leurs écritures, les parties doivent indiquer non seulement les noms de leurs éventuels témoins et experts mais en plus indiquer un bref résumé des témoignages présumés, à défaut de témoignages écrits détaillés et, pour les experts, mentionner le domaine d'expertise pour chacun d'entre eux.

Article R44.4 : procédure accélérée
Le principe d'une procédure accélérée reste en vigueur mais les modalités peuvent également être fixées par le Président de Chambre.

Articles R46 et R59 : opinions dissidentes
Le CIAS a décidé d'officialiser la pratique du TAS visant à ne pas reconnaître les opinions dissidentes et à ne pas les communiquer.

Article R51 : mémoire d'appel
Une déclaration d'appel ne peut plus être considérée comme un mémoire d'appel si l'appelant n'en fait pas la demande par écrit. En l'absence d'une telle demande, et si aucun mémoire d'appel n'est déposé dans le délai prescrit, le TAS met un terme à la procédure d'arbitrage.

Article R52 : jonction
Le CIAS a décidé d'officialiser une pratique constante du TAS en confirmant que le tribunal peut envoyer une copie de la déclaration d'appel et du mémoire d'appel, pour information, à l'autorité qui a rendu la décision attaquée. En outre, le Président de Chambre ou le Président de la Formation, s'il est déjà nommé, dispose de pouvoirs plus étendus en matière de jonction de causes.

Article R55 : pas de demandes reconventionnelles en appel
La possibilité de déposer des demandes reconventionnelles en procédure d'appel est supprimée. Les personnes et entités qui souhaitent contester une décision devront donc impérativement le faire avant l'expiration du délai d'appel applicable, sans attendre de voir si l'adversaire a saisi le TAS ou non.

Article R56 : pièces complémentaires
Avec l'accord des parties ou en cas de décision spécifique du Président de la Formation, les parties peuvent non seulement produire de nouvelles pièces et formuler de nouvelles offres de preuve après la soumission de la motivation d'appel et de la réponse mais pourront encore modifier leurs conclusions. En outre, une nouvelle disposition a été insérée pour permettre à une Formation arbitrale de tenter une conciliation en procédure d'appel.

Article R59 : délai pour rendre la sentence
En procédure d'appel, le délai prévu par l'ancien Code pour la communication de la sentence finale par le TAS était fixé à quatre mois à compter du dépôt de la déclaration d'appel. En raison des délais causés par des questions préliminaires liées à la constitution de la Formation, au choix de la langue et aussi au paiement des avances de frais, le CIAS a

décidé de fixer un délai plus facile à maîtriser pour les Formations arbitrales. Le nouveau délai pour rendre les sentences en matière d'appel est désormais fixé à trois mois à compter de la transmission du dossier de la procédure aux arbitres concernés.

Article R67 : disposition transitoire
Le nouveau Code est applicable à toutes les procédures mises en œuvre par le TAS à compter du 1er janvier 2010. Les procédures en cours au 1er janvier 2010 restent soumises au Règlement en vigueur avant 2010, sauf si les deux parties demandent l'application du nouveau Code.

Article R68 : responsabilité
Il s'agit d'une nouvelle disposition prévoyant une exclusion de responsabilité pour les arbitres et médiateurs du TAS, les membres du CIAS ainsi que les employés du TAS.

Commentaire concernant les modifications entrées en vigueur après le 31 décembre 2010

Article S14
Le CIAS a décidé d'assouplir la règle relative à la constitution de la liste des arbitres du TAS. Autrefois, les propositions en vue de la nomination de nouveaux arbitres du TAS émanaient en grande partie d'organisations sportives et le CIAS devait respecter certaines proportions en sélectionnant des arbitres proposés soit par le CIO, soit par les Fédérations Internationales ou soit encore par les Comités Nationaux Olympiques. Or, l'ancienne formulation de l'Art. S14 pouvait donner la fausse impression que les arbitres proposés par ces entités étaient liés à celles-ci et qu'ils devenaient leurs représentants de fait. En outre, ce système de répartition proportionnelle faisait apparaître un critère quantitatif dans le choix des arbitres qui n'était pas toujours facile à respecter pour le CIAS.

La nouvelle rédaction de l'Art. S14 offre une plus grande flexibilité au CIAS dans la sélection des nouveaux arbitres et permet surtout d'élargir le choix en donnant la possibilité à toute personne remplissant les conditions de l'Art. S14 de présenter sa candidature sans passer par une organisation sportive. Le CIAS a toutefois rappelé que le CIO, les FIs et les CNOs pouvaient toujours proposer des candidats arbitres ou médiateurs. Le CIAS reverra également sa procédure interne de nomination d'arbitres et publiera des directives permettant de faciliter la préparation des dossiers de candidature.

Article R39
Cette disposition est complétée par deux paragraphes spécifiques relatifs à la question de la compétence du Tribunal. Ce complément reprend très largement les termes de l'Art. 186 LDIP. Le CIAS a surtout voulu rappeler que les Formations du TAS avaient la faculté de statuer de manière préalable sur leur compétence dans une décision incidente.

En outre, le nouvel Art. R39 prévoit désormais la possibilité de joindre deux procédures similaires. Une telle disposition existait déjà dans le cadre de la procédure d'appel mais pas dans la procédure ordinaire.

Article R44.2
Afin de pouvoir établir un calendrier de procédure dans les plus brefs délais après la saisine du TAS, cette disposition prévoit désormais que le Président de la Formation doit fixer la date de l'audience "*dès que possible*" et non plus après la clôture de la procédure écrite.

Le recours à des moyens techniques pour la conduite des audiences au TAS devient standard et ne constitue plus une mesure exceptionnelle. Le Président de la Formation reste libre d'organiser l'audience comme il le souhaite mais il dispose d'une plus grande marge de manœuvre permettant l'audition de témoins ou experts, voire encore de parties domiciliés à l'étranger qui, pour des raisons de disponibilité, ne peuvent participer à l'audience que par conférence téléphonique ou vidéo conférence.

Articles R60ss.
Lors de sa réunion du 15 novembre 2011, le CIAS a décidé de supprimer la procédure consultative du Code de l'arbitrage en matière de sport. Cette procédure consultative avait été souvent utilisée au cours des premières années d'existence du TAS. A partir de 1995, le recours à cette procédure est devenu beaucoup plus rare. Le but initial de la procédure consultative était de donner la possibilité à des organisations sportives d'obtenir un avis de droit tout à fait neutre auprès du TAS de manière à prévenir la survenance d'éventuels litiges ultérieurs, dus à des conflits de règles ou à des problèmes d'interprétation. Toutefois, au cours des dernières années, la procédure consultative fut davantage utilisée pour essayer de régler des litiges déjà existants ou sur le point de naître. Le demandeur d'avis disposait ainsi d'une procédure unilatérale lui permettant de faire valoir ses arguments sans risquer d'être contredit et qui aboutissait à un avis consultatif, certes non contraignant, mais pouvant néanmoins avoir une certaine influence sur la résolution du litige en question.

Le CIAS a constaté que l'actuelle procédure d'arbitrage ordinaire permettait tout aussi bien à deux parties en désaccord sur l'interprétation

d'un règlement d'obtenir un avis du TAS, sous la forme d'une sentence arbitrale contraignante, dans le cadre d'une procédure contradictoire. A titre d'exemple on citera la procédure d'arbitrage (TAS 2011/O/2422, sentence du 4 octobre 2011) entre le Comité Olympique Américain (USOC) et le Comité International Olympique (CIO) au sujet du règlement d'application de la Règle 45 de la Charte Olympique (interdiction faite aux athlètes ayant subi une suspension pour dopage de plus de 6 mois de participer aux deux prochaines éditions des Jeux Olympiques).

Articles R64 et R65

Le droit de greffe devant être versé par la partie qui initie une procédure d'arbitrage au TAS est passé de CHF 500.-- à CHF 1'000.--. Il s'agit de la première augmentation depuis l'adoption du Code de l'arbitrage en matière de sport en 1994.

Les nouveaux articles R64 et R65 du Code prévoient désormais la possibilité pour le Président de Chambre concerné de rendre une décision sur les frais lorsqu'une procédure d'arbitrage se termine avant même qu'une Formation arbitrale n'ait pu être constituée. Cette solution doit faciliter les opérations lorsqu'une demande d'arbitrage ou un appel est retiré. Elle permettra notamment d'éviter de devoir constituer une Formation arbitrale exprès pour rendre une sentence sur frais alors que le retrait intervient en tout début de procédure.

En ce qui concerne plus particulièrement l'Art. R65.1 du Code, le CIAS a décidé de maintenir le principe de la gratuité des procédures d'appel pour les affaires à caractère disciplinaire. Toutefois, la gratuité ne s'appliquera que pour les appels dirigés contre des décisions rendues par des fédérations ou organisations sportives internationales. Les décisions rendues par des fédérations ou organisations sportives nationales pourront toujours être soumises en appel au TAS mais les parties devront contribuer aux frais de la procédure.

Modifications du Code de l'arbitrage en matière de Sport depuis le 31.12.2010

S5 Les membres du CIAS sont désignés pour une période renouvelable de quatre ans. Les nominations doivent avoir lieu au cours de la dernière année du cycle de quatre ans.

(…)

(…)

Si un membre du CIAS démissionne, décède ou est empêché d'assurer ses fonctions pour toute autre cause, il est remplacé, pour la période restante de son mandat, selon les modalités applicables à sa désignation.

(…)

S6 Le CIAS exerce les fonctions suivantes:

1. (…);

2. Il élit en son sein, pour une période renouvelable de quatre ans:

   - le Président;
   - deux Vice-présidents chargés de suppléer le Président le cas échéant, selon l'ordre de leur âge; si le poste de Président devient vacant, le doyen des Vice-présidents exerce les fonctions et les responsabilités de Président jusqu'à l'élection du nouveau Président;
   - le Président de la Chambre d'arbitrage ordinaire et le Président de la Chambre arbitrale d'appel du TAS;
   - les suppléants des deux Présidents de chambre qui peuvent remplacer ces derniers en cas d'empêchement;

   L'élection du Président et celle des Vice-présidents ont lieu après consultation avec le CIO, l'ASOIF, l'AIOWF et l'ACNO;

   L'élection du Président, celle des Vice-présidents, des Présidents de chambre et de leurs suppléants ont lieu lors de la réunion du CIAS suivant la nomination des membres du CIAS pour une période de quatre ans [~~lors de la dernière réunion plénière du CIAS précédant la fin du cycle de quatre ans~~];

S8 1. (…)

2. (…)

3. Tout membre du CIAS peut faire acte de candidature à la Présidence du CIAS. Toute candidature doit être adressée par écrit au Secrétaire Général au plus tard quatre [~~six~~] mois avant la réunion pour l'élection.

   L'élection du Président du CIAS a lieu lors de la réunion du CIAS suivant la nomination des membres du CIAS pour une période de quatre ans. Le quorum est atteint si au moins trois quarts des

membres participent au vote. Le Président est élu à la majorité absolue des membres présents. S'il y a plusieurs candidatures à la fonction de Président du CIAS, un scrutin à plusieurs tours sera organisé. Le candidat ayant obtenu le nombre de voix le moins élevé à l'issue de chaque tour de scrutin est éliminé. En cas d'égalité entre deux ou plusieurs candidats, un vote entre ces candidats est organisé et le candidat ayant obtenu le nombre de voix le moins élevé est éliminé. Si, à la suite de ce vote supplémentaire, l'égalité persiste, le(s) candidat(s) le(s) plus âgé(s) est(sont) sélectionné(s).

(…)

4. (…)

S12 Le TAS met en oeuvre des Formations qui ont pour mission de procurer, par la voie de l'arbitrage et/ou de la médiation, la solution des litiges survenant dans le domaine du sport conformément au Règlement de procédure (articles R27 et suivants).

A cet effet, le TAS veille à la constitution des Formations et au bon déroulement des procédures. Il met à la disposition des parties l'infrastructure nécessaire.

Les Formations sont notamment chargées:

a. de trancher les litiges qui leur sont soumis par la voie de l'arbitrage ordinaire;

b. de trancher, par la voie de la procédure arbitrale d'appel, des litiges concernant des décisions de fédérations, associations ou autres organismes sportifs, dans la mesure où les statuts ou règlements desdits organismes sportifs ou une convention particulière le prévoient.

~~c. de donner des avis non contraignants à la demande du CIO, des FI, des CNO, de l'Agence mondiale antidopage (AMA), des associations reconnues par le CIO et des Comités d'Organisation des Jeux Olympiques (COJO).~~

S14 En constituant la liste des arbitres du TAS, le CIAS devra faire appel à des personnalités ayant une formation juridique complète, une compétence reconnue en matière de droit du sport et/ou d'arbitrage international, une bonne connaissance du sport en général et la maîtrise d'au moins une des langues de travail du TAS, dont les noms et qualifications sont portés à l'attention du CIAS, notamment par le CIO, les FI et les CNO. ~~En outre, le CIAS devra respecter, en principe, la répartition suivante:~~

~~• 1/5e des arbitres sélectionnés parmi les personnes proposées par le CIO, choisies en son sein ou en dehors;~~
~~• 1/5e des arbitres sélectionnés parmi les personnes proposées par les FI, choisies en leur sein ou en dehors;~~
~~• 1/5e des arbitres sélectionnés parmi les personnes proposées par les CNO, choisies en leur sein ou en dehors;~~
~~• 1/5e des arbitres choisis, après des consultations appropriées, en vue de sauvegarder les intérêts des athlètes;~~
~~• 1/5e des arbitres choisis parmi des personnes indépendantes des organismes chargés de proposer des arbitres conformément au présent article.~~]

R35 Révocation

Tout arbitre peut être révoqué par le CIAS s'il refuse ou s'il est empêché d'exercer ses fonctions ou s'il ne remplit pas ses fonctions conformément au présent Code dans un délai raisonnable. Le CIAS peut exercer ce pouvoir par l'intermédiaire de son Bureau conformément au Statut faisant partie du présent Code. Le CIAS invite auparavant les parties, l'arbitre concerné et les autres arbitres à prendre position par écrit et rend une décision sommairement motivée.

R39 Mise en œuvre de l'arbitrage par le TAS et réponse – Compétence du TAS

Sauf s'il apparaît d'emblée qu'il n'existe manifestement pas de convention d'arbitrage se référant au TAS, le Greffe du TAS prend toute disposition utile pour la mise en oeuvre de l'arbitrage. A cet effet, il communique en particulier la demande au défendeur, interpelle le cas échéant les parties sur le choix du droit applicable au fond du litige et fixe au défendeur des délais pour formuler toutes indications utiles concernant le nombre et le choix du ou des arbitres, notamment pour désigner un arbitre figurant sur la liste des arbitres du TAS, ainsi que pour soumettre une réponse à la demande d'arbitrage. La réponse doit comprendre les éléments suivants:

- une brève description des moyens de défense;
- toute exception d'incompétence;
- toute demande reconventionnelle.

Le défendeur peut demander que le délai pour le dépôt de la réponse soit fixé après le paiement par le demandeur de l'avance de frais prévue à l'article R64.2 du présent Code.

La Formation statue sur sa propre compétence. Elle statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.

Lorsqu'une exception d'incompétence est soulevée, le Greffe du TAS ou la Formation, si celle-ci est déjà constituée, invite les parties à se déterminer par écrit au sujet de la compétence du TAS. En général, la Formation statue sur sa compétence soit dans une décision incidente, soit dans une sentence au fond.

Lorsqu'une partie dépose une demande d'arbitrage relative à une convention d'arbitrage et à des faits similaires à ceux faisant l'objet d'une procédure ordinaire déjà en cours devant le TAS, le Président de la Formation, ou s'il n'a pas encore été nommé, le Président de la Chambre peut, après consultation avec les parties, décider de joindre les deux procédures.

R40.2 Désignation des arbitres

Les parties conviennent du mode de désignation des arbitres figurant sur la liste du TAS. A défaut de convention, les arbitres sont désignés selon les alinéas suivants.

(…)

R44.1 Instruction écrite

[…]

Dans leurs écritures, les parties indiquent les noms des témoins, en incluant un bref résumé de leur témoignage présumé, et les noms des experts, avec mention de leur domaine d'expertise, qu'elles désirent faire entendre, et formulent toute autre offre de preuve. Les éventuels témoignages écrits doivent être déposés avec les écritures des parties.

[…]

R44.2 Instruction orale

~~[Lorsque l'échange d'écritures est clos,]~~Le Président de la Formation fixe les modalités de l'instruction orale dès que possible et en particulier la date de l'audience. L'instruction orale comprend en principe une audience au cours de laquelle la Formation entend les parties, les témoins et les experts ainsi que les plaidoiries finales des parties, la partie défenderesse ayant la parole la dernière.

Le Président de la Formation dirige les débats et veille à ce qu'ils soient concis et limités à l'objet des présentations écrites, dans la mesure où celles-ci sont pertinentes. Les débats ont lieu à huis clos, sauf accord contraire des parties. Ils peuvent faire l'objet d'un procès-verbal. Toute personne entendue peut se faire assister d'un interprète aux frais de la partie qui la fait entendre.

Les parties amènent et font entendre les témoins ou experts qu'elles ont désignés dans leurs écritures. Les parties sont responsables de la disponibilité et des frais des témoins et experts appelés à comparaître.

Le Président de la Formation peut ~~[exceptionnellement]~~ décider de tenir une audience par vidéo-conférence ou entendre certaines parties, témoins et experts par télé- ou vidéo-conférence. Avec l'accord des parties, il peut également dispenser un témoin/expert de comparaître si ce dernier a déposé une déclaration écrite au préalable.

(…)

R51 Motivation de l'appel

[…]

Dans ses écritures, l'appelant indique les noms des témoins, en incluant un bref résumé de leur témoignage présumé, et les noms des experts, avec mention de leur domaine d'expertise, qu'il désire faire entendre, et formule toute autre offre de preuve. Les éventuels témoignages écrits doivent être déposés avec le mémoire d'appel, sauf si le Président de la Formation en décide autrement.

R53 Nomination d'arbitre par l'intimé

Sauf si les parties sont convenues de recourir à un arbitre unique ou si le Président de la Chambre estime que l'appel ~~revêtant un caractère d'urgence doit~~ devrait être soumis à un arbitre unique, l'intimé désigne un arbitre dans les dix jours suivant la réception de la déclaration d'appel. A défaut de désignation dans ce délai, le Président de la Chambre procède à la désignation en lieu et place de l'intimé.

R55 Réponse de l'intimé – Compétence du TAS

Dans les vingt jours suivant la réception de la motivation de l'appel, l'intimé soumet au TAS une réponse comprenant les éléments suivants:

- une description des moyens de défense;
- toute exception d'incompétence;
- toutes les pièces et offres de preuves que l'intimé entend invoquer ~~; y compris les noms des témoins et experts qu'il désire faire entendre; les éventuels témoignages écrits doivent être déposés avec la réponse, sauf si le Président de la Formation en décide autrement.~~
- les noms des témoins, en incluant un bref résumé de leur témoignage présumé; les éventuels témoignages écrits doivent être déposés avec la réponse, sauf si le Président de la Formation en décide autrement.
- les noms des experts, avec mention de leur domaine d'expertise, qu'il désire faire entendre, et formule toute autre offre de preuve.

Si l'intimé ne dépose pas sa réponse dans le délai imparti, la Formation peut néanmoins poursuivre la procédure d'arbitrage et rendre une sentence.

L'intimé peut demander que le délai pour le dépôt de la réponse soit fixé après le paiement par l'appelant de l'avance de frais prévue à l'article R64.2 du présent Code.

La Formation statue sur sa propre compétence. Elle statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.

Lorsqu'une exception d'incompétence est soulevée, le Greffe du TAS ou la Formation, si celle-ci est déjà constituée, invite les parties à se déterminer par écrit au sujet de la compétence du TAS. En général, la Formation statue sur sa compétence soit dans une décision incidente, soit dans une sentence au fond.

~~R60 Demande d'avis~~

~~Le CIO, les FI, les CNO, l'AMA, les organisations reconnues par le CIO et les COJO peuvent demander un avis consultatif au TAS sur toute question juridique concernant la pratique ou le développement du sport ou toute activité relative au sport. La demande d'avis est adressée au TAS et accompagnée de tout document de nature à éclairer la Formation appelée à rendre l'avis.~~

~~R61 Mise en oeuvre par le TAS~~

~~Lorsque le TAS est saisi d'une demande, le Président du TAS examine dans quelle mesure elle peut faire l'objet d'un avis. Le cas échéant, il procède à la constitution d'une Formation de un à trois arbitres du TAS et en désigne le Président. Il formule, selon sa propre appréciation, les questions soumises à la Formation et les transmet à cette dernière.~~

~~R62 Avis~~

~~Avant de rendre son avis, la Formation peut requérir un complément d'information. L'avis peut être publié avec l'accord du demandeur d'avis. Il ne constitue pas une sentence arbitrale et n'a pas de valeur contraignante.~~

R64 En général

R64.1 Lors du dépôt de la requête/déclaration d'appel, le demandeur/appelant verse un droit de Greffe de CHF 1000.—, faute de quoi le TAS ne procède pas. Cet émolument reste acquis au TAS. La Formation en tient compte dans le décompte final des frais.

Si une procédure d'arbitrage est clôturée avant qu'une Formation n'ait pu être constituée, le Président de Chambre statue sur les frais dans l'ordonnance de clôture. Cependant, il ne peut ordonner le paiement de dépens que sur requête d'une partie et après que toutes les parties ont eu la possibilité de déposer des écritures concernant la question des frais et dépens.

R64.2 (…)

R65 Appels contre des décisions rendues par des fédérations internationales dans le cadre d'affaires disciplinaires [~~Litiges disciplinaires à caractère international jugés en appel~~]

R65.1 Le présent article R65 est applicable aux appels contre des décisions de nature exclusivement disciplinaire rendues par une fédération ou une organisation sportive internationale [~~ou par une fédération ou organisation sportive nationale agissant par délégation de pouvoir d'une fédération ou organisation sportive internationale~~].

R65.2 Sous réserve des articles R65.2 al. 2 et R65.4, la procédure est gratuite. Les frais et honoraires des arbitres, calculés selon le barème du TAS, ainsi que les frais du TAS sont à la charge du TAS.

Lors du dépôt de la déclaration d'appel, l'appelant verse un droit de Greffe de CHF 1000.--, faute de quoi le TAS ne procède pas et l'appel est réputé retiré. Cet émolument reste acquis au TAS.

Si une procédure d'arbitrage est clôturée avant qu'une Formation n'ait pu être constituée, le Président de Chambre statue sur les frais dans l'ordonnance de clôture. Cependant, il ne peut ordonner le paiement de dépens que sur requête d'une partie et après que toutes les parties ont eu la possibilité de déposer des écritures concernant la question des frais et dépens.

R65.3 Les frais des parties, témoins, experts et interprètes sont avancés par les parties. La Formation [~~en attribue la charge~~] détermine dans la sentence quelle partie doit les supporter et dans quelle proportion, en tenant compte du résultat de la procédure, du comportement et des ressources financières des parties.

~~R66 Procédure consultative~~

~~Les frais de la procédure consultative sont à la charge du demandeur d'avis. Le Greffe du TAS peut requérir de la part du demandeur d'avis le paiement d'une provision avant la notification de l'avis consultatif.~~

Amendments to the Code of Sports-related Arbitration since 31.12.2010

S5 The members of the ICAS are appointed for a renewable period of four years. Such nominations shall take place during the last year of the four-year cycle.

(...)

(...)

If a member of the ICAS resigns, dies or is prevented from carrying out his functions for any other reason, he is replaced, for the remaining period of his mandate, in conformity with the terms applicable to his appointment.

(...).

S6 The ICAS exercises the following functions:

1. (...);

2. It elects from among its members for a renewable period of four years:

   - the President,
   - two Vice-Presidents who shall replace the President if necessary, by order of seniority in age; if the office of President becomes vacant, the senior Vice-President shall exercise the functions and responsibilities of the President until the election of the new President,
   - the President of the Ordinary Arbitration Division and the President of the Appeals Arbitration Division of the CAS,
   - the deputies of the two Division Presidents who can replace them in the event they are prevented from carrying out their functions;

   The election of the President and of the Vice-Presidents shall take place after consultation with the IOC, the ASOIF, the AIOWF and the ANOC.

The election of the President, Vice-Presidents, Division Presidents and their deputies shall take place at the ICAS meeting following the appointment of the ICAS members for a period of four years [~~at the last ICAS plenary meeting before the end of the four-year cycle~~].

3. (...)

S8 1. (...)

2. (...)

3. Any ICAS member is eligible to be a candidate for the ICAS Presidency. Registration for candidature shall be made in writing and filed with the Secretary General no later than four ~~[six]~~ months prior to the election meeting.

The election of the ICAS President shall take place at the ICAS meeting following the appointment of the ICAS members for a period of four years. The quorum ~~[required at a meeting for the election of the ICAS President]~~ is three quarters of the ICAS members. The President is elected by an absolute majority of the members present. If there is more than one candidate for the position of President, successive rounds of voting shall be organized. The candidate having the least number of votes in each round shall be eliminated. In the case of a tie among two or more candidates, a vote between those candidates shall be organized and the candidate having the lesser number of votes shall be eliminated. If following this subsequent vote, there is still a tie, the candidate(s) who has (have) seniority of age is (are) selected.

(...)

4. (...)

S12 The CAS sets in operation Panels which have the task of providing for the resolution by arbitration and/or mediation of disputes arising within the field of sport in conformity with the Procedural Rules (Articles R27 et seq.).

To this end, the CAS attends to the constitution of Panels and the smooth running of the proceedings. It places the necessary infrastructure at the disposal of the parties.

The responsibilities of such Panels are, *inter alia*:

a. to resolve the disputes that are referred to them through ordinary arbitration ;

b. to resolve through the appeals arbitration procedure disputes concerning the decisions of federations, associations or other sports-related bodies, insofar as the statutes or regulations of the said sports-related bodies or a specific agreement so provide ;

~~c. to give non-binding advisory opinions at the request of the IOC, the IFs, the NOCs, the World Anti-Doping Agency ("WADA"), the associations recognized by the IOC and the Olympic Games Organizing Committees ("OCOGs").~~

S14 In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or international arbitration, a good knowledge of sport in general and a good command of at least one CAS working language, whose names and qualifications are brought to the attention of the ICAS, including by the IOC, the IFs and the NOCs. ~~In addition, the ICAS shall respect, in principle, the following distribution:~~

- ~~1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside;~~
- ~~1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;~~
- ~~1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;~~
- ~~1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;~~
- ~~1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.]~~

R35 Removal

An arbitrator may be removed by the ICAS if he refuses to or is prevented from carrying out his duties or if he fails to fulfil his duties pursuant to the present Code within a reasonable time. The ICAS may exercise such power through its Board in accordance with the Statutes which form part of this Code. The Board shall invite the parties, the arbitrator in question and the other arbitrators to submit

written comments and shall give brief reasons for its decision.

R39 Initiation of the Arbitration by the CAS and Answer – CAS Jurisdiction

Unless it is apparent from the outset that there is manifestly no arbitration agreement referring to the CAS, the CAS Court Office shall take all appropriate actions to set the arbitration in motion. To this effect, it shall in particular communicate the request to the Respondent, call upon the parties to express themselves on the law applicable to the merits of the dispute and set time limits for the Respondent to submit any relevant information about the number and choice of the arbitrator(s), in particular to appoint an arbitrator from the CAS list, as well as to file an answer to the request for arbitration. The answer shall contain :

- a brief statement of the defence;
- any defence of lack of jurisdiction;
- any counterclaim.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Claimant of the advance of costs provided by Art. R64.2 of this Code.

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to the CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the parties to file written submissions on the CAS jurisdiction. In general, the arbitral tribunal may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

Where a party files a request for arbitration related to an arbitration agreement and facts similar to those being the subject of a pending ordinary procedure before the CAS, the President of the Panel, or if he has not yet been appointed, the President of the Division, may, after consulting the parties, decide to consolidate the two procedures.

R40.2 Appointment of the Arbitrators

The parties may agree on the method of appointment of the arbitrators from the CAS list. In the absence of an agreement, the arbitrators shall be appointed in accordance with the following paragraphs.

(...)

R44.1 Written Submissions

[...]

In their written submissions, the parties shall list the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, which they intend to call and state any other evidentiary measure which they request. Any witness statements shall be filed together with the parties' submissions.

[…]

R44.2 Hearing

~~[Once the exchange of pleadings is closed,~~]The President of the Panel shall issue directions with respect to the hearing as soon as possible and in particular set the hearing date. As a general rule, there shall be one hearing during which the Panel hears the parties, the witnesses and the expert as well as the parties' final oral arguments, for which the Respondent has the floor last.

The President of the Panel shall conduct the hearing and ensure that the statements made are concise and limited to the subject of the written presentations, to the extent that these presentations are relevant. Unless the parties agree otherwise, the hearings are not public. Minutes of the hearing may be taken. Any person heard by the Panel may be assisted by an interpreter at the cost of the party which called such person.

The parties call to be heard by the Panel such witnesses and experts which they have specified in their written submissions. The parties are responsible for the availability and costs of the witnesses and experts called to be heard.

The President of the Panel may ~~[exceptionally]~~ decide to conduct a hearing by video-

conference or to hear some parties, witnesses and experts via tele- or video-conference. With the agreement of the parties, he may also exempt a witness/expert from appearing at the hearing if the latter has previously filed a statement.

(...)

R51 Appeal Brief

[...]

In his written submissions, the Appellant shall specify the name(s) of any witnesses, including a brief summary of their expected testimony, and the name(s) of any experts, stating their area of expertise, whom he intends to call and state any other evidentiary measure which he requests. The witness statements, if any, shall be filed together with the appeal brief, unless the President of the Panel decides otherwise.

R53 Nomination of Arbitrator by the Respondent

Unless the parties have agreed to a Panel composed of a sole arbitrator or the President of the Division considers that the appeal ~~is an emergency and must~~ should be submitted to a sole arbitrator, the Respondent shall nominate an arbitrator within ten days after receipt of the statement of appeal. In the absence of a nomination within such time limit, the President of the Division shall proceed with the appointment in lieu of the Respondent.

R55 Answer of the Respondent – CAS Jurisdiction

Within twenty days from the receipt of the grounds for the appeal, the Respondent shall submit to the CAS an answer containing :

- a statement of defence;
- any defence of lack of jurisdiction;
- any exhibits or specification of other evidence upon which the Respondent intends to rely~~, including the names of the witnesses and experts whom he intends to call; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise~~;
- the name(s) of any witnesses, including a brief summary of their expected testimony; the witness statements, if any, shall be filed together with the answer, unless the President of the Panel decides otherwise;
- the name(s) of any experts, stating their area of expertise, whom he intends to call and state any other evidentiary measure which he requests.

If the Respondent fails to submit its response by the given time limit, the Panel may nevertheless proceed with the arbitration and deliver an award.

The Respondent may request that the time limit for the filing of the answer be fixed after the payment by the Appellant of the advance of costs in accordance with Art. R64.2 of this Code.

The Panel shall rule on its own jurisdiction. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless substantive grounds require a suspension of the proceedings.

When an objection to the CAS jurisdiction is raised, the CAS Court Office or the Panel, if already constituted, shall invite the parties to file written submissions on the CAS jurisdiction. In general, the arbitral tribunal may rule on its jurisdiction either in a preliminary decision or in an award on the merits.

~~R60 Request for Opinion~~

~~The IOC, the IFs, the NOCs, WADA and the organizations recognized by the IOC and the OCOGs, may request an advisory opinion from the CAS about any legal issue with respect to the practice or development of sport or any activity related to sport. The request for an opinion shall be addressed to the CAS and accompanied by any document likely to assist the Panel entrusted with giving the opinion.~~

~~R61 Initiation by the CAS~~

~~When a request is filed, the CAS President shall review whether it may be the subject of an opinion. In the affirmative, he shall proceed with the formation of a Panel of one or three arbitrators from the CAS list and designate the President. He shall formulate, at~~

~~his own discretion, the questions submitted to the Panel and forward these questions to the Panel.~~

~~R62 Opinion~~

~~Before rendering its opinion, the Panel may request additional information. The opinion may be published with the consent of the party which requested it. It does not constitute a binding arbitral award.~~

R64 In general

R64.1 Upon filing of the request/statement of appeal, the Claimant/Appellant shall pay a Court Office fee of Swiss francs 1000.—, without which the CAS shall not proceed. The CAS shall in any event keep this fee. The Panel shall take it into account when assessing the final amount of costs.

If an arbitration procedure shall be terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. However, he can order the payment of legal costs only upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

R64.2 (...)

R65 Appeals against decisions issued by international federations in disciplinary matters [~~Disciplinary cases of an international nature ruled in appeal~~]

R65.1 The present Article R65 is applicable to appeals against decisions which are exclusively of a disciplinary nature and which are rendered by an international federation or sports-body [~~or by a national federation or sports-body acting by delegation of powers of an international federation or sports-body~~].

R65.2 Subject to Articles R65.2, para. 2 and R65.4, the proceedings shall be free. The fees and costs of the arbitrators, calculated in accordance with the CAS fee scale, together with the costs of the CAS are borne by the CAS.

Upon submission of the statement of appeal, the Appellant shall pay a Court Office fee of Swiss francs 1000.— without which the CAS shall not proceed and the appeal shall be deemed withdrawn. The CAS shall in any event keep this fee.

If an arbitration procedure shall be terminated before a Panel has been constituted, the Division President shall rule on costs in the termination order. However, he can order the payment of legal costs only upon request of a party and after all parties have been given the opportunity to file written submissions on costs.

~~R66 Consultation Proceedings~~

~~The costs of the consultation procedure shall be borne by the entity requesting the opinion. The CAS Court Office may ask the applicant to advance the costs before the notification of the advisory opinion.~~

Language of procedure before CAS: practice, criteria and impact of the language on the outcome of the case

Dr Despina Mavromati, Counsel to the CAS*

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* **The following text contains parts of the forthcoming book of Mavromati/Reeb "Commentary on the Code of the Court of Arbitration for Sport" which will be published in 2013 by Kluwer Law International, The Hague.**

I. Introduction

A. Content of Article R29 CAS Code

Article R29 of the CAS Code reads as follows:

"*The CAS working languages are French and English. In the absence of agreement between the parties, the President of the panel or, if he has not yet been appointed, the President of the relevant Division, shall select one of these two languages as the language of the arbitration at the outset of the procedure, taking into account all pertinent circumstances. Thereafter, the procedure is conducted exclusively in the language selected, unless the parties and the panel agree otherwise.*

The parties may request that another language be selected provided that the panel and the CAS agree. In case of agreement, the CAS determines with the panel the conditions related to the choice of the language and, if necessary, the panel may order that the parties bear all or part of the translation and interpreting costs.

The panel may order that all documents submitted in languages other than that of the procedure be filed together with a certified translation in the language of the procedure".

As Article R29 CAS Code indicates, the two "*official*" CAS languages are English and French; in a historical context, we could say that the choice of these two languages was also made because the CAS was initially created by the International Olympic Committee (IOC) in 1984, and English and French are two of the official IOC languages. The CAS "*working language*" means that the language chosen will be used during the entire proceedings: all official documents, the statement of appeal, the appeal brief, the answer to the appeal, all exhibits, the correspondence with CAS secretariat and the panel, the conduct of the hearing and, finally, the text of the award will be in the language chosen at the outset of the procedure. Contrary to what it was once suggested, the language of the procedure should not necessarily be the one of the country whose law applies to the merits of the dispute, even if there are

strong links between the two[1].

In case both parties agree on the same (official) language (i.e. either English or French), this language will be automatically chosen for the procedure before CAS; if, however, the parties cannot reach an agreement as to the language of the procedure, the case has to be brought to the President of the panel or the President of the Division who will decide which of the two languages shall be used. This has to be made already "*at the outset of the procedure*". It is important to choose the language at a very early stage because the early choice of language facilitates the constitution of the panel. The language issue is therefore a precondition for the setting in motion of the arbitration procedure and should be one of the first acts of the arbitral tribunal[2]. In the event the panel is already constituted, the choice of the arbitration language may even cause a change in the constitution of the panel.

In practice, in most cases the decision on the language is made by means of an "*order on language*" issued by the President of the Division, since the language issue arises at a very early stage and – in the majority of cases – the panel has not yet been constituted[3]. In some situations, however, it could be better to let the specific panel rule on the language issue by taking into account the specific circumstances of the case based on their level of knowledge of the language(s) in question.

Although the choice of a specific language is, at first sight, a formal issue, it might affect the costs and the conduct of the procedure in general; indeed, the choice of the language can affect the costs of the entire procedure as it might entail significant translation costs for one party or the other as well as significant loss of time in order to get the translations; furthermore, priority given to one language may also engender issues related to the fairness of the procedure[4]. What is more, the language chosen often reflect the legal tradition of the country concerned[5].

In some – extreme – cases of non-compliance with the provisions concerning the language of the procedure it is possible to challenge the award before the Swiss Supreme Court or to refuse its enforcement, albeit only in cases where one can establish violation of due process and equal treatment of the parties; otherwise, the award is valid[6].

The President (of the panel or the Division) takes into account "*all pertinent circumstances*" of the case. In the pages that follow we will present a number of criteria that are taken into account when deciding on the language to be employed for the procedure before CAS, as they were found in the various orders on language issued so far by the CAS within the framework of all registered procedures (see also the list of orders in Figure I at the end of this chapter).

As seen above, both languages are "*official*". What is more, and according to Article R69 CAS Code, English and French are also the official – and authentic – languages of the text of the CAS Code. In case of discrepancy in the text of the CAS Code, Article R69 defines that the French version shall prevail. The reason for that is that the CAS Code was initially drafted in French. In practice however, the great majority of CAS procedures is conducted in English (even if both are considered as official working languages). The indicative table III at the end of this chapter shows in more detail the distribution of procedures according used (approximately 1810 procedures conducted in English and approximately 550 procedures conducted in French).

The fact that there are two official CAS languages does not mean that the CAS accepts only these two languages for the procedure. As an arbitral tribunal, CAS should remain flexible and take into account the circumstances of each case, while respecting the autonomy of the parties. The important criterion is, again, the choice of the parties: according to the newly inserted second paragraph of Article R29 CAS Code, "*The parties may request that another language be selected provided that the panel and the CAS agree. In case of agreement, the CAS determines with the panel the conditions related to the choice of the language and, if necessary, the panel may order that the parties bear all or part of the translation and interpreting costs*".

Although the aforementioned paragraph is new - it was inserted during the amendment of the CAS Code in 2010 – the practice existed already many years ago. The new paragraph therefore institutionalised

1. Von Bretenstein D., La langue de l'arbitrage. Une langue arbitraire, Bulletin ASA, 1995, p. 18.

2. See Caron/Caplan/Pellonpää, The UNCITRAL Arbitration Rules, Oxford commentaries on international law –Oxford University Press 2006, p. 354.

3. See however CAS 2012/A/2722 & CAS 2012/A/2723, Orders on language of 29 February 2012, where the Panel had already been constituted ; since one of the Arbitrators did not speak the language eventually chosen for the proceedings (i.e. English), he had to be replaced by a new one.

4. Ibid., p. 351; see also Derains Y., Langue et languages de l'arbitrage, in Mélanges en l'honneur de P. Tercier, Gauch/Werro/Pichonnaz (eds.), Schulthess, 2008, p. 789.

5. See Derains Y. op.cit., p. 794 f.

6. See Fouchard/Gaillard/Goldman on International Commercial Arbitration, KIuwer 1999, p. 679; see also the decision rendered by the French Court of Appeals - CA Paris, June 21, 1990 Compagnie Honeywell Bull S.A. v. Computacion Bull de Venezuela C.A., 1991 Rev. Arb. 96.

a long-time practice, since in many occasions the parties – coming from the same region and having the same mother tongue (not necessarily English or French) wished to make use of another language for the procedure before the CAS. Until now, CAS procedures have mostly been conducted – apart from English and French – in Spanish, German and Italian[7].

The use of a different language is conditional upon the agreement of the panel and the agreement of the CAS. The first condition is met if the arbitrators appointed all agree and are all able to conduct the arbitration in such language and draft the final award in the same language without the assistance of an interpreter/translator: According to S. Lazareff "*il est evident que l'arbitre ne doit pas accepter sa mission s'il n'entend pas parfaitement la ou les langues de l'arbitrage*" [8]. As to the agreement of CAS, it means that as the institution is responsible for the awards it notifies, it must be in position to understand its content in accordance with article R59 of the CAS code, in the event it must be explained publicly or in case of an appeal against the award before the Swiss Federal Tribunal.

As to the translation of documents (exhibits, statement of appeal, appeal brief, answer to the appeal etc.), "*the panel may order that the parties bear all or part of the translation and interpreting costs*". Finally, the panel "*may order that all documents submitted in languages other than that of the procedure be filed together with a certified translation in the language of the procedure*". In practice, however, if all Arbitrators understand the original language in which the supporting documents have been drafted – and if the President of the panel agrees – said documents may be accepted even without translation in the language of the procedure[9].

B. Language of the procedure in other arbitration rules

Other than Article R29 CAS Code, in the majority of the arbitration rules parties are free to determine their working language of their choice (for exchange of documents and the conduct of the hearing). If they fail to determine the language, the panel will do this. This is the case with Article 1045 para. 1 of the Swiss Code on Civil Procedure (CCP) and, as we will see below, Article 22 para. 1 UNCITRAL Model Law. Some arbitration rules determine the language of the procedure based on the language in which the arbitration agreement was drafted: see e.g. Article 17 LCIA Rules, which distinguishes between the initial language – that of the arbitration agreement – and the language of the arbitration as determined by the arbitrators[10].

In practice the courts sometimes do not request the translation of documents drafted in a foreign language which they understand. The Swiss Federal Tribunal does not usually request the translation of documents or awards drafted in English in case of an appeal for setting aside the award[11].

Article 16 ICC Rules reads as follows: "*In the absence of an agreement by the parties, the Arbitral Tribunal shall determine the language or languages of the arbitration, due regard being given to all relevant circumstances, including the language of the contract* ". Moreover, pursuant to Article 4 ICC Rules, the language of the arbitration should be contained in the "*Request for Arbitration*" (along with comments as to the place of arbitration, the applicable rules of law etc.).

Similar to Article 16 ICC Rules, Article 22 of the UNCITRAL Model law provides that parties are free to agree on the language(s) to be used in the arbitral proceedings. In the absence of such choice, the arbitral tribunal shall determine the language(s) to be used in the proceedings. As to the translations of documents drafted in another language, these are not requested automatically but may be ordered by the arbitral tribunal.

As seen above, Article 17.1 LCIA Rules allows the parties to choose the language of the arbitration, in the arbitration agreement or subsequently in writing, otherwise the language chosen will be the one of the arbitration agreement[12]. In cases where the arbitration agreement is written in two languages, the LCIA Court will decide between them (Article 17, 2)[13].

According to Article 17.3 LCIA Rules, the tribunal has to consult the parties prior to changing the language of the arbitration: parties have to be given the opportunity to submit their comments in writing. The tribunal will also take into account the initial language of the arbitration (i.e. the disruption that would be caused by switching languages) and any other matters which it considers appropriate given all the circumstances of the case[14].

7. See also the statistical Figure III at the end of this chapter.

8. See Lazareff S., La langue de l'arbitrage institutionnel, Bulletin de la CCI, 1997, Vol. 8, n.1, p. 18; see also Derains Y., op.cit. p. 793.

9. See *inter alia* CAS 2006/A/1057 & TAS 2006/A/1095 ; see below.

10. See Poudret/Besson, Comparative Law of International Arbitration, 2nd ed., Sweet & Maxwell London, 2007, N. 579.

11. Id.

12. See Article 17 rule 2 LCIA Rules.

13. See Nesbitt S. in Mistelis (editor), Concise International Arbitration – Kluwer Law International, 2010, ad art. 17, p. 433.

14. Article 17.3 LCIA Rules.

According to Article 17.4 "*If any document is expressed in a language other than the language(s) of the arbitration and no translation of such document is submitted by the party relying upon the document, the Arbitral Tribunal or (if the Arbitral Tribunal has not been formed) the LCIA Court may order that party to submit a translation in a form to be determined by the Arbitral Tribunal or the LCIA Curt, as the case may be*". The language of the contract is simply one factor among others for the tribunal to take into account[15]. The previous version of Article 17 LCIA Rules[16] imposed that an arbitration should be conducted in the language of the document(s) containing the arbitration agreement if the parties could not agree on any other. However, this lack of flexibility frequently entailed unnecessary costs for the translation and interpretation of documents[17].

II. Determination of the language of the procedure before the constitution of the panel

A. Determination of the language of the procedure by means of an order on language

Usually, in cases where there is no agreement as to the language of the procedure before CAS, the President of the – ordinary or appeals- Division of CAS issues an "*Order on language*". Generally, the circumstances that are taken into consideration for the determination of the language of the procedure include "*the choice of the applicable law and the language of the contract, the language of other principal documents, the mother tongue of likely fact and expert witnesses and the availability of suitable arbitrators and counsel with the necessary language skills*"[18].

In most cases, the order is only meant to clarify the issue of language. However, as we can see from the indicative Figure (II) listing the orders on language at the end of this text, in some cases the President of the Division issues the order on language at the same time with an order on provisional measures[19]; it can also resolve other matters, such as the appointment of arbitrators, if they have not been appointed by the parties (as it was the case in CAS 2005/A/1003, Order of 7 April 2006), or decide on the admissibility of the case (CAS 2006/A/1163, Order on language and admissibility of 2 November 2006).

At this point we should note that the Orders on Language issued by the CAS are procedural orders and not awards; as such, they cannot be challenged in court pursuant to Article 190 Swiss PILA (see also CAS 2009/A/1743 MP2); furthermore, they are ordered without costs[20].

B. Criteria for the determination of the language of the procedure

1. Choice of English or French in the absence of agreement between the parties

In case of disagreement between the parties, Article R29 CAS Code does not provide for the possibility to the President of the panel/the President of the Ordinary or Appeals Division of CAS to choose a language other than English or French ("*[the President] shall select one of these two languages as the language of the arbitration at the outset of the procedure*"). In TAS 2005/A/760[21] the Panel held that by inserting an arbitration clause acknowledging CAS' jurisdiction into the statues of the federation, said federation also accepts that the CAS Code be applied[22]. Notwithstanding the clear provision of Article R29 CAS Code, some parties do request the use of another language. In principle, CAS shows some flexibility, either by granting an additional deadline in order to translate the submissions or by allowing parties to express themselves orally in both languages.

In CAS 2006/A/1155 the Appellant was of Brazilian nationality and, at the time of the appeal, was registered with a Spanish football club. He appealed against a decision issued by the FIFA Appeal Committee and named FIFA as the Respondent. In the "*Order on provisional measures and on the language of the proceedings*" of 27 September 2006, the President of the Appeals' Division decided on the application for a stay of the appealed decision and, on the same time, on the language of the arbitration[23]. The Appellant had requested to choose Spanish as the language of the proceedings, by arguing that Spanish is an official language of FIFA and, in addition, the appealed decision was drafted in Spanish. FIFA objected by stating that Spanish was an official FIFA language (according to Article 108 para. 1 FIFA Disciplinary Code, FDC), but not an official CAS language. Therefore, the procedure should take place in English; moreover, the Appellant's representative had a good command in English.

The President of the Appeals' Division concluded

15. See also Article 16 ICC Rules.

16. Article 8,1 of the 1985 edition of the LCIA Rules.

17. See Nesbitt S., op.cit., p. 433.

18. See Reed/Paulsson/Blackaby, Guide to ICSID Arbitration, Kluwer 2004, pp. 30 – 31; see also CAS 2008/O/1661, order on language issued on 13 November 2008.

19. See CAS 2006/A/1155, Order on provisional measures and on the language of the proceedings of 27 September 2006.

20. See e.g. the Order on language in TAS 2005/A/950, order of 27 September 2005.

21. See TAS 2005/A/760, para. 28.

22. Including Article R29 providing for the two CAS working languages: see also CAS 2009/A/2014 paras. 91 f.

23. See the CAS 2006/A/1155, Order on provisional measures and on the language of the proceedings of 27 September 2006, paras. 40 ff.

that, in the absence of any agreement between the parties, only French or English could be chosen as the language of the proceedings: One should differentiate between the official languages of the Federation and the CAS working languages. The President took into account the fact that the statement of appeal and FIFA's submission on the Appellant's applications were lodged in English, and held that English should be the most appropriate language for the proceedings in question. Interestingly however, the President of the Appeals' Division granted the Appellant an additional deadline of 15 days in order to lodge the translations or documents/submissions in another language (in order to allow him some reasonable time to translate these documents into English)[24].

In TAS 2006/A/1095 the dispute was of purely national nature, between a Swiss football club and the Swiss Football League (SFL). The Football club (Appellant) requested that German be used as the language of the procedure before CAS, since the appealed decision was drafted in German, all relevant applicable Regulations were drafted in German and that both parties exercised their activities in the German-speaking part of Switzerland. Notwithstanding all these facts, the Deputy President of the Appeals Arbitration Division of CAS held that in the absence of agreement between the parties French had to prevail upon German. However, he granted the parties the possibility to express themselves orally in both languages (either in French or in German), also because the appointed Arbitrators had a good command in both languages, and held that the translation of all relevant documents into French would only be necessary upon such request of the panel[25].

2. Language of the contract / the decision appealed against and language of the procedure

The language in which the first-instance decision was drafted may be a decisive criterion for the determination of the language of the procedure before CAS (in case of disagreement between the parties), however it is not the only one. In TAS 2005/A/760[26] and in TAS 2002/A/366, the Panels referred to Article 24 of the Belgian law of 15 June 1935, according to which for appeals it is common to use the same language as the language in which the first-instance decision was drafted. However, it noted that such provision only regulates national arbitration, and cannot be applied to an international arbitration.

In TAS 2005/A/950, the dispute was between a French-speaking football club (the Appellant) and an English-speaking football player (the Respondent)[27]. The decision appealed against was drafted in English but the President of the Appeals Division noted that the disputed contract was drafted in French, and therefore there was no reason not to use French as the language of the procedure.

In CAS 2007/A/1232 [28], the President of the Appeals Division concluded that the employment contract between the Appellant and the Respondent had been drafted in Romanian but had already been translated into English, all exchanges between the parties were made in English and the challenged decision was drafted in English; moreover, the President found that none of the parties was English native speaker or resident of an English speaking country, therefore the general principle of equal treatment was respected. Both parties could equally express their arguments, without advantage of using the strong and specific meanings of a mother tongue. This was also the case in CAS 2006/A/1181 (order on language of 26 January 2007).

In CAS 2010/A/2075[29] the President of the Appeals Division confirmed that, according to the common practice of the CAS, the language of the concerned decision constitutes one of the main criteria for the choice of the language of the arbitration. The particular case concerned a decision rendered by FIFA and we have a lot of similar examples concerning the same facts[30]. However, this also applies to decisions rendered by other bodies[31].

We should note that it is not the contract/agreement as such that determines the language but rather the contract / agreement that forms the subject matter of the dispute. In CAS 2012/O/2722 (Order of 29 February 2012), the President of the Division held that while the agreement between the parties was in French, there also existed an annex to the agreement which formed the subject matter of the dispute (and equally contained the jurisdiction clause about CAS) and therefore English should prevail over French as the language of the procedure (see also CAS 2012/O/2723, Order on language of 29 February 2012).

24. Ibid., para. 43.

25. See also CAS 2007/A/1290, order on language of 25 June 2007; also TAS 2006/A/1163, order on language of 13 May 2009.

26. See TAS 2005/A/760, para. 31.

27. See TAS 2005/A/950, order on language of 27 September 2005.

28. CAS 2007/A/1232 order on language of 13 April 2007.

29. CAS 2010/A/2075, order on language of 13 April 2010.

30. See also CAS 2005/A/1003, order on language of 7 April 2006 and TAS 2006/A/1015, Order on language of 28 February 2006.

31. See for instance the order on language of 25 June 2007 in CAS 2007/A/1290, which concerned the proceedings before the IOC Executive Board and the decision, which was rendered in English.

Finally, in the absence of other decisive elements, the language of the procedure remains the one in which the Appellant drafted his statement of appeal /appeal brief /claim (the language in which the Appellant initiated the procedure[32]. In TAS 2006/A/1163 the Appellant sent his statement of appeal/ appeal brief in French, and the Respondent (a federation) asked that English be chosen as the language of the procedure. However, the President of the Appeals Division noted that the federation in question had English and French as official languages and the disputed event (i.e. a world championship) had taken place in France; therefore, in the absence of other decisive elements in favour of the one or the other official language, the President decided to apply the language in which the Appellant initiated the procedure.

3. Citizenship, mother tongue of the parties and language of the parties' counsel

In CAS 2008/A/1630, the Appellant (a French citizen) sent the statement of appeal in French. In a letter sent to the CAS some days after his statement of appeal, the Appellant argued that French should be chosen as the language of the procedure, since French is one of the official languages of the CAS, and that none of the two CAS official languages should *a priori* be favoured before CAS ; the particular case concerned a French citizen (the Appellant), who lived in France and had very little knowledge of English: the Appellant should therefore be able to conduct his defence in French, in his mother tongue, in order to better defend his rights, whereas the choice of English could be detrimental to the Appellant; another argument in favour of French being chosen as the language of the procedure was that the Arbitrator who had been appointed was a French citizen.

However, the Respondent asked that English be chosen as the language of the proceedings, since this is the official language of the Federation, and the applicable rules were drafted in English. An additional argument in favour of English was that the proceedings before the first-instance body were conducted in English, counsel representing the Federation did not speak French and the exhibits submitted by the Appellant were in their majority in English; the Appellant further supported that translation of all documents drafted in English would constitute an excessive burden and expense on the Federation; finally, if the Appellant needed the assistance of an interpreter during the hearing, the Federation would be ready to bear the relevant costs.

In his Order on language issued on 15 August 2008, the Deputy President of the Appeals Arbitration Division decided that English should be used as the language of the procedure; the citizenship and the mother tongue of the Appellant do not constitute key elements regarding the choice of the language of arbitration, whereas proceedings before CAS may be conducted in a language which may not necessarily be the one of the country of the Appellant[33]. The fact that the Appellant has not a good command in English is not a decisive element either, especially when the parties do not have a common language[34]. Furthermore, as it was also found in TAS 2006/A/1163, the language of party's counsel is not a decisive element for the language of the procedure[35].

As to the argument of fair trial, the Deputy President held that this fails if the Appellant is assisted by a lawyer having a good command in the language of the procedure and/or an interpreter. The Deputy President considered that the fact that the first-instance proceedings were conducted in English and the challenged decision was in English played an important role and concluded that English should be selected as language of the procedure. Consequently, according to the letter of Article R29 CAS Code, there is no right of the athlete to use his own mother tongue but there has to be an agreement between the parties and the Panel has the prerogative to decide according to the circumstances.

C. Acceptance of more than one languages by the CAS panel

In some cases, although there is only one "*official*" language chosen by the President of the relevant Division of CAS, the parties are allowed to bring their documents in another language without having to translate them, or can express themselves orally in another language[36]. This happens mostly when the appointed Arbitrators have a good command in both languages chosen with a view to gaining time and reduce additional costs that would have to be borne by the parties. The consent of the parties also plays a role in this respect: In CAS 2008/A/1564, "*The hearing was conducted in English, but the panel, with the consent of the parties, allowed flexibly for the use of German, where a person could not express him/herself in English*".

32. See TAS 2006/A/1163, order on language issued on 2 November 2006.

33. CAS 2010/A/2306, order of 28 December 2010.

34. CAS 2009/A/1975, order on language of 18 November 2009.

35. TAS 2006/A/1163, order on language of 13 May 2009.

36. See also TAS 2006/A/1095 mentioned above.

D. Translation of documents

According to Article R29 CAS Code, the Panel has the possibility (but is not obliged) to request the production of certified translations of all documents that are not in the language of the procedure. Documents submitted in any other language shall be accompanied by a translation; otherwise the panel could decline to consider them[37]. Such translation should in principle be certified translation; however, CAS Panels often allow non-certified / free translation provided by one of the parties if there is no objection raised by the other party.

In CAS 2007/A/1207, the Panel held that it has the prerogative to decide that it is not necessary to order the Appellant to produce certified translations of documents that were produced in another language. The two conditions are that the panel should be in a position to understand the contents of these documents and that the non-translation of these documents does not bring he Respondent at a disadvantage in the proceedings, nor deprive it of its right to be heard; this can happen if the Respondent's attorneys are of this other language's mother tongue and therefore understand all documents produced[38].

Indeed, in some instances the fact that the parties' counsel is fluent in another language is taken into consideration by the CAS Panels before deciding on whether to request a translation, especially when such translation is not requested by the other party. In CAS 2006/A/1057 the Panel chose not to order any further translation than the one already provided by the Appellant, by taking into consideration that the athlete's counsel is also comfortable with the French language and that the largest part of the relevant documentation consists of scientific statistics.

In a similar context, in TAS 2006/A/1095 the Panel considered that it would be disproportionate to ask a party to translate a series of documents from German to French, especially since the parties had already used the German language before and the party who asked for the translation not only has its seat in the German-speaking part of Switzerland, but also has German as official language, in accordance with its statutes. The Panel thus decided that the Panel should take into consideration the exhibits submitted by the other party in German[39].

37. See CAS 2008/A/1641 & 1642.

38. See CAS 2007/A/1207; see also CAS 2007/A/1213.

39. See also TAS 2009/A/1764, order of 11 February 2009.

E. Impact of the language on the conduct of the hearing

1. Inadmissibility of documents submitted in a foreign language and excessive formalism

Normally, documents sent in another language than the one chosen as the language of the procedure are not automatically declared inadmissible. CAS Counsel reminds the parties on the language chosen, and gives the parties a deadline in order to comply with Article R29 CAS Code. In the CAS 2003/O/460[40], the panel held that when a party lodges a pleading (e.g. a request for arbitration or a statement of appeal), which would be incomplete because of a failure to comply fully with the requirements of Rules R29 and R38 of the Code (e.g. by failing to write the request in one of the official languages) then an additional period is granted to such party to pay the minimum fee or to complete or translate its request.

Furthermore, the panel concluded that this practice is consistent with the jurisprudence of the Swiss Federal Tribunal concerning the translation of proceedings into an official language[41]. Both the doctrine and jurisprudence demonstrate that the denial of such additional deadline constitutes an excessive formalism, forbidden by the Swiss Federal Constitution[42]. This, however, does not apply in cases where the d.ocument in question should anyway be declared inadmissible because it was e.g. filed late. In TAS 2010/A/2100, the Respondent (an Egyptian football club) sent a document containing his written arguments in English. The panel found that the specific document was not admissible and had to be removed from the file of the case since it was sent late (Article R56 CAS Code) but also because it was written in a language other than the French language (that had been chosen for the procedure).

2. Translation of the parties' names and inadmissibility of the appeal

An interesting CAS Award was recently issued with regard to the language of the parties' names and the admissibility of the appeal[43]: an anti-doping authority appealed to the CAS against the second-instance decision lifting the initially imposed sanction for use of a prohibited substance. The Athlete's

40. Preliminary Award CAS 2003/O/460; the case was eventually terminated.

41. See *inter alia* Decision of the Swiss Federal Tribunal (DFT) 1B_17/2012, judgment of 14 February 2012, at 3; DFT 1B_4/2012, Judgement of 11 January 2012, at 3; see also the older ATF 102 Ia 35; ATF 106 Ia 299.

42. See also Poudret J., Commentaire de la loi fédérale d'organisation judiciaire, Vol. I, Bern, 1990, nr 1.2.4 ad Article 30, p. 179, with further references.

43. See CAS 2011/A/2311 & 2312.

representative (Respondent) argued that the case should not be admissible because the parties' names were translated into English (instead of Dutch). The Panel rejected this argument because the language that had been chosen for the proceedings before the CAS was English. It found that it is perfectly admissible to translate the names of the parties into the language of the proceedings. Moreover, both Appellants used the English denomination in their respective Statement of Appeal and Appeal Brief. What is more, the Respondent was fully aware of the entities that were translated into English, and their identity was at no time doubtful.

The Panel concluded that using the exact English translation of the Appellants was not capable of causing any confusion and that his right of defense was not endangered therethrough. In any event, in order to facilitate the cooperation with the CAS, the Panel requested the Appellants to use the original, non-translated (i.e. Dutch) names. On another front, the same Respondent argued that the fact that the Appellants' names were translated into English (instead of Dutch) resulted in the appeal being filed late. However, the Panel found that the denomination in English or in Dutch did not influence the existence or identity of the parties, and therefore the appeals were filed timely.

3. Modification of the appointment of an arbitrator

The decision of the President of the – ordinary or appeals – Division as to the language of the procedure might affect the appointment of an arbitrator by one of the parties. This was the case in TAS 2005/A/983 & 984 (order on language of 23 December 2005); the dispute concerned a football club from a Spanish-speaking country (the Appellant) and a French football club (the Respondent). The decision appealed against was drafted in Spanish and, while the Appellant filed his statement of appeal in French, it appointed an arbitrator who could not conduct an arbitration in French; the President of the Appeals Division held that in the absence of agreement between the parties it was not possible to choose Spanish as the language of the arbitration and opted for French. As a result, the President ordered that the initially appointed arbitrator (who could not conduct the arbitration in French) should be replaced by another French-speaking arbitrator and granted the Appellant with an additional deadline in order to appoint a new arbitrator of his choice and to submit the translations of all relevant documents into French[44].

44. See also CAS 2012/A/2722 & CAS 2012/A/2723, Orders on language of 29 February 2012, where the arbitrator that had initially been appointed did not speak English, the language eventually chosen for the procedure, and was subsequently replaced.

III. Final remarks

Parties bringing their dispute before CAS may choose among the two "*official*" CAS languages i.e. English and French, which are also the official languages of the IOC which created the CAS back in 1984. If, however, the parties cannot reach an agreement as to the language of the procedure, the case has to be brought to the President of the panel or the President of the Division who will decide which of the two languages shall be used, in most cases by means of an "*order on language*". This has to be made at the outset of the proceedings, but issues related to language can also arise at a later stage.

Specifically for the appeal proceedings, one should differentiate between the CAS working languages and the official languages of a Federation/association that issued the first-instance decision. Indeed, the language of the first-instance proceedings (and the decision appealed against) may be a criterion in order to decide which language will be used before CAS; this, however, is not the case if the first-instance proceedings took place in a third language. Another criterion determining the language of the proceedings is the language in which it was drafted the contract or agreement, in particular when the latter forms the subject matter of the dispute. Generally, however, the citizenship and the mother tongue of the Appellant (or one of the parties) do not constitute key elements regarding the choice of the language of arbitration, whereas proceedings before CAS may be conducted in a language which may not necessarily be the one of the country of the Appellant/ one of the parties. The fact that the appellant or one of the parties or their counsel has not a good command in English is not a decisive element either.

In some cases, although there is only one "*official*" language chosen by the President of the relevant Division of CAS, the parties are allowed to bring their documents in another language without having to translate them or can express themselves orally in another language (when the appointed Arbitrators have a good command in both languages chosen). In any event, documents sent in another language than the language of the procedure are not automatically declared inadmissible, but parties are granted a deadline in order to complete or translate their request (in order to avoid the excessive formalism according with the jurisprudence of the Swiss Federal Tribunal). CAS Panels show flexibility in order to satisfy both parties and not encumber the procedure, but always within the limits of due process.

It follows that the choice of a language of procedure should not be underestimated; although, at first

glance, a formal issue, it might affect the costs and the conduct of the procedure in general. Indeed, the choice of the language can affect the costs of the entire procedure as it might entail significant translation costs for one party or the other as well as significant loss of time in order to get the translations; furthermore, priority given to one language may also engender issues related to the fairness of the procedure. What is more, the language chosen often reflects the legal tradition of the country concerned, and from this scope, it might have an impact on the outcome of the dispute.

Figure 1: List of orders on language issued by CAS

List of all registered cases where orders on language were issued*		
1. 2005/A/838	15. 2007/A/1290	29. 2008/A/1868
2. 2005/A/950	16. 2007/A/1388 & 1389	30. 2009/A/1957
3. 2005/A/973	17. 2008/A/1611	31. 2009/A/1975
4. 2005/A/983	18. 2008/A/1630	32. 2009/A/1976 & 1977
5. 2005/A/984	19. 2008/A/1661	33. 2009/A/2075
6. 2005/A/1003	20. 2008/A/1667	34. 2010/A/2306
7. 2006/A/1015	21. 2008/A/1677	35. 2011/A/2615
8. 2006/A/1075	22. 2008/A/1680	36. 2011/A/2618
9. 2006/A/1095	23. 2008/O/1689	37. 2011/A/2620
10. 2006/A/1155	24. 2008/A/1727	38. 2012/O/2722
11. 2006/A/1163	25. 2009/A/1756	39. 2012/O/2722
12. 2006/A/1180	26. 2009/A/1764	40. 2012/A/2739
13. 2006/A/1181	27. 2008/A/1828	
14. 2007/A/1232	28. 2008/A/1829	

*Data available up until April 2012

Figure 2: Orders on language in CAS procedures

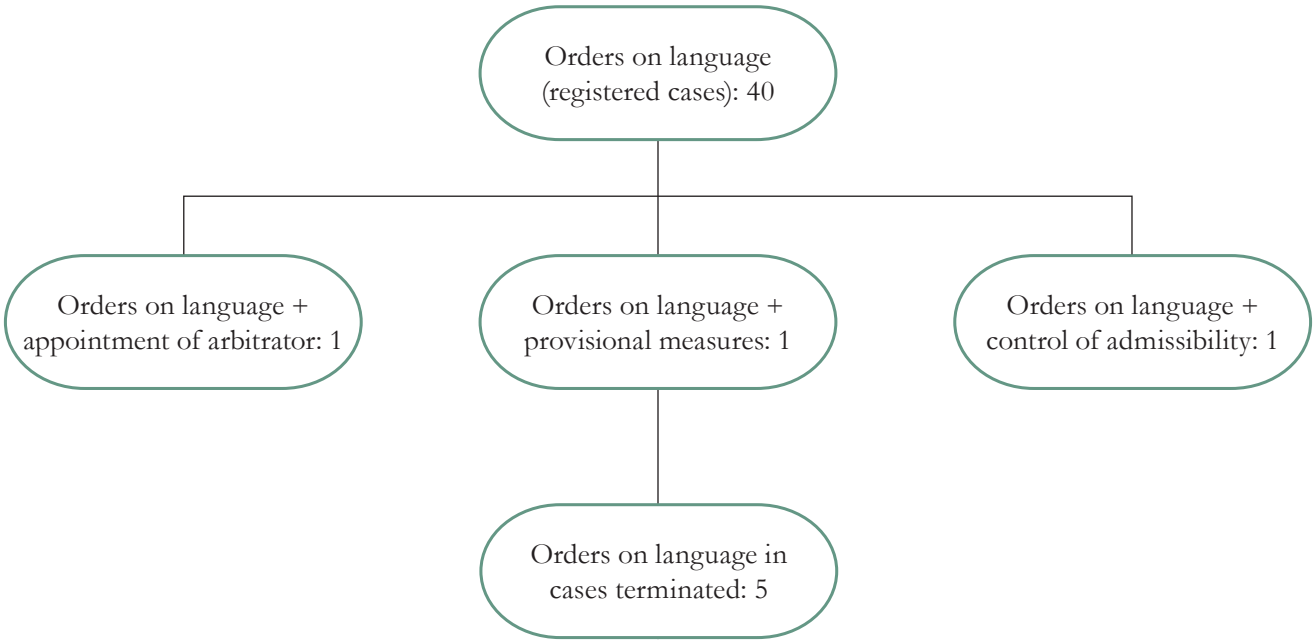
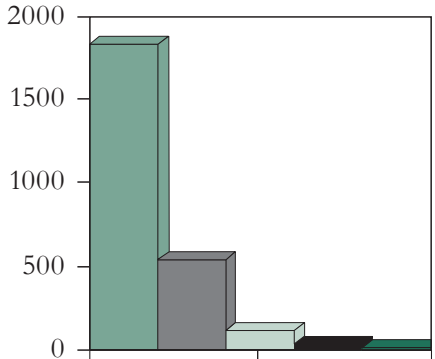


Figure 3: Language of the proceedings before CAS*



	Language of procedure	Percentage
English	1836	72%
French	551	21%
Spanish	130	5%
German	29	1%
Italian	19	1%

* Indicative table based on the number of registered cases from the creation of CAS in 1984 up to April 20, 2011.

Arbitrages ordinaires pouvant être soumis au Tribunal Arbitral du Sport

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* Les auteurs tiennent à remercier Mlle Farah Haydar pour son aide précieuse.

I. Introduction

Comme cela est le cas pour les autres institutions d'arbitrage, un litige ne peut être soumis au Tribunal arbitral du sport (le "*TAS*") que s'il existe entre les parties une convention d'arbitrage en sa faveur. Une telle convention peut se trouver dans un contrat ou un compromis d'arbitrage, mais aussi dans des statuts de fédération sportive.

Mais l'article R27 du Code de l'arbitrage en matière de sport (le "*Code du TAS*") précise que le TAS a uniquement compétence pour trancher des litiges ayant un lien avec le sport. Est ce à dire que le TAS ne connaît et ne peut connaître que de litiges proprement sportifs ? De fait, depuis sa création et comme nous le verrons plus en détail, le TAS ne s'est jamais déclaré incompétent en raison de la nature non sportive d'un litige.

En principe, deux types de litiges peuvent être soumis au TAS : les litiges de nature disciplinaire et les litiges de nature commerciale. Les affaires dites de nature disciplinaire, souvent les plus médiatisées, regroupent les litiges relatifs au dopage, à l'inexécution d'une décision, à des affaires de corruption ou de matchs arrangés ou encore à d'autres types d'affaires (actes de brutalité sur un terrain, injure à l'encontre d'arbitres, comportement inconvenant de spectateurs, sanctions contre les autres membres d'une équipe, etc.). La catégorie des litiges de nature commerciale regroupe quant à elle essentiellement les litiges portant sur l'exécution des contrats, par exemple en matière de transferts de joueurs et de relations entre joueurs ou entraîneurs et clubs et/ou agents (contrats de travail, contrats d'agents), de concession de licences, de sponsoring, de vente de droits de télévision, d'organisation de manifestations sportives. Les litiges portant sur les questions de responsabilité civile appartiennent également à cette catégorie (accident d'un athlète lors d'une compétition sportive). Alors que les litiges de nature disciplinaire relèvent quasiment exclusivement de la procédure dite d'appel du TAS, les litiges commerciaux peuvent relever des deux types de procédure offertes par le TAS : la procédure dite ordinaire et la procédure d'appel.

Malgré le caractère spécifique du TAS et la croyance répandue selon laquelle ce dernier ne serait compétent que pour régler les litiges de nature purement sportive en appel – qui s'explique par le fait que les sentences rendues dans le cadre de la procédure d'appel sont publiées tandis que celles rendues dans le cadre de la procédure ordinaire sont en principe confidentielles – tous les types de litiges ayant un lien avec le sport peuvent être soumis au TAS et à la procédure ordinaire. Dans les développements qui suivent, il sera donc fait référence à une autre catégorisation de

litiges pouvant être soumis à la procédure ordinaire du TAS : les litiges dits contractuels commerciaux portant sur l'exécution de contrats de concessions de licences, de sponsoring, de vente de droits de télévision, d'organisation de manifestations sportives, etc. et les litiges dits contractuels sportifs portant sur l'exécution de contrats de transferts de joueurs, de travail, de mandat, etc.

A la lumière du droit suisse de l'arbitrage, applicable aux procédures devant le TAS (I) et du règlement et de la jurisprudence du TAS (II) il apparaît que le TAS est compétent pour connaître de la plus large gamme de litiges, y compris commerciaux. Le TAS est ainsi une option ouverte pour tous les types de contrats commerciaux dont les parties souhaiteraient voir leurs litiges soumis au TAS. Le choix du TAS comme institution d'arbitrage présente de nombreux avantages comme cela ressort de la comparaison du Code du TAS avec les règlements d'arbitrage des principales autres institutions (III).

Il n'est fait référence dans cet article à des sentences du TAS rendues dans le cadre de la procédure ordinaire que dans le cas où celles-ci sont publiées[1].

II. L'arbitrabilité des litiges au regard du droit suisse de l'arbitrage

Chaque Etat détermine souverainement les matières pouvant être soumises à l'arbitrage. L'arbitrabilité est ainsi déterminée par la loi du siège de l'arbitrage. Le TAS a son siège à Lausanne en Suisse et le type de litiges pouvant être soumis à l'arbitrage doit être étudié sous l'angle du droit suisse de l'arbitrage contenu dans la Loi fédérale du 18 décembre 1987 sur le droit international privé (la "*LDIP*")[2]. Le présent article se limitera au cas des litiges à dimension internationale, c'est-à-dire ceux impliquant au moins une partie dont le domicile est hors de Suisse.

Selon les dispositions de l'article 177, alinéa 1, de la LDIP, un tribunal arbitral ayant son siège en Suisse pourra connaître du litige dès lors qu'il est de nature patrimoniale.

Comme l'a relevé le Tribunal fédéral suisse, l'article 177, alinéa 1, de la LDIP "*ne subordonne pas l'arbitrabilité d'une cause à la disponibilité du droit litigieux (...) Il s'agit là de deux critères distincts. Le législateur a, volontairement, fait abstraction du second, lequel présuppose le choix d'une solution conflictuelle puisque, en matière internationale, l'appréciation du caractère disponible des rapports de droit soumis à l'arbitrage requiert l'examen du droit matériel qui les régit*"[3].

La notion de "*matière patrimoniale*" n'est pas définie spécifiquement dans le chapitre sur l'arbitrage de la LDIP. Toutefois, tout comme le Tribunal fédéral suisse, la doctrine reconnaît la volonté du législateur fédéral d'"*ouvrir largement l'accès à l'arbitrage international*". Elle en a déduit qu'il faut procéder à une "*interprétation aussi extensive que possible*"[4] et en tout cas "*très libérale du concept de 'patrimonialité'*" dans le contexte de l'article 177, alinéa 1, de la LDIP[5].

La seule limite à cette interprétation extensive est l'ordre public. C'est ainsi que le Tribunal fédéral suisse a considéré qu' "*un tribunal arbitral siégeant en Suisse, dans le cadre d'un arbitrage international, n'est pas compétent pour connaître d'une cause patrimoniale si le fait d'admettre l'arbitrabilité du litige est incompatible avec l'ordre public*". Plus particulièrement, le Tribunal fédéral suisse reconnaît expressément que "*l'arbitrabilité de la cause pourrait* [être niée] *à l'égard des prétentions dont le traitement aurait été réservé exclusivement à une juridiction étatique par des dispositions qu'il s'imposerait de prendre en considération sous l'angle de l'ordre public*"[6]. Ainsi, selon le Tribunal fédéral suisse, la simple existence d'une compétence exclusive ne suffit pas à entraîner l'inarbitrabilité de la cause du point de vue de l'article 177 de la LDIP. Encore faut-il que cette compétence exclusive soit impérative et que la prise en compte de cette "*impérativité*" s'impose sous l'angle de l'ordre public.

Il est important de noter que le Tribunal fédéral suisse ne définit pas ce qu'il faut entendre par ordre public: ordre public suisse, étranger, international suisse, transnational. Selon certains auteurs, il ne s'agit que de l'ordre public international dont l'inobservation conduirait à l'annulation de la sentence en application des dispositions de l'article 190, alinéa 2, let. e, de la LDIP[7]. D'autres proposent de tenir également compte, en plus de l'ordre public international, des dispositions de l'ordre public suisse au sens de l'article 18 de la LDIP, pour autant qu'elles visent à protéger un groupe de personnes spécifiques, qu'elles prévoient à cet effet une procédure étatique particulière et que le litige présente un lien avec la Suisse pour assurer la mise en œuvre de ces dispositions protectrices

1. Les sentences référencées ainsi que les autres sentences publiées du TAS sont disponibles sur le site internet du TAS à l'adresse suivante : www.tas-cas.org, sous la rubrique jurisprudence.

2. RS (Recueil systématique du droit fédéral) 291.

3. Arrêt du Tribunal fédéral suisse du 23 juin 1992, ATF 118 II 353, Fincantieri, Bull. ASA 1993, p. 58.

4. Lalive/Poudret/Reymond, Le droit de l'arbitrage interne et international en Suisse, Lausanne (Payot) 1989, n°2 ad p. 306 ; Walter/Bosch/Brönimann, Internationale Schiedsgerichtsbarkeit in deir Schweiz : Kommentar zu Kapitel 12 des IPR-Gesetzes, Berne (Stämpfli) 1991, p. 56.

5. Briner, *Basler Kommentar*, n°11 ad art. 177 LDIP, p. 1426.

6. ATF 118 II 353, Fincantieri précité.

7. Poudret/Besson, *Droit comparé de l'arbitrage* international, Zurich [etc.] (Schulthess [etc.]) 2002, nn°333 et 346, pp. 302 et 314.

impératives[8]. Enfin, selon un troisième courant doctrinal, les dispositions d'ordre public limitant l'arbitrabilité peuvent être prises en compte non seulement lorsqu'elles ressortissent du droit suisse, mais aussi lorsqu'elles appartiennent à un droit étranger (ordre public de l'Etat dont le droit est applicable au fond du litige ou d'un Etat tiers) par le biais de l'article 19 de la LDIP[9]. Selon cette thèse, une disposition peut limiter l'arbitrabilité d'un litige si :

- elle prévoit la compétence exclusive d'une juridiction étatique pour des raisons d'ordre public et veut exclure la compétence du tribunal arbitral en l'espèce ;

- le litige présente un lien étroit avec l'Etat dont les juridictions seraient ainsi compétentes ;

- des intérêts légitimes et manifestement prépondérants exigent que le tribunal arbitral se déclare incompétent ; et

- la prise en compte de la disposition restrictive ne mène pas à un résultat inadéquat, notamment à la lumière des conceptions généralement admises dans le domaine du droit en question.

Contrairement à bon nombre de pays qui ne reconnaissent pas l'arbitrabilité du contentieux du travail comme l'Italie ou encore la France, le droit suisse de l'arbitrage international considère que, le salaire étant l'un des éléments définitoires du contrat de travail, le contentieux du travail revêt par sa nature même un caractère patrimonial, de sorte qu'il est clairement arbitrable au sens de l'article 177, alinéa 1, de la LDIP[10]. A la lecture du paragraphe précédent, il est toutefois possible de considérer que le TAS pourrait être amené à constater une inarbitrabilité en matière de relation de travail si une disposition d'ordre public prévoit un for protecteur qui ne correspond pas au siège du tribunal arbitral ou si une disposition d'ordre public exclut expressément l'arbitrabilité ou prévoit la compétence exclusive des tribunaux étatiques. Cependant, comme nous venons de le voir, cette inarbitrabilité dépendra de l'approche de la formation arbitrale sur l'ordre public à prendre en considération. C'est ainsi par exemple qu'un tribunal arbitral ayant son siège à Genève, Suisse, dans un litige italien en matière de contrat de travail, alors que le droit italien prévoit que les litiges en matière de contrat de travail sont de la compétence du "*juge du travail*" et inarbitrables, a considéré que cette disposition n'était pas d'ordre public et que la seule restriction à l'article 177, alinéa 1, de la LDIP était l'ordre public au sens de l'article 190, alinéa 2, let. e, de ladite loi[11].

La jurisprudence du TAS abordant cette question de la prise en compte de dispositions nationales attribuant compétence exclusive à des juridictions étatiques est rare. En outre, elle concerne des affaires de dopage qui ne sont pas pertinentes dans le cadre de cet article, du fait de la spécificité de ces affaires et de la volonté des organisations sportives et du TAS de ne pas voir ce type de litiges soumis à des autorités étatiques.

Nous pouvons citer une sentence du 9 février 2007[12] dans laquelle la formation arbitrale a retenu la nécessité de prendre en considération les dispositions impératives aux conditions posées par l'article 19 de la LDIP. La formation arbitrale avait ainsi retenu que "*les dispositions impératives d'une loi étrangère attribuant compétence exclusive à une juridiction* [étatique] *sont, en principe, inapplicables. La seule exception serait une situation où l'application des dispositions impératives étrangères serait requise du point de vue de l'ordre public* ", cet ordre public n'étant pas limité à l'ordre public international ou à l'ordre public suisse, mais s'étendant à tous les ordres publics nationaux aux conditions de l'article 19 de la LDIP, notamment "*lorsque des intérêts légitimes et manifestement prépondérants au regard de la conception suisse du droit l'exigent* ".

Ainsi, le droit suisse de l'arbitrage est un droit favorable à l'arbitrage et la pratique du TAS va dans le sens de la compréhension large de l'arbitrabilité.

III. Les litiges pouvant être soumis au TAS

Au delà des règles sur l'arbitrabilité des litiges en droit suisse de l'arbitrage international, il est nécessaire de se pencher sur les dispositions de l'article R27 du Code du TAS et son interprétation. Comme indiqué en introduction l'article R27 du Code du TAS définit le champ de compétence du TAS : " *Le présent Règlement de procédure s'applique lorsque les parties sont convenues de soumettre au TAS un litige relatif au sport. (…)*

Ces litiges peuvent porter sur des questions de principe relatives au sport ou sur des intérêts pécuniaires ou autres mis en jeu à l'occasion de la pratique ou du développement du sport et, d'une façon générale, de toute activité relative au sport ".

Le critère de délimitation du champ des litiges pouvant être soumis au TAS tient donc sans surprise

8. Vischer, *Zürcher Kommentar.*

9. Bucher, *Le nouvel arbitrage international en Suisse*, Bâle et Francfort-sur-le Main (Heilbing & Lichtenhahn) 1988, nn°74-76, pp. 44-45 ; Antonio Rigozzi, *L'arbitrage international en matière de sport*, Thèse Genève, Bâle et al. 2005, nn°748-751.

10. Arrêt du Tribunal fédéral suisse du 23 juin 1989, Bull. ASA 1989, p. 334.

11. Sentence partielle CCI n°8420, YCA 2000, p. 328.

12. TAS 2006/O/1055 *V. del Bosque et al. c. Besiktas JK.*

au lien du litige en cause avec le sport. Pour autant, la question de la nature ou de l'intensité du lien avec le sport permettant de recourir au TAS n'est pas abordée par le Code du TAS.

Si aucune jurisprudence n'est venue définir plus avant le critère du lien avec le sport posé par l'article R27 du Code du TAS, il ressort néanmoins de la jurisprudence qu'une interprétation large de ce critère apparaît être retenue.

En premier lieu, il convient de rappeler qu'à la date de rédaction du présent article, aucun tribunal constitué sous l'égide du TAS depuis sa création en 1984 ne s'est déclaré incompétent pour connaître d'un litige au motif que ce dernier ne serait pas ou pas suffisamment "*relatif au sport*".

En second lieu, quant à la nature du lien du litige avec le sport, on relèvera la grande diversité des litiges dont a eu à connaître le TAS au delà des litiges purement sportifs, disciplinaires ou relatifs au dopage. Sans chercher à être exhaustif, on peut ainsi relever que les litiges contractuels sportifs portant sur l'exécution des contrats de travail peuvent être soumis à l'arbitrage ordinaire du TAS (sous réserve de la question de l'ordre public évoquée ci dessus, sur laquelle la jurisprudence n'est pas fixe). Ce dernier a ainsi déjà eu à connaître de telles affaires concernant un contrat de travail d'un entraîneur avec son club[13], de contrats de travail de joueurs avec leurs clubs, ou encore en matière de contrat de médiation entre un joueur et son agent[14] et plus généralement de contrat de mandat. Des litiges portant sur l'exécution de contrats de transferts de joueurs peuvent également être soumis à la procédure d'arbitrage ordinaire du TAS[15]. Les parties peuvent également soumettre à cette procédure les litiges contractuels commerciaux dans la mesure où ils ont un lien avec le sport. Cela est le cas par exemple en matière de vente de droits de télévision, de l'exécution d'un contrat de sponsoring[16], de contrats de marketing[17], ou encore de contrat relatif à l'organisation d'évènements sportifs internationaux[18].

Dans ces affaires, le lien du litige avec le sport n'a pas fait l'objet de débat. Il semble ainsi accepté par l'usage, ou à tout le moins ne pas soulever de question chez les parties et les arbitres, que lorsque le contrat en cause porte sur un événement sportif (organisation, retransmission, promotion, etc.), un lien suffisant avec le sport au regard de l'article R27 du Code du TAS est constitué. De même, dans le cas où le contrat porte sur l'activité sportive d'une partie ou d'un tiers (contrat de travail de sportif ou d'entraineur, transfert de joueur, contrat d'agent de joueur, etc.), il semble que le lien avec le sport ne soulève pas non plus de question au regard de la compétence du TAS.

Une jurisprudence du TAS suggère par ailleurs que le fait que le contrat en cause porte sur un équipement sportif suffirait à satisfaire au critère de l'article R27 du Code du TAS. Le TAS s'est ainsi également reconnu compétent pour connaître, dans le cadre d'une procédure d'arbitrage ordinaire, d'un litige portant sur l'exécution d'un contrat exclusif de concession de licence[19]. Dans cette affaire TAS 92/81 *L. c. Y. SA*, il s'agissait d'une relation purement commerciale, dont le seul lien avec le sport résidait dans le fait que les bateaux qui faisaient l'objet de la transaction litigieuse étaient des bateaux de sport.

En troisième lieu, quant à l'intensité du lien avec le sport du litige, il est intéressant de relever que dans la sentence du 30 novembre 1992 rendue dans l'affaire TAS 92/81 *L. c. Y. SA*, après avoir laissé entendre que le lien avec le sport pouvait être considéré comme "*trop ténu*", la formation arbitrale a néanmoins accepté de se saisir de l'affaire par souci de donner effet à la volonté commune des parties de soumettre leur litige au TAS, volonté qui représente la source de la compétence du tribunal arbitral.

Dans cette sentence, qui est la seule sentence publiée traitant de l'article R27 du Code du TAS, la formation arbitrale, conformément à la nature consensuelle de l'arbitrage, semble avoir fait primer la volonté des parties de soumettre leur litige au TAS, sans qu'il puisse être affirmé en l'état de la jurisprudence que la volonté des parties suffirait à écarter complètement les dispositions de l'article R27 du Code du TAS.

Pour autant, au vu de cette jurisprudence, il apparaît que peuvent être soumis à la procédure arbitrale ordinaire du TAS tous types de litiges purement commerciaux dès lors qu'un lien ténu avec le sport existe ; par exemple un litige portant sur un contrat de construction d'un stade, contrats de distribution d'équipements sportifs, etc.

Dans de tels contrats, les parties peuvent juger opportun de soumettre les éventuels litiges au TAS, au regard de la sensibilisation du Secrétariat du TAS comme de ses arbitres au monde du sport, à ses

13. TAS 87/10 *X. c. HC Y.*, sentence du 15 juillet 1989.

14. TAS 2007/O/1310 *Bruno Heiderscheid c. Franck Ribéry*, sentence du 16 avril 2008.

15. TAS 2005/O/985 *Feyenoord Rotterdam N.V. v. Cruzeiro Esporte Club*, sentence du 19 décembre 2006.

16. TAS 91/45 *W. c. X SA*, sentence du 31 mars 1992.

17. TAS 2001/O/319 *X. Sàrl c. Fédération Y.*, sentence du 17 octobre 2001.

18. TAS 96/161 *International Triathlon Union (ITU) c. Pacific Sports Corp. Inc.*, sentence du 4 août 1999.

19. TAS 92/81 *L. c. Y. SA*, sentence du 30 novembre 1992.

enjeux et à ses usages. En outre, la procédure devant le TAS présente de nombreux avantages.

IV. Comparaison de la procédure ordinaire proposée par le Code du TAS avec les règlements d'arbitrages d'autres institutions arbitrales

Chaque institution d'arbitrage a adopté un règlement spécifique s'appliquant aux litiges qui lui sont soumis. La procédure d'arbitrage ordinaire prévue par le TAS est largement similaire à celles proposées par d'autres institutions d'arbitrage, notamment en ce qui concerne le déroulement de la procédure écrite[20]. Elle contient toutefois des spécificités sur lesquelles il est intéressant de se pencher au travers d'une comparaison de la procédure dite ordinaire du TAS avec les règlements d'arbitrage de la Cour d'arbitrage de la Chambre de Commerce Internationale (la "*CCI wish you success in your career wish you success in your career*"), de la London Court of International Arbitration (la "*LCIA*"), de l'American Arbitration Association (la "*AAA*") et le règlement proposé par la Commission des Nations Unies pour le Droit Commercial International (la "*CNUDCI*").

A. Une restriction relative à la liberté des parties

Si le TAS semble laisser moins d'autonomie aux parties à certains égards, on constatera que cette restriction n'est que relative.

En premier lieu, pour ce qui est de la nomination des arbitres, l'article R33, alinéa 2, du Code du TAS dispose que l'arbitre nommé par les parties doit figurer sur une liste fermée[21]. Toutefois cette liste comporte 265 noms d'environ 80 pays différents. L'article S14 du Code du TAS dispose expressément que ces personnalités doivent avoir "*une formation juridique complète, une compétence reconnue en matière de droit du sport et/ou d'arbitrage international, une bonne connaissance du sport en général et la maîtrise d'au moins une des langues de travail du TAS*". En conséquence, le choix est vaste et il est difficile de penser que les parties ne pourraient pas trouver un arbitre ayant une expertise particulière satisfaisant aux critères et compétences qu'elles souhaitent pour le règlement de leurs litiges, qu'ils soient de nature sportive ou de nature commerciale. On relèvera que cette liste regroupe non seulement des spécialistes reconnus des questions relatives au sport, mais aussi des arbitres chevronnés et reconnus en matière commerciale. Au demeurant, il est pertinent de préciser ici que devant d'autres institutions d'arbitrage, alors que les arbitres peuvent être choisis librement, il apparaît que les parties nomment de fait régulièrement les mêmes arbitres. D'ailleurs, nombre de ces arbitres figurent également sur la liste des arbitres du TAS.

En second lieu, les parties semblent disposer de moins d'autonomie dans la détermination de la langue de la procédure. Là encore, la restriction à la liberté des parties n'est que relative. En effet, quand bien même les langues de travail du TAS sont le français et l'anglais (article R29, alinéa 1, du Code du TAS), les parties, avec l'accord du Greffe du TAS et des arbitres, peuvent choisir une autre langue (article R29, alinéa 2, du Code du TAS). Il est fréquent par exemple que le TAS conduise des procédures en espagnol ou encore en allemand[22]. En outre, pour ce qui concerne la détermination de la langue de la procédure à défaut de choix ou accord des parties, il revient au Président de la Chambre d'arbitrage ordinaire du TAS, ou à la formation arbitrale si celle-ci est constituée, de décider de la langue (article R29 du Code du TAS). Il sera tenu compte de l'ensemble des circonstances estimées pertinentes. Tout comme pour les autres règlements d'arbitrage[23], il sera tenu compte de la volonté des parties, notamment par référence à la langue du contrat objet du litige.

Ensuite, alors que dans les autres règlements d'arbitrage les parties déterminent librement le siège de l'arbitrage[24], d'après l'article R28 du Code du TAS, le siège du TAS est fixé à Lausanne, Suisse. Comme développé ci dessus, le droit suisse de l'arbitrage international est extrêmement favorable à l'arbitrage et il est difficile de voir dans cette disposition un réel désavantage, hormis pratique en ce qui concerne les recours contre les sentences arbitrales rendues par le TAS qui doivent être portées devant le Tribunal fédéral suisse.

Enfin, le Code du TAS prévoit que la loi applicable au fond du litige sera le droit choisi par les parties ou, à défaut de choix, le droit suisse (article R45 du Code du TAS). Les autres institutions d'arbitrage disposent qu'à défaut de choix de loi applicable par les parties, cette dernière sera la loi la plus appropriée[25].

20. Ces dispositions ne feront pas l'objet de développements particuliers dans le cadre de la présente étude.

21. La liste des arbitres du TAS est disponible sur le site web du tribunal: www.tas-cas.org sous la rubrique listes CIAS/TAS : http://www.tas-cas.org/arbitreslistegen.

22. Environ 15% des affaires traitées par le TAS le sont dans une langue autre que celles de travail.

23. Article 20 du règlement d'arbitrage de la CCI, article 16.1 du règlement d'arbitrage de la LCIA, article 13 du règlement d'arbitrage de la AAA, article 18 du règlement d'arbitrage CNUDCI.

24. Article 18.1 du règlement d'arbitrage de la CCI, article 17 du règlement d'arbitrage de la LCIA, article 14 du règlement d'arbitrage de la AAA, article 19.1 du règlement d'arbitrage CNUDCI.

25. Article 21.2 du règlement d'arbitrage de la CCI, article 28.1 du règlement d'arbitrage de la AAA, article 35.1 du règlement d'arbitrage CNUDCI. Pour ce qui est du règlement d'arbitrage de la LCIA, l'article 16.3 renvoie à la loi du siège de l'arbitrage mais, étant donné que le siège de l'arbitrage est librement déterminé par les parties, ce sont ces

Contrairement aux autres institutions d'arbitrage, le TAS apporte donc plus de prévisibilité juridique dans le cas où les parties ne font pas de choix exprès de droit applicable au fond. En outre, en ce qui concerne le droit applicable, à l'instar des autres règlements d'arbitrage[26], l'article R45 du Code TAS prévoit que les parties peuvent autoriser les arbitres à statuer en équité.

B. Une procédure plus rapide

Les délais du Code du TAS sont généralement plus courts que ceux prévus par les règlements d'arbitrages des autres institutions.

Tel est le cas en matière de récusation d'un arbitre. Selon les dispositions de l'article R34, alinéa 1, du Code du TAS, les parties disposent d'un délai de 7 jours à partir de la connaissance des motifs de récusation pour déposer une requête en récusation. Devant d'autres institutions, ce délai est de 15 jours[27] ou de 30 jours[28].

Tel est également le cas pour la nomination d'un arbitre unique (sur accord des parties ou décision du Président de la Chambre arbitrale ordinaire du TAS). En effet, devant le TAS, les parties disposent d'un délai de 15 jours pour désigner d'entente un arbitre unique (article R40.1 du Code du TAS), faute de quoi il reviendra au Président de la Chambre arbitrale ordinaire du TAS de procéder à la nomination. Ces délais sont plus longs devant les autres institutions d'arbitrage et peuvent atteindre 45 jours[29].

En outre, on précisera qu'il revient au Greffe du TAS de fixer le délai pour que la partie défenderesse nomme son arbitre en cas de formation arbitrale de trois arbitres. En pratique, le Greffe du TAS accorde un délai de 10 jours à la partie défenderesse[30]. A ce titre également, à défaut d'entente dans un court délai fixé par le Greffe du TAS, auquel cas il reviendra au Président de la Chambre arbitrale ordinaire du TAS de nommer le Président de la formation arbitrale, ce dernier sera choisi par les co-arbitres désignés par les parties[31]. La liste obligatoire d'arbitres présente ici l'avantage d'une désignation plus facile et rapide du Président de la formation par les co-arbitres, ces derniers ayant une meilleure connaissance des qualités de chacun après avoir eu l'occasion de siéger avec eux dans d'autres procédures. Quant à la désignation du Président de la formation arbitrale, hormis la CNUDCI qui prévoit un système de désignation par les co-arbitres comme le TAS[32], la CCI, la LCIA et la AAA disposent qu'il revient à l'institution d'arbitrage de désigner le troisième arbitre[33].

Une procédure arbitrale ordinaire au TAS dure en moyenne entre 6 mois et 1 an. Il est en pratique extrêmement rare qu'une procédure ordinaire dure plus longtemps. Cela est dû principalement à la constitution rapide de la formation arbitrale et à la résolution rapide des incidents procéduraux préalables à ladite constitution.

En outre, le Code du TAS, en son article R44.4, prévoit que les parties peuvent s'accorder sur la mise en place d'une procédure accélérée. L'accord des parties sur une telle procédure sera pris en considération lors de la fixation des délais pour l'échange d'écritures [par le Greffe du TAS pour le délai de la réponse à la requête d'arbitrage (article R39 du Code du TAS) et par la formation arbitrale lors de la fixation des possibles échanges d'écritures additionnelles (article R44.1 du Code du TAS)].

Enfin, selon les dispositions de l'article R46, alinéa 2, du Code du TAS, si les parties n'ont ni domicile, ni résidence habituelle, ni établissement en Suisse et ont expressément renoncé au recours au Tribunal fédéral suisse dans la convention d'arbitrage ou dans un accord conclu ultérieurement, la sentence arbitrale ordinaire rendue par le TAS n'est susceptible d'aucun recours et est définitive.

C. Une sécurité juridique accrue

Au regard du Code du TAS mais aussi de sa jurisprudence, on peut constater que le TAS offre aux parties une sécurité juridique accrue.

Les articles R34 et R35 du Code du TAS prévoient que tant les décisions de récusation que de révocation d'arbitres doivent être motivées. Tel n'est pas le cas de la LCIA et de la CNUDCI dont les règlements ne contiennent aucune disposition relative à la motivation de telles décisions. Le règlement

dernières qui disposent du choix du droit applicable en l'absence de choix exprès d'un autre droit.

26. Article 21.3 du règlement d'arbitrage de la CCI, article 22.4 du règlement d'arbitrage de la LCIA, article 28.3 du règlement d'arbitrage de la AAA, article 35.2 du règlement d'arbitrage CNUDCI.

27. Article 10.4 du règlement d'arbitrage de la LCIA, article 8.1 du règlement d'arbitrage de la AAA, article 12.2 du règlement d'arbitrage CNUDCI.

28. Article 14.2 du règlement d'arbitrage de la CCI.

29. Le délai est de 30 jours devant la CCI (article 12.3 du règlement d'arbitrage) et la CNUDCI (article 8.1 du règlement d'arbitrage), et de 45 jours devant la LCIA (article 7.2 du règlement d'arbitrage) et la AAA (article 6.3 du règlement d'arbitrage).

30. Ce délai est de 15 jours devant la CCI (article 12.2 du règlement d'arbitrage) de 30 jours selon l'article 9.2 règlement d'arbitrage CNUDCI, et de 45 jours devant la AAA (article 9.2 du règlement d'arbitrage).

31. Article R40.2 du Code du TAS.

32. Article 9.1 du règlement d'arbitrage CNUDCI.

33. Article 12.3 du règlement d'arbitrage de la CCI, article 5.6 du règlement d'arbitrage de la LCIA, article 6.3 du règlement d'arbitrage de la AAA.

d'arbitrage de la CCI prévoit quant à lui que les motifs de ces décisions ne sont pas communiqués aux parties[34]. Le règlement d'arbitrage de la AAA dispose expressément que la décision de récusation d'un arbitre est discrétionnaire[35]. Enfin, selon les dispositions de l'article R34, alinéa 2, du Code du TAS, les décisions de récusation rendues par le Bureau du Conseil international de l'arbitrage en matière de sport ou du Conseil lui-même peuvent être publiées.

Le TAS prévoit la non publication des sentences arbitrales ordinaires, hormis accord contraire des parties ou si le Président de la Chambre arbitrale ordinaire du TAS le décide (article R43 du Code du TAS)[36]. La CCI, pour sa part publie un certain nombre de sentences ou d'extraits de sentences rendues sous son égide. Alors que l'on pourrait considérer que la CCI présente plus de sécurité juridique pour les parties avec une meilleure connaissance de sa jurisprudence, il est important de rappeler que les arbitres du TAS doivent avoir une formation juridique complète, une compétence reconnue en matière de droit du sport et/ou d'arbitrage international[37]. En outre, le fait que les arbitres du TAS figurent sur une liste obligatoire leur permet d'avoir une excellente connaissance de la jurisprudence du TAS[38]. On relèvera utilement que le principe est que les sentences rendues en matière d'appel sont publiées (article R59 du Code du TAS). Ces procédures sont quantitativement importantes, de nombreuses instances arbitrales ou disciplinaires de fédérations sportives prévoient en effet un appel devant le TAS. Ainsi, saisis de litiges ordinaires de nature sportive, les arbitres du TAS, tout comme les parties et leurs conseils, pourront se référer à la jurisprudence rendue en la matière par d'autres formations arbitrales qui avaient été saisies dans le cade de procédures d'appel.

En outre, avant la signature de la sentence arbitrale par les arbitres, celle-ci doit être transmise au Secrétaire général du TAS qui peut attirer l'attention de la formation arbitrale sur des questions de principe fondamentales (article R46 du Code du TAS). Ce dernier "*contrôle*" de la sentence avant notification permet d'éviter des risques de contradiction entre deux ou plusieurs sentences ou un changement non motivé dans la jurisprudence préétablie du TAS. Il est important de préciser ici que le "contrôle" du Secrétaire général du TAS ne vise en aucun cas à "*modifier*" la sentence. Il revient aux formations arbitrales de juger les affaires portées devant elles et de prendre ou non en considération les questions de principe fondamentales portées à leur attention. Une disposition similaire existe dans le règlement d'arbitrage de la CCI en son article 33, à la différence près que le "contrôle" est effectué par la Cour, ce qui peut prendre plusieurs semaines, tandis que cette durée n'est que de quelques jours au TAS.

Enfin, aux termes de l'article R47, alinéa 2, du Code du TAS, "*il peut être fait appel au TAS d'une sentence rendue par le TAS agissant en qualité de tribunal de première instance, si un tel appel est expressément prévu par les règles applicables à la procédure de première instance*". Les parties peuvent donc prévoir un second degré de juridiction au sein même du TAS. Une telle procédure dite d'appel sera soumise aux règles spécifiques de la procédure d'appel du Code du TAS. Sans entrer dans les détails, il est utile d'indiquer qu'une telle procédure est extrêmement rapide puisque l'article R59, alinéa 5, du Code du TAS prévoit que le dispositif de la sentence doit être communiqué aux parties dans un délai de 3 mois suivant la transmission du dossier à la formation arbitrale.

D. Une procédure peu coûteuse

De manière sommaire et purement descriptive, il sera fait ici mention ici des fourchettes générales appliquées par le TAS et par les autres institutions d'arbitrage examinées.

Le règlement d'arbitrage de la CCI prévoit que les frais administratifs varient entre USD 3'000 et 113'215 en fonction du montant en litige. Pour ce qui est des honoraires des arbitres, ils varient entre USD 3'000 et 9'010 pour un litige n'excédant pas USD 50'000 jusqu'à une tranche entre USD 50'000 et 200'000 pour un litige excédant USD 500'000'000.

Le règlement d'arbitrage de la LCIA prévoit quant à lui un taux horaire pour les frais administratifs variant entre GBP 100 et 200. Les honoraires des arbitres sont en principe entre GBP 150 et 350 de l'heure.

La AAA prévoit des frais administratifs variant entre USD 200 et 6'000 en fonction du montant en litige et des honoraires pour les arbitres fixés par la formation arbitrale[39].

Le règlement d'arbitrage CNUDCI ne prévoit pas de barème particulier et dispose simplement que les

34. Article 11.4 du règlement d'arbitrage de la CCI.

35. Article 9 du règlement d'arbitrage de la AAA.

36. Le même principe est reconnu par la LCIA (article 30.3 du règlement d'arbitrage), la AAA (article 27.4 du règlement d'arbitrage) et la CNUDCI (article 34.5 du règlement d'arbitrage).

37. Article S14 du Code du TAS.

38. Sur la volonté de créer une véritable *lex sportiva*, voir par exemple Frank Latty, *La lex sportiva Recherches sur le droit transnational*, (Martins Nijhoff Publishers) 2007.

39. Article 31 du règlement d'arbitrage de la AAA.

coûts doivent être raisonnables[40].

Les frais administratifs du TAS, hormis le droit de greffe versé par la partie demanderesse avec sa requête d'arbitrage d'un montant de CHF 1'000, varient quant à eux entre CHF 100 et 25'000 en fonction du montant en litige. Le taux horaire des arbitres n'excèdera jamais CHF 400 pour un litige excédant CHF 10'000'000 et peut même descendre jusqu'à CHF 250 si le litige n'excède pas CHF 1'000'000.

Comme nous pouvons le constater, alors que le TAS propose des honoraires déterminés pour les arbitres, les autres institutions d'arbitrage prévoient uniquement des fourchettes ne permettant pas aux parties de prévoir à l'avance le montant total des frais qu'elles encourront.

V. Conclusion

Le TAS, bien qu'institution d'arbitrage "*spécialisée*" n'est pas limité à l'arbitrage des litiges purement sportifs. Une très vaste palette de litiges survenant dans le monde du sport, au sens large, peut être soumise au TAS, y compris des litiges purement commerciaux. Au regard de cette large compétence et des avantages de rapidité, de maitrise des coûts et de sécurité juridique que présente le TAS, celui-ci a vocation non seulement à être l'institution d'arbitrage des litiges sportifs, mais encore l'institution d'arbitrage des litiges du monde du sport dans toutes ses facettes, tant disciplinaires que commerciales.

40. Article 41 du règlement d'arbitrage CNUDCI.

Arbitration CAS 2010/A/2083
Union Cycliste Internationale (UCI) v. Jan Ullrich & Swiss Olympic
9 February 2012

Cycling; blood doping; disciplinary proceedings against a rider and Article 75 Swiss Civil Code; initiation of disciplinary proceedings against a rider who is no longer a UCI licence-holder; probative value of the evidence leading to the conclusion that the rider engaged in blood doping; determination of the first or the second infraction according to the 2009 WADC; first or second violation for the calculation of the period of ineligibility; commencement of the Period of Ineligibility according to the UCI Rules

Panel:
Mr. Romano Subiotto QC (United Kingdom), President
Prof. Ulrich Haas (Germany)
Mr. Hans Nater (Switzerland)

Relevant facts

The Appellant, the International Cycling Union (UCI), is an international sporting federation and the world governing body for cycling, headquartered in Aigle, Switzerland. The UCI oversees competitive cycling events internationally and maintains a calendar of races in which its license-holders compete. Part 14 of the UCI Cycling Regulations that entered into force on August 13, 2004 were the Anti-Doping Cycling Rules of the UCI (the "*UCI Rules*") in force throughout 2006. The UCI Rules adopt and implement the World Anti-Doping Code (WADC), as it stood at the time.

The First Respondent, Jan Ullrich ("*Ullrich*"), is a German former professional road cyclist resident in Switzerland. Among other achievements, Ullrich was the winner of the 1997 Tour de France and the gold medallist in the men's individual road race at the Sydney 2000 Summer Olympic Games. Prior to the events in question in 2006, Ullrich was a member of the T-Mobile professional cycling team, a member of Swiss Cycling, and a UCI license-holder.

The Second Respondent, Swiss Olympic, is the National Olympic Committee of Switzerland. An independent body within Swiss Olympic, the Disciplinary Chamber, issued the first instance award against which the UCI appeals (the "*Decision*"). In a letter from its Deputy Director, Hans Babst, dated December 15, 2010, Swiss Olympic advised that it "*does not wish to be actively involved in the present procedure*," and "*confirms that it will abide by any decision the Panel will reach in the present procedure*".

Ullrich is a retired professional cyclist who has been resident in Switzerland since 2003. Prior to taking up residence in Switzerland, Ullrich was a resident of his native Germany. The UCI has provided evidence that in 2002, Ullrich tested positive for amphetamines out of competition. At the time of his original infraction the UCI and the German national cycling federation (BDR), of which Ullrich was a member, both banned the presence of amphetamines in athletes in all circumstances.

This ban extended to out of competition testing. As a result of the positive test, Ullrich was subject to antidoping disciplinary proceedings by the BDR and suspended by its association tribunal ("*BDR Bundessportgericht*") by a decision dated July 23, 2002. The BDR Bundessportgericht at the time took into account that Ullrich was at the time of the infraction in hospital, suffering from depression, and did not take amphetamines to improve his sporting performance. In addition, Ullrich at the time admitted taking amphetamines. Given Ullrich's antidoping violation, the BDR Bundessportgericht was obligated to impose a sanction of ineligibility of between six and 12 months under the rules applicable to that case; in view of the circumstances already described, it imposed the minimum period of ineligibility – a six month suspension. The BDR Bundessportgericht's decision was not appealed at the time, and the time-limit for any appeal has long expired.

Upon Ullrich's relocation to Switzerland until the events in question, he was a member of the Swiss Cycling Federation ("*Swiss Cycling*"), and through the auspices of Swiss Cycling was a UCI-license holder. By a form signed and dated November 24, 2005, Ullrich applied for and obtained a UCI license for the 2006 calendar year.

In 2004, the Spanish Guardia Civil and the

Investigating magistrate no. 31 of Madrid opened an investigation that has come to be known as "*Operation Puerto*". Pursuant to this investigation, on May 23, 2006 searches were carried out on two Madrid apartments belonging to a Spanish physician, Dr. Eufemiano Fuentes. Documents and other materials were seized from the apartments, including evidence of possible doping offences by athletes. The Guardia Civil drafted a report ("*Report no 116*") dated June 27, 2006, which made reference to certain of the materials seized from the apartments.

Media reports at the time connected Ullrich to Operation Puerto. In the aftermath of those media reports, on June 30, 2006, Ullrich was suspended by his professional cycling team, T-Mobile, and withdrawn from the 2006 Tour de France. On July 21, 2006, T-Mobile dismissed Ullrich.

A copy of Report no 116 was provided to the umbrella Spanish sport organization, the Consejo Superior de Desportes (CSD), which in turn forwarded Report no 116 to the Real Federacion Espanola de Cyclismo (RFEC), the UCI and the World Anti-Doping Agency (WADA).

Having examined Report no 116, by letter dated August 11, 2006, the UCI requested that Swiss Cycling open disciplinary proceedings against Jan Ullrich pursuant to Articles "*182 à 185 et 224 et suivants*" of the UCI Rules.

On October 19, 2006, Ullrich resigned his membership from Swiss Cycling.

On February 26, 2007, Ullrich publicly announced his retirement from professional cycling.

Sometime after August 11, 2006, Swiss Cycling forwarded the UCI's letter and its attachments to the Commission for the Fight Against Doping (FDB). The FDB was the body charged, under the version of Swiss Olympic's doping statutes effective at the time, with the organization of the non-governmental fight against doping in sports. The FDB also represented Swiss Olympic in proceedings before the Disciplinary Chamber. The latter is an independent organ within Swiss Olympic entrusted with the resolution of doping-related disputes.

As of July 1, 2008, the FDB's anti-doping responsibilities, including the responsibility to appear on behalf of Swiss Olympic before the Disciplinary Chamber, were transferred to Antidoping Schweiz. The statutes and regulations of Swiss Olympic were adapted accordingly.

On May 20, 2009, based on the files received from the FDB, Antidoping Schweiz initiated proceedings before the Disciplinary Chamber. These proceedings resulted in the Decision, which was dated January 30, 2010, in which the Disciplinary Chamber held that Swiss Olympic's statute in force in 2006 did not permit Swiss Olympic (or its nominated anti-doping prosecutor) to initiate new proceedings against an athlete who had previously terminated his membership. The Disciplinary Chamber made no ruling as to whether or not the UCI, which was not an active party to the proceedings, might itself have standing.

On March 22, 2010, the UCI lodged a Statement of Appeal with the Court of Arbitration for Sport (CAS), requesting that the Decision be set aside and, among other requests, that Ullrich be declared to have committed an antidoping offence under the UCI Rules.

Following correspondence between the parties and counsel for the CAS, this Panel issued procedural directions dated November 24, 2010, stipulating among other things that (1) English would be the language of this arbitration, and (2) a partial award on jurisdiction would be issued prior to a consideration of the substantive issues.

Following the exchange of pleadings on jurisdiction, this Panel issued a Partial Award on March 2, 2011. The Partial Award sets out in detail the reasons for the validity of the arbitration agreement between Ullrich and UCI. The Panel reserved costs associated with the Partial Award for determination in this Final Award.

As the Partial Award was limited to narrow questions of jurisdiction, a number of procedural questions still require adjudication in this matter. Those and other issues were addressed in a further round of pleadings by the parties, comprised of the Appeal Brief and the Answer, as well as at a hearing on August 22, 2011 in Lausanne, Switzerland.

In its Appeal Brief dated 8 April 2011, the UCI made in particular the following requests for relief:

"1. Annul and reform the decision of the Disziplinarkammer für Dopingfälle von Swiss Olympic;

2. Find Jan Ullrich guilty of anti-doping rule violations under articles 15.1, 15.2 and 15.5 ADR;

3. Sanction Jan Ullrich in accordance with Art. 261 of the anti-doping rules of the UCI with a lifetime ineligibility;

4. *Disqualify Jan Ullrich from all sporting results as from the date of the earliest anti-doping violation and at least as from 29 May 2002;*

5. *Condemn Jan Ullrich and Swiss Olympic Association jointly and severally to the cost of the proceedings;*

6. *Condemn Jan Ullrich and Swiss Olympic Association jointly and severally to participate in UCI's costs".*

On 16 May 2011, Jan Ullrich submitted his Answer with the following prayers for relief:

"dismiss the appeal filed by the International Cycling Union in its entirety;

confirm the Decision of the Disciplinary Chamber of Swiss Olympic dated 30 January 2010;

order the International Cycling Union to pay any and all costs of these appeal arbitration proceedings, including all legal costs incurred by Mr Jan Ullrich;

dismiss any other relief sought by the International Cycling Union".

Although Ullrich's representatives elected not to participate in that hearing, the parties were provided with a recording of the hearing and invited to submit additional observations about a number of areas where the Panel requested their views. Ullrich and the UCI submitted their observations accordingly.

While the UCI mainly confirmed its requests for relief mentioned in its appeal, Jan Ullrich made the following prayers for relief:

"dismiss the appeal filed by the Union Cycliste Internationale in its entirety;

confirm the Decision of the Disziplinarkammer of the Schweizerische Olympische Verband dated of 30 January 2010;

order the Union Cycliste Interantionale to pay any and all costs of these arbitration proceedings, including all legal costs incurred by Mr Jan Ullrich;

dismiss any other or further relief sought by the Union Cycliste Internationale,

And should the CAS Panel decide that it may examine the merits:

invite the Parties to make further submissions thereon;

and, should the CAS Panel decide that it has the authority and power to pronounce a sanction against Mr Jan Ullrich:

declare that no doping violation was committed by Mr Jan Ullrich;

and, should the CAS Panel decide otherwise:

declare that no earlier doping violation within the meaning of the UCI Antidoping Rules was committed by Mr Jan Ullrich;

take into account that Mr Jan Ullrich has actually been banned since July 2006".

Extracts from the legal findings

A. Procedural issues

A number of outstanding procedural issues require resolution. In the context of these issues, Ullrich has raised a number of objections. Ullrich's objections are predicated on the assumption that the UCI Rules do not apply, which is an assertion we have already dealt with. Nevertheless, for the sake of completeness Ullrich's objections are addressed below.

1. Proper Appellant

Article 75 of the Swiss Civil Code provides that members of an association are entitled to appeal decisions/resolutions passed by the association. In the case at hand UCI brought the appeal against the Decision. Obviously UCI is not a member of the sports organization to which the Decision must be attributed. However, this is not in contradiction with Article 75 of the Swiss Civil Code. The provision provides for certain standards for the protection of members of an association, but does not forbid that a third party be given – on a contractual basis – comparable rights of appeal like a member. This is all the more true in cases in which the third party belongs to the respective sports family and is affected by the decision/resolution in a similar way as a member. In the case at hand UCI's right to bring the appeal is based upon the Article 281(c) of the UCI Rules. This rule provides that the UCI has the right to bring an appeal against a decision pursuant to Article 242 of the UCI Rules to the CAS. The Decision in the case at hand was issued pursuant to Article 242 of the UCI Rules; thus, the UCI has standing to bring this appeal.

The Panel rejects Ullrich's submission as to whether the Decision is issued pursuant to Article 242 of the UCI Rules. It therefore follows that the UCI is a proper Appellant to bring this appeal under Article 281(c) of the UCI Rules.

2. Proper Defendants

Article 282 of the UCI Rules provides that "*The appeal of the UCI shall be made against the License-Holder and against the National Federation that made the contested decision and/or the body that acted on its behalf*". The UCI brought its appeal against Jan Ullrich and against Swiss Olympic, the body to whom Ullrich's national sporting federation (Swiss Cycling) has delegated its authority for prosecuting antidoping violations.

The Panel firstly notes that the present case is not – strictly speaking – one that is situated within the scope of applicability of Article 75 of the Swiss Civil Code, since in the case at hand it is not a member of an association that has lodged the appeal against a decision/resolution of an association, but a non-member (that is, however, equally affected by it). Such recourse in favor of a third party is covered by the parties' autonomy and is not – as stated above – restricted or prevented by Article 75 of the Swiss Code. The parties, therefore, are free to rule and determine who are the proper respondents in a case in which an appeal is lodged by a non-member. In the case at hand the applicable rule (Article 282 of the UCI Rules) provides that the appeal must be filed "*against the License-Holder and against the National Federation that made the contested decision and/or the body that acted on its behalf*".

2.1 "*License-Holder*"

The fact that according to Article 282 of the UCI Rules the appeal must be lodged also against the "*license-holder*" is not arbitrary. As the UCI points out, if the position under Article 75 of the Swiss Civil Code were otherwise, sporting rules like the UCI Rules and the WADC would not be capable of enforcement under domestic Swiss law, because the athlete could never be a proper defendant. This would clearly be an absurd result. Furthermore, only by being made a party to these proceedings will Ullrich's basic rights be guaranteed. It is only through Article 282 of the UCI Rules that Ullrich is in a position to know about the appeal affecting his rights and obligations, to present his view of the facts and the law and to avail himself of all procedural rights. Accordingly, the Panel cannot adopt the narrow reading of Article 75 that Ullrich urges upon the Panel. Instead, the Panel holds that Ullrich is, in principle, a proper defendant in the case at hand.

2.2. "*National Federation*" / "*Body*"

Article 282 of the UCI Rules further provides that the appeal must be filed also "*against … the National Federation that made the contested decision and/or the body that acted on its behalf* ". In the Panel's understanding the term "National Federation" in Article 282 of the UCI Rules refers to the Swiss Cycling. In the case at hand, however, Swiss Cycling did not "*make*" the contested decision, since none of its association organs were involved in passing the Decision. Instead, Swiss Cycling has outsourced its (original) competence to deal with doping disputes between itself and its members to Swiss Olympic which in turn has entrusted the Disciplinary Chamber (an independent organ within Swiss Olympic) with this task. The organ acting "*on the National Federation's behalf* ", therefore, is the Disciplinary Chamber. Hence, the UCI was – in principle – correct in directing the appeal also against Swiss Olympic.

The question arises, however, whether or not the UCI has a protected legal interest to pursue the appeal against Swiss Olympic as well. In the case at hand Swiss Olympic has – from the outset – declared that it will not take an active part in these proceedings and that it considers itself bound by an award issued by CAS irrespective of the outcome of these proceedings. In other words, it is clear that Swiss Olympic has attorned to the jurisdiction of the CAS. Ullrich has no personal jurisdiction to object to the inclusion of Swiss Olympic as a defendant, and given Swiss Olympic's attornment, this Panel finds the question of whether Swiss Olympic is a proper defendant to be moot.

3. Ullrich's Resignation

Ullrich resigned his membership in Swiss Cycling on October 19, 2006. The question, therefore, arises whether or not Ullrich can still be considered a "*license-holder*" within the meaning of Article 282 of the UCI Rules.

The Panel agrees with the UCI's interpretation of the Swiss Supreme Court's judgment (Swiss Supreme Court's judgment ATF of September 1, 2009, 5A_10/2009), namely that it places no impediment against actions against former members of an association when there is an interest in doing so. Furthermore and more particularly, as noted above, the UCI Rules are applicable to these proceedings. The Panel will therefore address at first instance the competence of the UCI under the UCI Rules to pursue cases on appeal that were initiated against athletes following the resignation of their memberships. This is consistent with the UCI's submission, which submits that Article 1.1.004 of the UCI Rules is a complete answer to Ullrich's objections.

Contrary to Ullrich's assertion, the Disciplinary Chamber was correct to consider the issue through

the lens of Article 1.1.004 of the UCI Rules. It provides:

"*License holders remain subject to the jurisdiction of the relevant disciplinary bodies for acts committed while applying for or while holding a license, even if proceedings are started or continue after they cease to hold a license*" (See UCI Cycling Regulations, Article 1.1.004). [emphasis added]

The Disciplinary Chamber's view was that under this Article, proceedings could only be pursued against an athlete who resigned his license if those proceedings had been initiated prior to the resignation. This Panel disagrees. Article 1.1.004 states very clearly that proceedings can be "*started*" even "*after*" an athlete ceases to hold a license. This Panel sees no reason why Ullrich's resignation of his license would not fit within the category of circumstances where an athlete *"cease[s] to hold a license*". While the Disciplinary Chamber was correct that the latest version of the UCI Rules spells out with additional clarity the application of the anti-doping obligations to retired athletes, the fact of those amendments to the newest version of the UCI Rules does not negate the plain language of the applicable UCI Rules.

It was therefore, in principle, possible to initiate proceedings under the UCI Rules following Ullrich's resignation of his UCI license. As the UCI Rules are applicable, the UCI enjoys a right of appeal against the Decision (See UCI Rules, Article 281). Its competence to appeal and continue the proceedings against Ullrich derives from the UCI Rules. Moreover, the Panel takes note of the third paragraph of Article 283 of the UCI Rules, which expressly entitles the UCI on appeal to participate and "*demand that a sanction [be] imposed*". This is an additional basis for the UCI's competence to pursue the requests listed in its Statement of Appeal.

It is also open to the Panel for the purposes of determining the applicability of the UCI Rules in light of Ullrich's resignation to consider as a factual matter whether Ullrich's resignation was motivated by a desire to escape sanction. However, given the legal conclusions reached above, such an assessment is not required at this time.

4. Scope for Appeal Proceedings

Article R57 of the Code provides that *"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".*

Ullrich submits that under Article R57 of the Code, this Panel's right of review is limited to the matters at issue in the Decision – namely, the jurisdictional question upon which the Decision turned. Accordingly, Ullrich submits that should the Panel reverse the Decision, the case should be referred back to Swiss Olympic and its Disciplinary Chamber for further deliberation. Ullrich bases his reasoning on Article 75 of the Swiss Civil Code, according to which an appeal is limited in that it does not permit courts to replace the decisions of associations that were taken illegally – it requires that such decisions be sent back for reconsideration by the association, in order to protect the association's autonomy. By contrast, the UCI requests that the Panel consider and finally pronounce upon the merits of this case. According to the UCI, Article 75 of the Swiss Civil Code is no impediment to an association's providing more rights to its members: an association should be entitled to invest additional rights into a procedure which otherwise respects the precepts of Article 75 of the Swiss Civil Code. In other words, Article 75 of the Swiss Civil Code operates as a minimum guarantee of the rights of members of an association, and not as a straightjacket, within which an association and its members must operate. It follows, according to the UCI, that Article 75 of the Swiss Civil Code cannot be infringed if an arbitral tribunal adopts a new decision on appeal, insofar as the association has expressly authorized this in its rules. The UCI refers in this respect to the jurisprudence of the Swiss Supreme Court in which the latter has recognized, within the framework of Article 75 of the Swiss Civil Code, that an appeal body may adopt a full decision, even if the first level body has not taken a decision on the merits.

While it is open to the Panel to adopt the procedural path proposed by Ullrich, it is not necessary. First, the Panel notes that the appeal lodged by the UCI is not – strictly speaking – falling within the scope of application of Article 75 of the Swiss Civil Code, since – as mentioned previously – UCI is neither a member of Swiss Cycling nor of Swiss Olympic. Article R57 of the Code in the case at hand is, therefore, not limited by Article 75 of the Swiss Civil Code. Furthermore, the Panel notes that even if Article 75 of the Swiss Civil Code were applicable the fact that this provision provides for cassatory powers of the adjudicating body would not prevent this Panel from deciding the dispute on the merits. In the view of the Panel the main reason why Article 75 of the Swiss Civil Code confers only cassatory powers upon state courts when deciding on appeals against resolutions/decisions of an association is to protect the association's autonomy (Article 23 BV). The contents of this constitutional right is designed to protect the association – within certain boundaries - from all kinds of state interference (including

interference by state courts) with the association life (See Heini/Portmann/Seemann in Grundriss des Vereinsrechts, 2009, marg. no. 35). In the case at hand no such danger exists, since here a private arbitral tribunal is called upon to decide the dispute between the parties. Lastly, the Panel holds that the Swiss Federal Tribunal has been very clear about the jurisdiction of CAS panels operating under Article R57 of the Code. As the court found in the context of Article R57 of the Code, it is "*a characteristic of an appeal that the higher body may decide the merits itself*". As a policy matter, the decision by a panel to assess the merits, even if not considered at first instance, "is apt to facilitate quick disposition of disputes" (See generally, Case 4A_386/2010, *Valverde v. WADA, UCI and RFEC*, judgment of January 3, 2011 at 5.3.4).

Given the scope for proceedings provided by Article R57 of the Code, the Panel has concluded that for reasons of procedural economy it would be in the interests of all parties for this matter to be resolved without the need for further proceedings. Accordingly, having addressed the outstanding procedural issues in this case, and on the basis of the evidence submitted, the Panel will assess the substantive merits of this case.

B. Merits of the Case

1. UCI's Allegations of Doping Violations

The UCI alleges that Ullrich violated Article 15.2 of the UCI Rules, which prohibits the *"use or attempted use of a prohibited substance or a prohibited method*". In particular, the UCI alleges that Ullrich engaged in blood doping (a prohibited method) and used several prohibited substances, including growth hormones, IGF-1, testosterone patches (PCH), EPO and a masking substance referred to as "*magic power*" that is said to destroy EPO in urine samples.

The UCI also alleges that through the same actions, Ullrich violated Article 15.5 of the UCI Rules, which prohibits "*Tampering, or Attempted to tamper, with any part of Doping Control*".

2. Evidence in Support of the UCI's Allegations

The UCI has submitted a number of different pieces of evidence that allegedly show that Ullrich engaged in doping violations. Each of these pieces of evidence stem from the aforementioned 2004 Operation Puerto investigation. A short, non-exhaustive summary of that evidence is as follows:

- *Report No. 116. The UCI submitted Report No. 116. Report No. 116 is a report prepared by the Spanish Civil Guard dated June 27, 2006. The report describes the organization and operations of Dr. Fuentes' doping network, and describes with some detail the evidence recovered in connection with Operation Puerto. Section 9 of Report No. 116 references and summarizes the documents and physical evidence that the Spanish Civil Guard allege related to doping by Jan Ullrich.*

- *Documents Recovered from Operation Puerto and Other Sources. The UCI has offered into evidence documents obtained from the Spanish Civil Guard, which the Spanish Civil Guard seized or otherwise obtained as part of its Operation Puerto investigation or from other sources. These documents include: (1) Documents evidencing travel by Ullrich to Madrid for reasons that are not known to be related to cycling events. (2) Calendars seized from Dr. Fuentes that use a code to record the withdrawal of blood from athletes on specified dates, and inventories of fridges and freezers containing blood bearing the date of extraction – since the blood samples can be associated to particular individuals, read together the inventory and the calendar are a guide to the dates when Ullrich is alleged to have provided blood to Dr. Fuentes for storage. (3) Ullrich's bank statements that show a payment to Dr. Fuentes in 2004 in the amount of €25,003.20, and a second payment in 2006 to a numbered Swiss HSBC bank account in the amount of €55,000 which HSBC has confirmed was also associated with Dr. Fuentes during that time period.*

- *Analytic evidence. The UCI has submitted a 2007 report prepared by a Dusseldorf lab comparing DNA materials taken from Ullrich by the German police against nine so-called "Spanish" samples provided by the Spanish Civil Guard. The report, prepared by Dr. Dirk Porstendörfer, concluded that the samples provided by Ullrich matched the genetic materials provided by the Spanish Civil Guard with an extremely high degree of probability (one in six billion).*

In summary, the documentary evidence presented by the UCI shows that (1) Dr. Fuentes was engaged in the provision of doping services to athletes, (2) Ullrich travelled in the vicinity of Dr. Fuentes' operations on multiple occasions, and evidence in Dr. Fuentes' possession suggested that Ullrich was in personal contact with him on certain of those occasions, (3) Ullrich paid Dr. Fuentes very substantial sums of money for services that have not been particularized, and (4) a DNA analysis has confirmed that Ullrich's genetic profile matches blood bags that appear to have been for doping purposes found in the possession of Dr. Fuentes. The evidence has been obtained from multiple sources and is internally consistent despite differences in its provenance. The evidence is probative and directly related to the question of whether an antidoping violation has occurred.

3. Evidence in Support of the UCI's Allegations

Ullrich has not questioned the veracity of the evidence or any other substantive aspect of this case. Indeed, despite the fact that this appeal has been ongoing for well over twelve months and pleadings and other submissions and correspondence now extend to volumes of binders, not including the substantive evidence introduced by the UCI, Ullrich has maintained a steadfast focus on procedural objections to the exclusion of all other submissions. Ullrich's silence in this respect is both notable and surprising, given the vigour with which he has otherwise contested the UCI's allegations. Despite the Panel's surprise in this respect, it is of no consequence to its ultimate decision; the UCI rules do not contain a provision that would permit a negative inference to be drawn from efforts to avoid addressing the substance of an allegation of an antidoping rule violation (there are no provisions equivalent to Art. 3.2.4 of the current WADC in the 2004 version of the UCI Rules).

4. Conclusions on the Allegations

Given the volume, consistency and probative value of the evidence presented by the UCI, and the failure of Ullrich to raise any doubt about the veracity or reliability of such evidence, this Panel is satisfied beyond its comfortable satisfaction that Ullrich engaged at least in blood doping in violation of Article 15.2 of the UCI Rules.

C. Sanction

In its Appeal Brief UCI requests that Ullrich be sanctioned with "*a lifetime ineligibility in accordance with Article 261 of the anti-doping rules of the UCI.*" Ullrich on the contrary requests, should the Panel come to the conclusion that he committed a doping violation, that "*no earlier doping violation*" be taken into account.

1. Applicable Law

The 2004 iteration of the UCI Rules, applicable to these proceedings, were replaced on January 1, 2009 (the "*new UCI Rules*"). The new UCI Rules provide that cases brought after January 1, 2009, such as the present matter, are governed by the predecessor "*rules in force at the time of the anti-doping rule violation, subject to any application of the principle of lex mitior by the hearing panel determining the case*" (See Art. 373(a) of the new UCI Rules). On account of the operation of the principle of lex mitior, the Panel will apply the new UCI Rules should the latter be more advantageous for Ullrich.

2. Period of Ineligibility

2.1 First or Second Infraction?

Under the new UCI Rules an athlete's prior antidoping record is relevant to the time period in which he or she will be declared ineligible following an antidoping rule violation.

As noted above, the UCI has provided evidence that in 2002, Ullrich tested positive for amphetamines out of competition. The BDR Bundessportgericht entered a final judgment for this infraction, and Ullrich was suspended by the BDR Bundessportgericht for a six month period by a decision dated July 23, 2002. This decision was not appealed at the time, and the time-limit for any appeal has long expired. The question is, therefore, whether this original antidoping violation, which occurred before the WADC 2003 (and the UCI Rules implementing the WADC) entered into force, can be taken into account when determining the period of ineligibility under the UCI Rules applicable to the second infraction.

This issue is not explicitly addressed in the 2004 UCI Rules or the new version of the UCI Rules, where the period of applicable sanction is set out. However, the Panel notes that the 2009 version of the WADC, which are implemented by the new UCI Rules, gives certain guidance as to how certain pre-2009 WADC violations are to be treated when determining a sanction under the 2009 WADC (See Article 24.5 of the WADC, which concerns Specified Substances, and which as such is not relevant to the facts of this case). It is therefore clear from the 2009 WADC that in principle, pre-2009 violations of antidoping rules may be treated as prior violations for the purposes of determining a period of ineligibility under the 2009 WADC.

This issue has also received some attention in previous cases before the CAS.

In CAS 2006/A/1025, an athlete had committed an antidoping violation that the panel classified as having been committed with "*no significant fault or negligence*". The athlete had also committed a previous antidoping violation in 2003, prior to the promulgation of the original WADC. The panel in CAS 2006/A/1025 was obligated to assess whether the 2004 violation constituted a first offence for the purposes of assessing whether the athlete was a recidivist (which would have resulted in an additional period of ineligibility). The panel in CAS 2006/A/1025 found that the purpose of the sporting regulations under which the athlete had been sanctioned in 2003 and the applicable WADC were "*the same, i.e., the fight*

against doping in sports. To achieve this objective, the sanctions under both sets of rules are intended to deter athletes from the use of prohibited substances and prohibited methods… The Panel accepts the reasoning… that the fight against doping would be entirely thwarted if one were to ignore the existence of a first offence under the pre-WADC [rules] in setting the sanction for a second offence under the [current rules]. In both cases [the athlete] uses a Prohibited Substance. As the ITF correctly points out, it would be contrary to the spirit of the rules and would seriously undermine the fight against doping in sport if the 'slate were to be wiped clean' on entry into force of the [new rules]. The fight against doping must be a long term campaign if it is to succeed. The adoption of the [new rules] did not provide for an amnesty for all athletes previously sanctioned who commit a second offence" (See CAS 2006/A/1025, paras. 11.6.7 and 11.6.8).

In CAS 2008/A/1577, an athlete had abused marijuana – a "*Specified Substance*" – for non-performance enhancing purposes. The athlete had also tested positive for a performance enhancing steroid in 2001, prior to the entry into force of the original WADC. Given the 2001 violation, the panel found that the ingestion of marijuana "*must be considered a second offence. The fact that the applicable pre-WADC anti-doping rules at the time of the first offense may have provided for a more lenient sanction in the event of a second offence is of no relevance in adjudicating the [second offence]… The fact that [the athlete's] 2nd violation took place almost 6 years subsequent to the androstenedione offense has no relevance, therefore, for the qualification of the latter as a 2nd offense*" (See CAS 2008/A/1577, at paras. 56 and 59).

It is clear from the 2009 WADC and from prior decisions of the CAS that in principle, decisions issued prior to the creation of the WADC can be treated as first violations when assessing the period of ineligibility following an antidoping violation sanctioned under the current WADC or its equivalents.

The distinction in the case at hand is related to the substance of Ullrich's 2002 violation, where Ullrich was sanctioned for ingesting amphetamines out of competition. Since 2002 and the adoption of a single Prohibited List by WADA, amphetamines have been re-classified, such that their presence results in an antidoping violation only where they are found in an athlete's system in-competition. In short, were Ullrich to be found to have ingested amphetamines out of competition today, he would not have committed an anti-doping violation. It appears that the question that faces this Panel has not yet been considered: should a previous infraction, which has been finally determined by a sports arbitration tribunal, be treated as a first violation where the same conduct would not constitute a violation under existing antidoping rules?

This Panel is of the view that treating the decision of the BDR Bundessportgericht as it stands – in other words, as a first violation – without any examination of the underlying substance in determining the appropriate sanction in this case would not serve the ends of justice. Inattention on the part of the Panel to evolving scientific thinking about the nature of substances since the time of the BDR Bundessportgericht's decision, which have been reflected in updates to the Prohibited List, would result in the condemnation of prior conduct that is not itself condemnable under the current UCI Rules. In legal terms, periods of ineligibility involve the application of the substantive law, and the principle of lex mitior – applicable under the UCI Rules – requires that Ullrich benefit from the least lenient penalty applicable, even if enacted after the commission of the original offence (See in particular *Scoppola v. Italy (No. 2)*, European Court of Human Rights, Application no. 10249/03, at para. 106: *"a concensus has gradually emerged in Europe and internationally around the view that application of a criminal law providing for a more lenient penalty, even one enacted after the commission of the offence, has become a fundamental principle of criminal law*").

Separately, this Panel notes that if it were to accept the decision of the BDR Bundessportgericht as a first violation, it would be obligated to "*transpose*" this first antidoping violation into the categories of the UCI Rules in force in 2009. In other words, this panel would have to (re-)qualify the BDR Bundessportgericht's decision under the 2009 UCI Rules either as a St-, NSF- or RS-violation. Such a "*transposition*" would necessarily involve an examination of the substance of the BDR Bundessportgericht's decision. Moreover, such a "*transposition*" would require that this Panel make decisions about matters of substance for which it has not examined the underlying evidence. It would not be appropriate for this Panel to examine the substance of the BDR Bundessportgericht's decision for the purposes of "*transposing*" the award without also remarking that such a decision would not constitute a violation under the new UCI Rules.

2.2 Period of Ineligibility

Given the foregoing findings about the decision of the BDR Bundessportgericht, the present infraction is Ullrich's first antidoping violation. The old as well as the new UCI Rules provide that the mandatory sanction in the event of an antidoping violation is a two year period of ineligibility. Accordingly, it is the decision of this Panel that Ullrich is ineligible to participate in sports for a period of two years. Since the old UCI rules apply here in principle, there is no room for Article 305 of the (new) UCI Rules which

provides for a period of ineligibility from two to four years in case of aggravating circumstances.

2.3 Commencement of the Period of Ineligibility

According to Article 314 of the UCI Rules, where there has been no acceptance or acknowledgement of an athlete's culpability, periods of ineligibility are set to run from the date of a hearing in an antidoping case. The first instance hearing took place in 2009/2010. As a result, the question is whether this first instance hearing is the one from which the period of ineligibility is set to run. The Panel finds this not appropriate, since the first instance panel did not look at the merits of the case but dismissed the case for lack of competence. This Panel, however, is of the view that – in principle – the period of ineligibility should only start to run from such hearing date on which a first instance panel looked into the substance of the alleged doping offence. This hearing date is the one that took place on 22 August, 2011 (see above). In view of Article 314 of the UCI Rules, the Panel has decided to start the period of ineligibility on 22 August 2011.

2.4 Other Ancillary Orders

Article 313 of the new UCI Rules provides that in addition to a period of ineligibility, *"all other competitive results obtained from the date a positive Sample was collected… or other anti-doping rule violation occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified"*.

The evidence presented by the UCI shows that Ullrich's intensive involvement with Dr. Fuentes' doping program goes back to at least 2004, and likely substantially earlier. Although the date at which Ullrich's doping cannot be determined, there is clear evidence Ullrich was fully engaged with Dr. Fuentes' doping program by the spring of 2005.

In view of Article 313 of the new UCI Rules, this Panel disqualifies the results of Jan Ullrich from all sporting events in which he competed from May 1, 2005 until the time of his retirement.

3. Other Arguments and Prayers for Relief

The preceding discussions of the procedural questions and matters of substance may not purport and include every contention put forward by the parties. However, this Panel has carefully considered and taken into account in its discussions and subsequent deliberations all of the evidence and arguments submitted by the parties, even if there is no specific reference to those arguments in the above analysis. In conclusion the Panel finds that the present appeal is to be partially upheld. All other prayers of relief are dismissed.

Arbitration CAS 2010/A/2091
Dennis Lachter v. Derek Boateng Owusu
21 December 2011

Football; players' agent commission; *lis pendens*; no legal interest, no standing; *res judicata*; arbitral character of awards issued by the Israeli Football Association's Arbitration Institute; national or international character of the dispute; statutory arbitration clause

Panel:
Prof. Massimo Coccia (Italy), President
Mr. Tal Lavie (Israel)
Mr. Dirk-Reiner Martens (Germany)

Relevant facts

Mr Dennis Lachter (the "*Appellant*" or the "*Agent*") is a players' agent licensed by and registered with the Israeli Football Association (IFA).

Mr Derek Boateng Owusu (the "*Respondent*" or the "*Player*") is a football player of Ghanaian nationality. From July 2006 to January 2009 he played for Beitar Jerusalem FC in the Israeli Premier League. In the seasons 2009/2010 and 2010/2011 the Respondent played for Getafe CF – a club registered with the Spanish Football Association – in the Spanish football league *Liga*. The Respondent is also a player of the Ghanaian national team, with which he participated in the FIFA World Cup in 2006 and 2010.

On 19 February 2006, while the Respondent was playing for the Swedish club AIK Football AB of Solna ("*AIK Solna*"), the parties signed a representation contract (the "*Contract*") for two years, from 19 February 2006 to 19 February 2008, whereby Mr Lachter became the agent of Mr Boateng Owusu.

The parties agreed on an exclusivity clause, stating that *"the placement rights be transferred exclusively to the player's agent* [*i.e.* the Appellant]*"* and that *"no other person or entity other than the Agent shall have the same rights in representing the Player"* (article 3 of the Contract).

Article 2 of the Contract provided that the Agent's remuneration *"as a result of the employment contract negotiated by the player's agent"* had to be calculated as follows: 10% of the Player's salary for a salary up to 200,000 USD; 15% for a salary between 250,000 USD and 500,000 USD; 20% for a salary between 500,000 USD and 1,000,000 USD; 25% for a salary over 1,000,000 USD. In addition, the Player had to pay the Agent 50% of any remuneration received on account of a possible sponsorship or advertising contract.

The Parties also declared, in Article 4.1 of the Contract, to be *"subject to the FIFA Licensed Players' Agents Regulations (hereinafter referred to as the FIFA Regulations)"*.

Article 4.28 of the Contract set forth the following dispute resolution clause: *"In case the disputes and differences are not settled by means of negotiations, the parties shall have the right to address to competent FIFA bodies. (All in accordance with the provisions stipulated under Article 22 of the FIFA Regulations)"*.

Article 5 of the Contract, entitled "Mandatory legislation", set forth the following clause: *"The parties agree to adhere to the public law provisions governing job placement and other mandatory national legal provisions in force in the country concerned as well as in international law and applicable treaties"*.

On 16 July 2006, AIK Solna and the Israeli club Beitar Jerusalem FC ("*Beitar FC*") signed an agreement concerning the transfer of the Player to Beitar FC. On the same date the Respondent signed a termination agreement with AIK Solna.

On 30 July 2006, the Respondent signed a three-year employment contract with Beitar FC. The contract entitled the Respondent to a basic salary for each season, to be paid in twelve (12) monthly instalments. In the contract it was further provided that each instalment had to be paid *"until the 15th of the month following the month, for which the payment is made"* and that the first instalment *"s hall be paid for July 2006"*. The contract contained no reference to the Appellant's involvement in the negotiations between the Respondent and Beitar FC.

On 3 March 2007, the Agent filed with the District Court of Tel Aviv-Jaffa (Israel) an application for an

interim attachment order against the Player for the alleged unpaid commission fees. Such attachment was first granted and subsequently revoked.

On 4 March 2007, the Agent submitted a claim to the Players' Status Committee of FIFA (the "*FIFA-PSC*"), requesting it to order the Respondent to *"fulfil all his contractual obligations, under the Representation Contract"* and to pay him the sum of […] USD for commission fees, penalty and interest.

On 21 June 2007, the Player lodged a claim with the IFA Arbitration Institute, asking for declaratory relief ascertaining that he did not owe anything to the Agent.

On 3 September 2007, the first arbitral hearing was held in Israel before a sole arbitrator appointed in accordance with IFA arbitration rules (the "*IFA Arbitrator*"). The Agent's counsel appeared at the hearing asking for an extension of the time limit to file the statement of defence. The extension was granted by the IFA Arbitrator and a new hearing was thus fixed for 16 October 2007.

On 10 September 2007, the Player filed an answer with the FIFA-PSC contesting the jurisdiction of FIFA to rule on the dispute. The Player based his objection on the basis that the same dispute was pending before the competent IFA arbitral tribunal in Israel, and that the dispute was a "*national dispute*" in accordance with article 22.1 of the 2001 edition of the FIFA Players' Agent Regulations (the "*FIFA Agents Regulations*") providing that in *"the event of disputes between a players' agent and a player, a club and/or another players' agent, all of whom are registered with the same national association (national disputes), the national association concerned is responsible. It is obliged to deal with the case and pass a decision, for which service it is entitled to charge an appropriate fee"*.

On 16 October 2007, a second hearing was held before the IFA Arbitrator. The Agent decided not to appear, communicating his decision via fax to the IFA Arbitrator on the day of the hearing. In the same communication the Agent contested the jurisdiction of the IFA Arbitration Institute.

On 22 October 2007, the IFA Arbitrator issued an arbitral award retaining his jurisdiction and establishing that *"the player owe[d] the agent nothing"* as the Agent *"never took an active part in the deal transferring the player to Beitar"* and was thus *"not entitled to receive any commission"*.

On 8 November 2007, the Agent appealed the IFA Arbitrator's decision before the Tel Aviv-Jaffa District Court (Israel), requesting that the IFA Arbitrator's award be set aside.

On 21 November 2007, the Agent filed with the FIFA-PSC a reply to the Respondent's answer contending, *inter alia*, that: a) the claim before the FIFA-PSC had been filed by him four months prior to the claim lodged by the Player with the IFA Arbitration Institute; b) in the Contract (at article 4.28) the dispute settlement clause explicitly made reference to *"FIFA bodies"*; c) the IFA Arbitrator had no authority to rule upon the matter; and d) the proceedings before the IFA Arbitrator had taken place without the participation of the Agent.

On 7 February 2008, the Player submitted to the FIFA-PSC a rejoinder maintaining that the IFA arbitral tribunal was the convenient forum for deciding the dispute and that, in the meanwhile, the IFA Arbitrator had issued an award in his favour.

On 11 January 2009, the District Court of Tel Aviv-Jaffa dismissed the Agent's application to set aside the IFA award, finding that the IFA Arbitrator *"was competent, and even obliged, to adjudicate on the [Player]'s claim against the [Agent]"*. The District Court affirmed the jurisdiction of the IFA Arbitrator on the basis of the Contract, of Israeli law, of the IFA regulations and of the FIFA Agents Regulations.

On 22 February 2009, the Agent filed with the Israeli Supreme Court an application for leave to appeal against the decision issued on 11 January 2009 by the District Court of Tel Aviv-Jaffa.

On 26 June 2009, the Single Judge of the FIFA-PSC dismissed the Agent's claim. On 6 July 2009, the parties were notified of the operative part of the decision.

On 4 November 2009, the Israeli Supreme Court dismissed the Agent's application for leave to appeal against the decision of the Tel Aviv-Jaffa District Court, stating that the IFA Arbitrator did possess jurisdiction. The IFA Arbitrator's award thus became final in the Israeli legal order.

On 17 March 2010, FIFA communicated to the parties the grounds of the decision adopted by the Single Judge of the FIFA-PSC. The Single Judge examined first of all his jurisdiction to rule upon the dispute. The relevant part of the decision reads as follows: *"Turning his attention to the question of competence, the Single Judge noted that the [Player] had sought to argue that FIFA should not be competent to hear the present matter since it had already been submitted to an arbitration tribunal in Israel. In this respect, taking into account that the [Agent]*

had stated that his claim had been lodged with FIFA before the matter was referred to the relevant instance in Israel and that the aforementioned allegation had not been denied by the [Player] during the course of this proceeding, as well as taking into account art. [4.]28 of the Contract which explicitly allowed the parties to have recourse to FIFA's decision-making bodies in case of a dispute between them, the Single Judge decided that he was competent to decide on the present matter. This established, the Single Judge recalled that in accordance with the provisions set out by both the 2001 and 2008 edition of the FIFA Players' Agents Regulations, FIFA has jurisdiction on matters relating to licensed players' agents, i.e. on those individuals who hold a valid players' agent license issued by the relevant member Association. Consequently, and since the present matter concerned a dispute between a players' agent licensed by the Israel Football Association and a Ghanaian player, regarding an alleged outstanding commission, the Single Judge held that he was thus competent to pass a decision in the case at hand which had an international dimension".

On the merits, the Single Judge of the FIFA-PSC considered that (i) *"he was not satisfied that the evidence provided by the Claimant was sufficient to corroborate the fact that his involvement was crucial to the signing of the employment contract in question"*, (ii) *"nor had it been proven that another agent had been involved in the negotiations leading to the signature of the employment contract* [and] *it could therefore not been concluded that the Respondent had breached any of the terms of the representation contract"*, and (iii) *"the percentage of commission due was clearly abusive since it disproportionately favoured the Claimant to the detriment of the Respondent"*.

As a consequence, the Single Judge of the FIFA-PSC rejected on the merits the Agent's claim and ordered him to pay to the Player the costs of the proceedings.

On 7 April 2010, pursuant to Article R47 of the Code of sports-related arbitration (the "*CAS Code*"), the Agent filed an appeal with the CAS to challenge the decision adopted by the Single Judge of the FIFA-PSC on 26 June 2009 and notified with grounds to the parties on 17 March 2010.

On 12 August 2010, the CAS Court Office communicated to the parties the Panel's decision to grant the Appellant the possibility to comment on the issues of *res judicata* and FIFA's jurisdiction, raised by the Respondent in his Answer filed on 1 July 2010.

On 15 October 2010, the CAS Court Office communicated to the parties the Panel's decision to bifurcate the case and to decide on a preliminary basis the issues of *res judicata* and FIFA's jurisdiction. By the same communication, the parties were also asked to file a further written submission to state their opinion as to whether the IFA award would be recognizable or not in Switzerland under Swiss law and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the "*New York Convention*").

On 31 January 2011, the CAS communicated to the parties the Panel's decision to hold a hearing on the preliminary issues. The hearing took place in Lausanne on 8 April 2011.

Extracts from the legal findings

A. The preliminary objections raised by the Respondent

The essence of the Respondent's preliminary objections is that the CAS may not entertain the merits of this case because the same matter has already been heard and decided by an Israeli arbitral tribunal with a binding award which has been confirmed by the competent Israeli state courts and has thus become final. It is a typical *res judicata* exception.

In addition, the Respondent argues that the FIFA Single Judge erred in hearing and adjudicating the case because it should have deferred to the Israeli arbitral tribunal, either because it did not have jurisdiction in the first place or because, if it did have a parallel jurisdiction, it should have declined to render a decision once the Israeli arbitrator had rendered his award.

The Panel will address the issue of *res judicata* first because, should such claim be upheld, there would be no need to ascertain whether the FIFA Single Judge had to decline to adjudicate the matter.

As a preliminary consideration, the Panel notes that it is discussed in the legal literature whether a well-founded exception of *res judicata* implies the lack of jurisdiction or the inadmissibility of the claim. In either case, the practical result would be the same, as the Panel would be prevented from dealing with the merits of the case. Indeed, in the *Final report on res judicata and arbitration* of the International Commercial Arbitration Committee of the International Law Association ("*ILA*"), the following can be read: *"In this respect, the Committee does not express an opinion as to the question whether preclusive effects of a prior arbitral award go to jurisdiction or to admissibility. Jurisdictions give different answers to this question and the Committee prefers to leave this question to the applicable law. On the other hand, the question is to a large extent moot since under both characterizations a preclusion defense is to be raised early in proceedings"* (ILA, International Commercial Arbitration Committee, Toronto Conference [2006], para. 68, in *www.ila-hq.org/en/committees/index.cfm/cid/19*).

The Panel notes that in the well-known *Fomento* judgment of 14 may 2001 the Swiss Federal Tribunal appears to make reference to *res judicata* as a matter of jurisdiction (*"compétence"* in French) rather than of admissibility: *"Quant à l'autorité de chose jugée, ce principe interdit au juge de connaître d'une cause qui a déjà été définitivement tranchée; ce mécanisme exclut définitivement la compétence du second juge"; freely translated: "With regard to res judicata, this principle precludes a judge from entertaining a case that has already been finally decided; such mechanism definitively excludes the jurisdiction of the second judge"* (ATF 127 III 279, at 283).

However, in a judgment of 3 November 1995, the Swiss Federal Tribunal appears to make reference to *res judicata* as an exception rendering the claim inadmissible (*"unzulässig"* in German) rather than depriving the adjudicating body of jurisdiction: *"die Klage für unzulässig zu erklären ist, wenn der Anspruch bereits rechtskräftig beurteilt worden ist";* freely translated: *"the action must be declared inadmissible if the claim has already been decided in a legally binding manner"* (ATF 121 III 474, at 477).

In view of the above, the Panel – also for the sake of simplicity – will leave this theoretical issue open throughout the award, since there is no need to address it. As said, the practical consequences are the same in either case: if the Panel ends up sustaining the *res judicata* objection, it would be precluded from entering into the merits of the present dispute, regardless of a qualification of the decision in terms of lack of jurisdiction or in terms of inadmissibility of the claim.

As a further preliminary consideration, the Panel observes that the issue of *lis pendens*, to which the parties also made some reference in their submissions, is not relevant in the present case as there is no parallel case still pending. Once the parallel case ends with a final award the issue centres only on *res judicata* (see Kaufmann-Kohler/Rigozzi, *Arbitrage international – Droit et pratique à la lumière de la LDIP*, 2nd ed., Bern 2010, p. 262). Therefore, it is irrelevant that the FIFA-PSC proceedings started before the IFA arbitration proceedings and that there were for some time two parallel proceedings, given that the Israeli award was pronounced and became final long before the beginning of this CAS arbitration.

As a final preliminary consideration, the Panel must address the counter-exception raised by the Appellant, who argues that the Respondent is estopped from raising the *res judicata* exception because he did not appeal the part of the FIFA Single Judge's decision that examined and discarded the *res judicata* exception.

In the Panel's opinion, the Appellant's argument is flawed. Indeed, given that the FIFA-PSC Single Judge ruled on the merits of the case in favour of the Player, the latter had no standing to appeal such decision because he had no legal interest in doing so. It was (and is) in the Player's interest that the Single Judge's decision be confirmed; hence, it would have been pointless to appeal against it. The CAS has already clarified that if a party does *"not have a cause of action or legal interest ('intérêt à agir') to act against the Appealed Decision [such party] would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing ('pas d'intérêt, pas d'action')"* (CAS 2009/A/1880-1881, at para. 152 *et seq.*). In such a situation, if the Player had filed an appeal against the decision of the Single Judge of the FIFA-PSC the Panel would have had to declare such appeal inadmissible for lack of legal interest and standing to appeal.

Consequently, the Panel holds that the Respondent has rightfully raised the *res judicata* exception before the CAS. This is, in fact, a preliminary exception which a party has always the right to invoke, given that it tends to protect a fundamental principle pertaining to Swiss procedural public policy.

B. Applicability of the *res judicata* principle

The Panel has no doubt, and it is common ground between the parties, that the merits of the dispute before it – does the Player owe money or not to the Agent on the basis of the Contract in relation to the Agent's alleged work in promoting the Player's transfer to and employment with Beitar FC? – were already litigated by the same parties in Israel and dealt with and adjudicated by an Israeli arbitral tribunal.

In other words, these arbitral proceedings involve the same subject matter, the same legal grounds and the same parties as the Israeli arbitral proceedings terminated with the award issued on 22 October 2007. The Panel thus finds that the so-called "*triple identity*" test – used basically in all jurisdictions to verify whether one is truly confronted with a *res judicata* question (cf. ILA, International Commercial Arbitration Committee, Berlin Conference [2004], *Interim Report: "Res Judicata" and Arbitration*, p. 2, in *www.ila-hq.org/en/committees/index.cfm/cid/19*) – is indisputably met.

It is also undisputed that the Appellant did not succeed in his attempts before the Israeli courts to invalidate the IFA Arbitrator's award. Indeed, the evidence before this Panel proves that the competent Israeli state judges – the District Court of Tel Aviv-Jaffa and the Supreme Court – ascertained and declared the

effectiveness and validity of that arbitral award under Israeli law, stating that the IFA arbitrator did have jurisdiction and rejecting the Appellant's request to set aside the award.

Accordingly, the IFA Arbitrator's award of 22 October 2007 is final and binding under Israeli law; in other terms it is *res judicata* in the Israeli legal system. As a consequence, the crucial issue to be solved by this Panel is whether, as an arbitration panel sitting in Switzerland, it must also consider that foreign award as *res judicata*. If the answer is in the affirmative, the Panel would be precluded from adjudicating again the same matter, given that the principle of *res judicata* is a fundamental principle of Swiss procedural public policy whose violation would yield the nullity of the award (see the decision of the Swiss Federal Tribunal of 13 April 2010, 4A_490/2009, which set aside a CAS award for violation of the *res judicata* principle).

In order to consider the IFA Arbitrator's award as *res judicata*, the Panel must first check whether such award is recognizable in Switzerland. Indeed, as the Swiss Federal Tribunal has stated, *"le principe de la chose jugée* [ne s'applique] *qu'à l'égard d'un jugement étranger susceptible d'être reconnu en Suisse"* (ATF 127 III 279, at 285; freely translated: *"the principle of res judicata* [is] *only applicable if the foreign judgment could be recognized in Switzerland"*).

Pursuant to Article 194 PILA, the recognition and enforcement of foreign arbitral awards are governed by the New York Convention. Given this direct reference by Swiss law to the New York Convention, the latter's provisions apply vis-à-vis any other country. In any event, Israel has been a party to the New York Convention since 7 June 1959.

In order to recognize a foreign award under the New York Convention, the first element to check is whether the decision under scrutiny is a true "arbitral award". On the basis of the evidence before it, the Panel finds that the proceedings before the IFA Arbitrator must be considered as true arbitral proceedings.

The Panel notes that throughout the whole litigation in Israel – during the arbitration proceedings first and during the judicial proceedings later – the Appellant never raised any objection as to the arbitral character of the proceedings administered by the IFA Arbitration Institute (he did raise objections as to the jurisdiction of the IFA Arbitration Institute, but this is another issue altogether). Even more significantly, the Appellant did not raise any such objection during these CAS proceedings and always made reference in all his written submissions to the IFA Arbitrator's award as a true arbitral award issued by a true arbitral tribunal.

Only during the CAS hearing, for the first time, the Appellant raised some doubts on the IFA Arbitration Institute and asserted that there is no certainty that the IFA Arbitrator's decision is a true arbitral award. The Panel holds that, pursuant to Article R56 of the CAS Code, this argument was belatedly raised and is thus inadmissible. In any event, the Panel is of the view that, even if the argument had been timely submitted, it would not be supported by the evidence on file.

Indeed, as the Appellant acknowledges in its submission of 12 June 2011, the IFA Statutes provide that the Arbitration Institute is independent in its decisions, provide for a mechanism to appoint the arbitrators for the individual cases (the appointing authority being the IFA presidency), provide that the appointed arbitrators are subject to the arbitration laws of Israel and provide the Arbitration Institute regulations to establish a procedure to solve disputes between players and players' agents. Furthermore, and decisively, two Israeli state courts have thoroughly scrutinized the IFA Arbitrator's award and have unequivocally treated such decision as a true arbitral award and the IFA Arbitration Institute's proceedings as genuine arbitral proceedings governed by Israeli arbitration laws. In particular, the Israeli Supreme Court has *"not found that there were significant procedural defects in the arbitration proceedings"* (see last page of the translated Israeli Supreme Court's judgment of 4 November 2009).

The Appellant has not submitted to the Panel any proof – for instance, an expert opinion on Israeli law – which could contradict the above significant evidence. The Panel thus concludes that the IFA Arbitration Institute administers true arbitral proceedings and the IFA Arbitrator's decision dated 22 October 2007 is a fully fledged arbitral award, capable of being recognized and enforced outside of Israel pursuant to the New York Convention.

Parenthetically, the Panel notes that, contrary to what both parties seemed to imply in their submissions, the same may not be said for the FIFA-PSC proceedings and decisions. In fact, as the CAS noted on several occasions, the proceedings administered by the FIFA adjudicating bodies are not true arbitral proceedings but rather "*intra-association*" proceedings (CAS 2009/A/1880-1881, para. 50), and the decisions issued by those bodies are not arbitral awards but decisions of a Swiss private association (CAS 2003/O/460, para. 5.3). This has been confirmed by the Swiss Federal Tribunal, which has often made reference to any FIFA-PSC decision as *"a decision of a Swiss association"* (Judgment of 13 April 2010, 4A_490/2009).

C. The jurisdiction of the IFA Arbitrator

The crux of the Appellant's case is the alleged lack of jurisdiction of the IFA Arbitrator. The Appellant argues that the Contract provided solely for the jurisdiction of FIFA bodies and, indirectly, of the CAS as the appellate instance vis-à-vis the FIFA bodies.

The Appellant relies on Article 4.28 of the Contract, which sets forth the following dispute settlement clause: *"In case the disputes and differences are not settled by means of negotiations, the Parties shall have the right to address to competent FIFA bodies. (All in accordance with the provisions stipulated under Article 22 of the FIFA Regulations)"*.

The Panel notes that two important elements can be ascertained from the very text of Article 4.28 of the Contract. First, the jurisdiction of FIFA bodies is not indicated as a mandatory exclusive jurisdiction, given that the parties are attributed "*the right*" rather than the duty to bring the dispute before FIFA. Second, the right to address the FIFA bodies is qualified by the necessary compliance ("*all in accordance*") with Article 22 of the FIFA Agents Regulations. This means, in the Panel's view, that the right granted by Article 4.28 of the Contract may be lawfully exercised only if it is in compliance with Article 22 of the FIFA Agents Regulations. This construction is strengthened by the fact that, pursuant to Article 4.1 of the Contract, the Parties have contractually agreed that their relationship is subject to the FIFA Agents Regulations.

Article 22 of the FIFA Agents Regulations – the 2001 edition, which is applicable in the present case given that the dispute arose in 2007, before the entry into force of the 2008 edition – so provides:

"1. In the event of disputes between a players' agent and a player, a club and/or another players' agent, all of whom are registered with the same national association (national disputes), the national association concerned is responsible. It is obliged to deal with the case and pass a decision, for which service it is entitled to charge an appropriate fee.

2. Any other complaint not covered by par. 1 shall be submitted to the FIFA Players' Status Committee".

The Panel observes that Article 22 of the FIFA Agents Regulations confers mandatory jurisdiction on national federations whenever disputes arise between individuals or entities that are registered with the same national federation. Those are defined as "*national disputes*". All other disputes are considered as international disputes and are residually attributed to the jurisdiction of the FIFA-PSC. Therefore, the only relevant criterion is the common registration of the disputing parties with the same national federation; nationality, domicile or other criteria are utterly irrelevant under Article 22. Accordingly, in the present case the fact that the Player is of Ghanaian nationality or has been playing with the Ghana national team is immaterial.

In the Panel's view, the pertinent point in time to establish whether a dispute is national or international is necessarily the moment when the dispute arises, that is, more precisely, the moment when a claim by either party is first filed. This occurred in March 2007, when the Agent filed his claim with the FIFA-PSC against the Player. At that time, both the Agent (who had received his agent's licence from the IFA) and the Player (who had signed a contract with the Israeli club Beitar FC) were undoubtedly registered with the IFA. The Panel does not share the Appellant's view that the relevant moment in time would rather be when the Contract was signed – with the consequence that, as the Player was registered at that time with the Swedish federation, the dispute would be "*international*" and the FIFA-PSC would have jurisdiction – because (i) the text of Article 22.1 of the FIFA Agents Regulation clearly makes reference to the moment when a dispute arises (*"In the event of disputes (…)"*), and (ii) it is a general procedural principle that jurisdictional issues must be addressed taking into account the moment when a claim is first filed.

Accordingly, the Panel finds that, when the present dispute arose, Article 22 of the FIFA Agents Regulations pointed to the IFA as the organization having the authority to solve the dispute. The Panel observes, however, that this would not have been enough in and of itself if the IFA did not have a dispute settlement system in place and if the parties were not bound to it. In fact, Article 22 requires all national federations to establish such a dispute settlement system but, if the competent federation has not established it, the parties would necessarily have to submit their complaint to the FIFA-PSC even in case of a national dispute (as it would be under Article 22.2 a *"complaint not covered by par. 1"*).

The Panel has already noted that the IFA did put in place an arbitration mechanism to deal with national disputes and thus did comply with Article 22 of the FIFA Agents Regulations. Indeed, Article 14, paras.1, 2 and 3, of the Israeli Agents Regulations reads as follows (as translated from Hebrew):

"14.1 Any disagreement or dispute between a players' agent and a player, or between a players' agent and a club or

another players' agent (…) operating under the auspices of the Association [IFA] and which concerns their activities as players' agents shall be referred to the Arbitration Institute for resolution. (…)".

"14.2 The obligation to refer the dispute to arbitration is mandatory, and arbitration proceedings shall be conducted in accordance with all the provisions contained in the Arbitration Institute's articles".

"14.3 Any disagreement or dispute as stated in paragraph 14.1 above concerning an international transfer, shall be adjudicated by FIFA's Player's Status Institute, unless all the parties to the dispute or disagreement are registered with and/or operate under the auspices of the Association [IFA], in which case the matter shall be referred to the [IFA] Arbitration Institute for determination".

The above provisions clearly set forth an arbitration clause in favour of the IFA Arbitration Institute when all the parties are registered with the IFA. As already stated, it is undisputed that at the time of the dispute both the Player and the Agent were registered with the IFA. As another CAS panel has clearly stated, when an individual such as a player or an agent registers with a national federation *"by his deliberate act of registering, he has contractually agreed to abide by the statutes and regulations of the* [national federation]*"* thus pledging to comply with an arbitration clause included therein (CAS 2007/A/1370-1376, para. 91). This is in line with the established case law of the Swiss Federal Tribunal, which has considered the arbitration clauses contained in the statutes of sports associations to be valid (see e.g. Judgment of 9 January 2009, 4A_460/2008, para. 6.2, and the previous jurisprudence quoted therein).

Accordingly, the Panel finds that both the Appellant and the Respondent were contractually bound to arbitrate their dispute before the IFA Arbitrator appointed in accordance with the rules of the IFA Arbitration Institute. In other words, the Panel finds that the IFA Arbitrator did have jurisdiction to entertain the said dispute and adjudicate the parties' claims. The Panel is comforted in this finding by the fact that both the District Court of Tel Aviv-Jaffa and the Israeli Supreme Court expressly held that the IFA Arbitrator lawfully retained his jurisdiction.

The Panel notes that the Appellant also argued that jurisdiction could not be conferred by the parties upon the IFA Arbitration Institute because the IFA Arbitrator's award could not enjoy the enforcement mechanism provided by FIFA. The Panel cannot concur with this argument. First, concerns about the possibility to enforce a decision do not change the substance of the provisions which confer jurisdiction. Second, the IFA Arbitrator's award, being a normal arbitral award, is easily enforceable (like any commercial arbitral award) in any country which is a party to the New York Convention. Finally, given that the IFA Arbitration Institute's jurisdiction is recognized by FIFA rules, it is possible that FIFA would provide its mechanisms in aid of enforcement if so requested.

In conclusion, the Appellant's submission that the award is not recognizable in Switzerland because the IFA Arbitrator had no jurisdiction fails.

D. Possible recognition under Article V, para. 1, of the New York Convention

Article V, para. 1, of the New York Convention reads as follows:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

The Appellant argues that the IFA award is not recognizable in Switzerland on the basis of Article V, paras. 1(b) and 1(d), of the New York Convention. The Appellant contends, in reference to lit. (b), that the IFA Arbitrator decided *ex parte* without examining the Appellant's evidence on the merits of the case and, in reference to lit. (d), that the composition of the IFA arbitral tribunal and the arbitral procedure adopted by the latter were not in accordance with the agreement of the parties.

With respect to Article V, para. 1(b) of the New York Convention, the Panel notes that the Appellant was given ample opportunity by the IFA Arbitrator to present his case on the merits, even postponing the deadline to file his submission and the hearing date. It is clear from the IFA Arbitrator's award that, in such arbitral forum, the Appellant chose (i) to defend himself only on a procedural basis, (ii) not to submit any evidence or arguments on the merits, and (iii) not to attend the hearing. Accordingly, on the basis of the evidence on file, the Panel finds that the Appellant was given proper notice of the appointment of the arbitrator and of the arbitration proceedings and was given ample opportunity to present his case. This Appellant's argument based on Article V, para. 1(d) of the New York Convention thus fails.

Then, the Panel observes that both Appellant's contentions based on Article V, para. 1(d), of the New York Convention unequivocally rest on the assumption that the parties had not agreed to refer their dispute to the IFA Arbitration Institute. However, the Panel found that the IFA Arbitration Institute did have jurisdiction based on the agreement of the parties.

As a result, the Panel finds that the composition of the IFA arbitral tribunal (*i.e.* the appointment of a sole arbitrator) and the arbitral procedure followed by the IFA Arbitrator were in accordance with the agreement of the parties. Indeed, Article 14.2 of the Israeli Agents Regulations, which has been contractually binding for both parties since the respective moments when they deliberately registered with the IFA, provide that *"arbitration proceedings shall be conducted in accordance with all the provisions contained in the Arbitration Institute's articles"*. The Panel observes that this is what normally happens in arbitration when an arbitration institution is chosen: the parties are automatically bound to follow the procedural rules of that arbitration institution.

The Panel remarks that the Appellant does not contend that the IFA Arbitration Institute did not compose the arbitral authority in accordance with its own rules or that the IFA Arbitrator did not follow the IFA Arbitration Institute's procedural rules. The Appellant rather complains about the non-compliance of the arbitral authority and the arbitral procedure with the FIFA-PSC rules, resting on the underlying premise that the parties had agreed to submit the dispute to the FIFA-PSC and not to the IFA Arbitration Institute. As the premise is fallacious, the Appellant's argument based on Article V, para. 1(d) of the New York Convention is bound to fail.

E. Possible recognition under Article V, para. 2, of the New York Convention

Article V, para. 2, of the New York Convention sets forth further reasons why an arbitral award may not be recognized:

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country".

The Appellant did not invoke Article V, para. 2 of the New York Convention at all. The Panel notes, however, that the requirements set forth by Article V, para. 2, must be checked *ex officio*.

As to lit. (a), the Panel notes that in Switzerland all matters having a pecuniary character, such as the present one, are capable of being solved through arbitration (Article 177.1 PILA).

As to lit. (b), the Panel cannot see how the recognition and enforcement of the IFA Arbitrator's award, which has stated that the Player owes no money to the Agent, could in any possible way breach Swiss public policy.

As a result, Article V, para. 2 of the New York Convention might not impede the recognition of the IFA Arbitrator's award in Switzerland.

F. The letter allegedly signed by the Player on 2 June 2008

The Appellant also argues that the Panel should disregard the IFA Arbitrator's award, and should thus reject the *res judicata* exception, because the Respondent signed a letter on 2 June 2008 by which he recognized that he owed the Agent […] USD as commission fee for his transfer from AIK Solna to

Beitar FC. In the Appellant's view, this commitment was undertaken by the Player after the publication of the IFA arbitral award (which is dated 22 October 2007) and, therefore, prevails over it.

The Panel must point out that it has some doubts as to the authenticity of such letter as, strangely, the Appellant never mentioned it in his submissions to the FIFA-PSC after 2 June 2008. In any event, the Panel need not decide on the authenticity of such letter. Indeed, even if it were authentic, it could only be relevant to the merits of the case, but it is not relevant at this preliminary stage and it cannot invalidate the procedural exception of *res judicata*. Indeed, in the letter the IFA Arbitrator's award is not even mentioned and there is no language which could imply that the Player waived his rights deriving from the award; in other words, the IFA Arbitrator's award maintains its full binding force vis-à-vis the parties to the arbitration.

Accordingly, the Panel holds that the letter is simply a piece of evidence which perhaps could be relevant to decide whether the Player owes some money to the Agent in connection with his transfer to Beitar FC; however, as already pointed out, due to *res judicata* the Panel may not adjudicate the merits of this case and, thus, may not evaluate the evidentiary value and the relevance of such letter.

G. Conclusion

In conclusion, the Panel has found that the arbitral award issued by the IFA Arbitrator is recognizable in Switzerland and, therefore, it represents a *res judicata* which prevents the Panel from adopting another decision in the same matter.

It follows that there is no need for the Panel to address the issue whether the FIFA-PSC could perhaps have a parallel jurisdiction or whether it had no jurisdiction at all. Indeed, once the Panel has found that the IFA Arbitrator's award must be considered as *res judicata* in Switzerland, and the Appellant's claim must thus be dismissed, this becomes a moot issue which the Panel need not adjudicate.

For the above reasons, the Panel concludes that it may not entertain the claim filed by the Appellant and must decline to decide upon the merits of the present case.

All other arguments or requests or prayers for relief submitted by the parties are hereby rejected.

Arbitration CAS 2010/O/2132
Shakhtar Donetsk v. Ilson Pereira Dias Junior
28 September 2011

Football; contract of employment between a player and a club; validity of an 'extension clause' providing for an extension of the contract; breach of contract by the player without just cause; liquidated damages clause; compensation or 'set off' of claim between an employer and an employee in an employment relationship; compensation for termination

Panel:
Mr. José Juan Pintó Sala (Spain), President
Mr. Michele Bernasconi (Switzerland)
Mr. Rui Botica Santos (Portugal)

Relevant facts

FC Shakhtar Donetsk ("*Shakhtar*" or the "*Claimant*" or the "*Club*") is a football club with seat in Donetsk (Ukraine), affilliated to the Football Federation of Ukraine.

Mr. Ilson Pereira Dias Junior (the "*Player*" or the "*Respondent*") is a Brazilian professional football player.

On 28 July 2007 the Player was transferred from São Paulo Futebol Clube ("*São Paulo*") to Shakhtar in exchange of EUR 10.000.000.

On the same date, the Player and Shakhtar signed an employment agreement (the "*Agreement*").

The referred Agreement was submitted to the Laws of Ukraine and to the extent compatible with such law, to the FIFA governing the Status and Transfer of Players (edition 2005) - the "*FIFA RSTP*"- and Swiss Law.

The duration of the Agreement was ruled in clause 7.1. as follows:

"The present Contract is valid from July 30, 2007 till June 30, 2011. The Player and the Club have agreed that unless the Club sells the Player's right during 2 first seasons of this Contract validity, the parties shall sign new three seasons Labour contract on the same conditions valid until June 30, 2012. If the player refuses to extend this Contract he shall pay to the Club the fine equal to the Player's salary per 5th season stipulated in Appendix 1 of this Contract".

The Player's salary was included in an appendix to the Agreement, which was afterwards re-negotiated twice in successive additional agreements dated 20 February 2008 and 1st March 2009.

The Player was not transferred to a third party within the first two seasons of the Agreement.

Thereafter the Club started asking the Player to, in accordance with clause 7.1 of the Agreement, sign a new contract valid until 30 June 2012.

On 14 December 2009 the Club requested the Player in writing via Notary Public to sign the new contract at the latest on 20 December 2009, and warned him about the situation of breach in which he would be incurs if he failed to do so.

On 23 December 2009 the Club sent a letter to the Player in which it mentioned, *inter alia*, that the deadline given to sign the new contract had expired, that the Player's behaviour constituted a breach of the Agreement and that the penalty clause convened in the Agreement to such purpose would be applied.

On 9 January 2010 the Player's legal representative sent a communication to the Club in which it was basically mentioned that clause 7.1. of the Agreement was unilateral and could not be enforced by the Club and thus, that the Player was not obliged to sign a new employment agreement in the terms requested by the Club. However it was also stated that the Player was interested in agreeing an extension of the Agreement, but in terms to be negotiated by both parties.

On 20 January 2010 the Club replied to the above mentioned communication, rejecting the alleged unilateral nature of clause 7.1 of the Agreement.

On 3rd February 2010 the Club sent a letter to the Player informing him that in light of the breach of his obligation under clause 7.1 of the Agreement, it would retain the amount of the fine contractually foreseen for such a breach from his future salaries.

The referred letter, in its pertinent part, reads as follows:

"Following to the above mentioned the Club has applied the fine stipulated in clause 7.1 of the contract. The Club will retain the amount of fine from your future salary starting from January 2010. Below is a breakdown of the amount to be paid by the Club under the labour contract:

*138,103 EUR * 18 month (outstanding salary) + 5389 * 18 month (house rent compensation) – 2.130.228 EUR (salary to fifth season/fine)= EUR 452.628*

So your monthly salary will be reduced to the amount of 452.628/18 months = 25.146 EUR before tax, which after tax deduction will be equal to EUR 21.166 net".

On 7 February 2010 the Player's legal representative sent another communication to the Club opposing to the reduction of salary it intended to apply, and warned the Club that such a reduction constituted a breach of the Club's contractual commitment to pay the salary, which entitled the Player to terminate the Agreement.

On 11 February 2010 the Club, in a letter addressed to the Player's legal representative, refused again the alleged unilateral nature of clause 7.1. of the Agreement as well as other statements made in the previous letter of the Player's representative dated 7 February 2010.

During March 2010 the parties negotiated the terms of a new employment contract, but finally they did not reach an agreement. The Club, in a fax to the Player's legal representative dated 1st April 2010, referred to this absence of agreement as follows:

" Following your position that denies your obligation to sign the fifth season of the Labour Contract, FC Shakhtar invited you and your representatives to negotiate a new long term labour agreement in Donetsk on March 17-18, 2010 which Club has offered you in order to avoid any further problem due to your breach of the Labour Contract.

In good faith and in course of that meeting FC Shakhtar offered you to sign the four seasons labour contract amounting to 8.000.000 euro net (i.e. 2.000.000 euro net per season) plus match bonuses. However, you filed a counteroffer to sign the four-five season contract amounting to 3.000.000 euro net per season plus match bonuses. The counteroffer has not been accepted by the Club as excessive and as showing a clear intention of not willing to reach an agreement.

I appreciate your efforts to find an amicable solution but I am definitely frustrated that the agreement has not been reached when we were trying to finalize a situation coming from your non fulfilment of the Labour Contract.

Anyhow, I believe that the dispute will not influence your performance in the football pitch".

On 5 April 2010 the Player's legal representative replied to such fax of 1st April, regretting the impossibility of reaching an agreement but at the same time rejecting any breach on the Player's side and requesting that the Player's wages regular payment was restored.

On 28 April 2010 the Player's legal representative sent a new letter to the Club claiming for the payment of salaries due to the Player.

On 5 May 2010 the Club answered to the Player that there were no outstanding payments but the application of a fine due to the Player's breach of his duty to extend the duration of the Agreement.

Within all this period the Player kept on playing for the Club.

On 17 May 2010 the Player's legal representative sent a letter to the Club terminating the Agreement with just cause due to the lack of payment of the salary, and warned that it would start actions in front of FIFA to obtain an indemnification from the Club.

On 19 May 2010 the Club rejected in writing the unilateral termination of the Agreement executed by the Player and informed him that the Club would start proceedings against him before the CAS.

On the same date the Player's legal representative replied to the last communication of the Club, insisting in the termination of the Agreement with just cause and in the fact that the Club was not entitled to deduct the alleged penalty from the Player's salaries.

On 24 May 2010 the Player filed a claim against the Club before FIFA, which on 20 August 2010 resolved that it was not competent to deal with such claim.

On 31st July 2010 the Player signed an employment contract with the Brazilian sport entity Desportivo Brasil Participaçoes Ltda. ("*Desportivo Brasil*").

On 30 August 2010 the Player signed another employment agreement with São Paulo.

On 3rd June 2010 the Club filed before the CAS a Request for Arbitration against the Player, asking the CAS to:

1. *Accept this request for arbitration against the Respondent Ilson Pereira Dias Junior.*

2. *Adopt an award condemning the Player to pay the Club compensation for his unilateral breach of contract without just cause in the amount of EUR 20.000.000 in accordance with article 7.2.4c of the Agreement.*

3. *In the alternative, to adopt an award condemning the Player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 13,715,286.53 in accordance with article 17 of the Regulations, Ukrainian and Swiss Law.*

4. *Condemn to the Player to the payment of the whole CAS administration costs and Panel fees.*

5. *Condemn the Player to pay 5% annual interest on the amount from the date of the breach of the contract in accordance with Swiss Law.*

6. *Fix a sum, to be paid by the Player to the Club in order to cover its defence fees and costs in a sum of CHF 35,000.*

On 7 July 2010 the Player filed his Answer to the Request for Arbitration before CAS, in which he asked CAS to decline jurisdiction in this case and alternatively, should CAS accept jurisdiction, that an award was issued in the following terms:

a. *Rejecting all requests by the Claimant, based on the lack of legal grounds to support them;*

b. *Recognizing the unlawfulness of the Claimant's decision to partially suspend Player's salaries;*

c. *Recognizing that the continued default by the Claimant, even after being put officially on default by the Respondent, constituted an unilateral breach to the Employment Agreement;*

d. *Recognizing that Player's early termination of the Employment Agreement was justified and supported on the Claimant's previous breach to the contract;*

e. *Recognizing clause 7.1. of the Employment Agreement as an unilateral provision, being null and void and not opposable to the Player.*

f. *Holding the Claimant liable for the termination of the Employment Agreement and determining the payment of the compensation to the player:*

g. *Determining the amount of EUR 2.426.826 as due and payable by the Claimant, to the Respondent, as compensation for unilateral breach of the Employment Agreement;*

h. *Granting the Respondent with 05% (five per cent) interest per annum over the outstanding salaries (EUR 473.384) and the salaries that remain unpaid as of this date and until the date of final payment, according to Swiss Law;*

i. *Condemning the Claimant to the payment of the entire administrative costs and Panel fees before the CAS; and*

j. *Fixing the amount of EUR. 30,000.00 to be paid by the Claimant to the Respondent to cover the legal costs and expenses incurred for his defence.*

On 17 August 2010 the Club filed written submissions expressing its position on the matter of jurisdiction of CAS in the present case. It confirmed that in its view, CAS has jurisdiction in the case at stake and asked CAS to continue dealing with it.

On 18 October 2010 the Club filed its Statement of Claim asking CAS to render an award in the following terms:

1. *To accept this request for arbitration against the Respondent Ilson Pereira Dias Junior.*

2. *To adopt an award condemning the Player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 18.018.058,68 in accordance with Article 17 of the Regulations, Ukrainian and Swiss Law.*

3. *In the alternative, to adopt an award condemning the Player to pay the club for his unilateral breach of contract without just cause in the amount of EUR 16.822.050,68 in accordance with Article 17 of the Regulations, Ukrainian and Swiss law.*

4. *In the alternative to adopt an award condemning the Player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 10,049,012.62 in accordance with Article 17 of the Regulations, Ukrainian and Swiss Law.*

5. *In the alternative, to adopt an award condemning the player to pay the Club for his unilateral breach of contract without just cause in the amount of EUR 10,029,012.62 in accordance with Article 17 of the Regulations, Ukrainian and Swiss Law.*

6. *We request the CAS find that Desportivo Brasil-SP and/or São Paulo and or any subsequent "new club" with which the Player contracts to be jointly and severally liable to pay compensation.*

7. *To acknowledge that sporting sanctions may be requested by the Claimant against the Respondent and Desportivo Brasil-SP and/or São Paulo and/or any subsequent "new club" with which the Player contracts at the relevant FIFA Dispute Resolution Body in the future.*

8. *Condemn the Respondent to the payment of the whole CAS administration costs and Panel fees.*

9. *Condemn the Respondent to pay 5% annual interest on the amount awarded by the CAS from the date of the breach of contract in accordance with Swiss Law.*

10. *Fix a sum, to be paid by the Respondent to the Club in order to cover its defence fees and costs in a sum of CHF 35,000.*

On 10 November 2010 the Player filed its Statement of Defense and Counterclaim, in which it was requested to CAS to issue an award in the following terms:

a. *Rejecting all requests for relief by the Claimant, based on the lack of legal grounds to support them;*

b. *the unlawfulness of the Claimant's decision to suspend Player's salaries;*

c. *Recognizing that the continued default by the Claimant, even after being put officially on default by the Respondent, constituted an unilateral breach to the Employment Agreement;*

d. *Recognizing that Player's early termination of the Employment Agreement was justified and supported on the Claimant's previous breach to the contract, holding the Claimant liable for the termination of the Employment Agreement and determining the payment of the compensation to the player:*

   (i) *n the amount of EUR 2.426.826, corresponding to his outstanding salaries and benefits up to the date of termination and the remuneration due to Player until 30 June 2011; or, alternatively,*

   (ii) *n the amount of EUR 2.166.826 corresponding to his outstanding salaries and benefits up to the date of termination and the remuneration due to Player until 30 June 2011 minus his remuneration for the 2010-2011 season under his current contract (i.e EUR 260.000) or, alternatively,*

   (iii) *in the amount of EUR 473.384 corresponding to his outstanding salaries during the months of January, February, March and April 2010;*

e. *Granting the Respondent with 5% interest per annum over the outstanding salaries (EUR 473.384) and the salaries that remain unpaid as of this date and until the date of final payment, according to Swiss Law and the hitherto jurisprudence of FIFA and this Court;*

f. *Condemning the Claimant to the payment of the entire administrative costs and Panel fees before the CAS; and*

g. *Fixing the amount of EUR. 30.000 to be paid by the Claimant to the Respondent to cover the legal costs and expenses incurred for his defence.*

On 15 December 2010 the Club filed its Answer to the Counterclaim, asking the CAS to dismiss such counterclaim.

On 11 January 2011 the Player filed a Final Statement in which he requested again that the Club's claim was rejected and his counterclaim was upheld.

The hearing in the present case took place in Lausanne on 13 May 2011. In the hearing, the parties confirmed their respective requests for relief contained in the Statement of Claim and in the Statement of Defense & Counterclaim respectively, made their respective initial statements, the witness Mr. Hennouda was examined, the Player and the Club's representatives served their respective declarations and at the end, the parties raised their final conclusions. Among other issues, the parties were particularly asked by the Panel to allege on the matter of compensation under the law applicable to the Agreement, which they both did.

The award to be rendered in the present proceedings will be made public as the parties so agreed in the hearing.

Extracts from the legal findings

A. Applicable law

Article R45 of the CAS Code reads as follows:

"The Panel shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to Swiss law. The parties may authorize the Panel to decide ex aequo et bono".

Clause 1.2 of the Agreement stipulates the following:

"1.2. The present Contract is a special form of a labour agreement and is regulated by the law of Ukraine and – to the extent compatible with Ukraine law - is subject to the FIFA regulations governing the status and transfer of players (edition 2005) and to Swiss law".

The Claimant holds in this respect that (i) in accordance with clause 1.2 of the Agreement, the law applicable to the dispute shall be Ukrainian Law and to the extent compatible with it, the FIFA RSTP and Swiss Law, and (ii) Swiss Law is not incompatible with Ukrainian Law concerning the matters object of discussion in the present proceedings (which has not been contested by the Player).

The Respondent is of the opinion that in spite of the wording of clause 1.2 of the Agreement, the law applicable to the present dispute shall be FIFA rules and subsidiarily Swiss Law given the international dimension of the dispute, as CAS and FIFA jurisprudence so have proclaimed in other cases of this kind.

In light of the above mentioned, the Panel considers that it shall resolve the present dispute in accordance with the FIFA RSTP and Swiss Law, as (i) the Claimant has expressly mentioned that for the matters involved in this dispute, such regulations are not incompatible with Ukrainian Law (which content, by the way, has not been proven in these proceedings) and (ii) the Player has not only not challenged such Claimant's statement, but also called for the applicability of FIFA regulations and Swiss Law. It is to be mentioned that both before and at the hearing, the parties were asked and had ample opportunity to comment on Swiss Law.

Therefore the present dispute will be decided according to the FIFA RSTP and Swiss Law.

B. Merits

1. The object of the dispute

According to the parties' written submissions and the arguments raised by them in the hearing, the object of the dispute may be briefly summarized as follows: the Claimant considers that the Player terminated the Agreement without just cause and that therefore he shall compensate the Club for this, while the Player understands that he was entitled to terminate the Agreement with just cause, and thus intends to get an indemnification from the Club as regards of such termination.

2. The validity of clause 7.1 of the Agreement. The breach of the Player's obligations. Consequences

The Panel shall start the assessment of the *quaestio litis* by analyzing clause 7.1 of the Agreement, and specifically by determining (i) if it is a valid and binding clause or if as the Respondent holds, this clause is null and void, and (ii) in case the clause is deemed valid, if the Player breached the obligations contained therein.

The referred clause reads as follows:

"The present Contract is valid from July 30, 2007 till June 30, 2011. The Player and the Club have agreed that unless the Club sells the Player's right during 2 first seasons of this Contract validity, the parties shall sign new three seasons Labour contract on the same conditions valid until June 30, 2012. If the player refuse to extend this Contract he shall pay to the Club the fine equal to the Player's salary per 5th season stipulated in Appendix 1 of this Contract".

The Player has challenged the validity of this clause by basically stating that it constitutes a unilateral option only providing obligations and consequences for the Player but not for the Club.

The Panel, after the corresponding checking of the mentioned clause, cannot share the Player's view on its alleged invalidity, mainly for the following reasons:

- According to the clause's wording, in case the Player was not transferred within the first two contractual seasons, both parties -and not only the Player- were bound to enter into a new contract under certain conditions previously stipulated in the Agreement ("… *the parties shall sign*…"). This means that both the Player and the Club could compel the counterparty to conclude the agreed extension of the Agreement. Accordingly, this cannot be considered a unilateral right of the Club. Therefore it cannot be understood that the clause was drafted in the interest or detriment of one of the parties only, but in the interest or detriment of the two of them.

- The event triggering the obligation of the parties to conclude a new contract (i.e. no transfer of the Player to a third club within the first two contractual seasons) also depended on both parties' will: both the consent of the Player and of the Club would have been necessary for such a transfer of the Player.

- The fact that the clause only foresees the consequences of its potential breach by the Player does not mean at all that in case it was the Club the one breaching the clause, no consequence would arise. This consequence could be well established in accordance with the applicable law to the Agreement. In fact, if the Club had breached its obligation under clause 7.1 of the Agreement the Player could have asked the enforcement of the clause, offering to the Club his working services, and claiming the salary for the whole (i.e. the extended) duration of the employment period.

Therefore the Panel understands that clause 7.1 of the Agreement is valid and binding for both parties.

This being said, the Panel shall determine if the Player breached its obligations under this clause, and if it is the case, which consequences arise out of the mentioned breach.

It is clear for the Panel that the Player indeed infringed said obligations. It has been proven that the Club asked the Player to sign the new contract in the terms foreseen in clause 7.1 of the Agreement and that the Player repeatedly refused to do so. This can be clearly derived from the content of the correspondence exchanged between the parties during the months of December 2010 to May 2011, and was even admitted by the Player at the hearing.

With regard to the consequences of such a breach, the parties specifically ruled on them in the same clause 7.1. of the Agreement in the following terms:

"If the player refuses to extend this Contract he shall pay to the Club the fine equal to the Player's salary per 5th season stipulated in Appendix 1 of this Contract".

In line with it the Panel considers that the Player shall be ordered to pay to the Club the sum contractually agreed in clause 7.1 in fine. However this agreed sum shall be reduced in (i) the amounts already retained by the Club on account of such sum and (ii) the amounts that the Player should have received for the days of May 2010 he remained with the Club (17 days).

The sum contractually agreed in clause 7.1 *in fine* of the Agreement is the Player's salary for the 5th season stipulated in Appendix 1 of the Agreement, which is to be quantified, as per the Claimant's request and the additional agreements dated 20 February 2008 and 1 March 2009, in EUR 2.194.896 in accordance with the following breakdown:

- Salary of the 5th season: (177.519 x 12) EUR 2.130.228

- Accommodation payments: (5.389 x 12) EUR 64.668

The Club retained EUR 473.384 on account of the sum contractually agreed in clause 7.1 (EUR 118.346 x 4 months -January to April 2010-). This has not been contested by the Club.

The Player's salary for the 17 days of May 2010 amounts EUR 81.312,14 in accordance with the following breakdown:

- Salary: EUR 78.258,37 (138.103/30 x 17)

- Accommodation payments: EUR 3.053,77 (5.389/30 x 17)

Therefore the amount payable by the Player to the Club is EUR 1.640,199,86, increased with the corresponding interest, which in accordance with article 102 *et seq.* of the Swiss Code of Obligations (the "*Swiss CO*") and the request of the Club in this respect ("*condemn the Respondent to pay 5% annual interest on the amount awarded by the CAS from the date of the breach of contract in accordance with Swiss Law"*) is to be fixed in 5% per annum from the date of the Agreement's termination, i.e. as from 17 May 2010.

3. The termination of the Agreement by the Player. Just cause or not.

The Panel shall now examine the termination of the Agreement executed by the Player as well as the consequences of such termination.

In this respect, the Panel notes that the Player holds that he had just cause to terminate the Agreement as the Club did not pay him the full agreed salary, while the Club argues that it was entitled to pay a reduced amount of salary to the Player at the time of the Agreement's termination and thus, that the Player terminated such Agreement without just cause.

The Panel deems indisputable (in fact, it is admitted by the parties) that from January 2010 on, the Player did not receive the total agreed salary.

The discrepancy between the parties' lies on the Club's legitimacy not to pay a very substantial part of the Player's salary on account or in application of the penalty stipulated in clause 7.1 of the Agreement given the breach of the Player's duties under such clause.

Therefore the Panel shall determine whether or not such partial payment of the salary constituted just cause and entitled the Player to unilaterally terminate the Agreement.

In this regard, the Panel is aware that given the rejection of the Player to sign the extension of his contractual relationship with the Club, Shakhtar decided to act in the way announced in its letter to the Player dated 3rd February 2010, which relevant part reads as follows:

"Following to the above mentioned the Club has applied the fine stipulated in clause 7.1 of the contract. The Club will retain the amount of fine from your future salary starting from January 2010. Below is a breakdown of the amount to be paid by the Club under the labour contract:

*138,103 EUR * 18 month (outstanding salary) + 5389 * 18 month (house rent compensation) – 2.130.228 EUR (salary to fifth season/fine) = EUR 452.628*

So your monthly salary will be reduced to the amount of

452.628/18 months = 25.146 EUR before tax, which after tax deduction will be equal to EUR 21.166 net".

It is thus clear that Shakhtar decided to apply the penalty foreseen in clause 7.1 of the Agreement against the future salaries of the Player, which in practice led to a very significant reduction of the Player's monthly salaries.

It is also noted that the Player repeatedly opposed to this salary reduction, not only on the basis of the purported nullity of the clause providing for the penalty itself, but also on the basis of an alleged lack of legal or contractual grounds to reduce the Player's salary. For instance, in the Player's representative letter of 19 May 2010 to the Club it is mentioned that "*even if the clause (7.1) was valid, there was no ground or provision for any deduction of the player's salaries*". Therefore the fact of having remained in the Club from January to May 2010 (period of reduction of salary) rendering his professional services shall not be understood as an unqualified acceptance by the Player of the salary reduction.

The Club has alleged that under Swiss Law (which is applicable to this case on the basis of the grounds given above in this award), it was entitled to proceed in the way it did, mainly because articles 120 and 323.2b of the Swiss CO allow an employer to compensate employees' salaries with the employer's claim (such as the penalty stipulated in clause 7.1 of the Agreement).

The Panel indeed agrees that in accordance with the referred legal provisions, compensation of employees' debts with salaries is feasible under Swiss Law.

The compensation or "*set-off*" of claims between an employer and an employee in an employment relationship is governed by the general provisions of art. 120 *et seq.* of the Swiss CO as well as by the specific provision of Art. 323b para. 2 of the Swiss CO, in accordance with the following principles and conditions (cf. Tercier P., Le droit des obligations, 4th ed., Zurich 2009, n. 1520 *et seq.*; Wyler R., Droit du travail, 2nd ed., Bern 2008, p. 269; Staehelin/ Vischer, Zürcher Kommentar, Vol. V2c, Der Arbeitsvertrag, Art. 319-330a OR, 4th ed., Zurich 2006, n 8 *et seq.* ad Art. 323b):

- The reciprocity of claims: each party must be at the same time obligee and obligor of the other;

- The similarity of the performances: the performances must be of the same kind (usually, monetary claims);

- The setting-off counterclaim must be due: although art. 120 para. 1 *in fine* Swiss CO seems to require that both claims be due, Swiss scholars and case law admit that the claim to be set-off can be only likely to be performed;

- The opportunity to claim the setting-off counterclaim in court: art. 120 para. 1 Swiss CO does not expressly set up this condition; however, it conveys the principle according to which a party shall not because of the set-off lose the benefit of the defences (set-off is an objection, cf. ATF 63 II 133, JdT 1937 I 566) that it could oppose to its obligee;

- The absence of reasons of prohibition: set-off is not permitted if ruled out or limited (i) by law (art. 125 CO, which refers to art. 323b para. 2 CO as one of the limitations), or (ii) by the agreement of the parties (art. 126 CO).

- The declaration or expression of set-off: according to art. 124 para. 1 Swiss CO, the obligor (here: the employer) must demonstrate to the obligee that he wishes to take advantage of his right to set-off, either by express statement or by conclusive act (for instance by paying only the difference between the two debts). In other words, the expression of set-off is a unilateral act which, under Swiss law, does not have to comply with any formal requirements and can even result from conclusive act (cf. Swiss Federal Tribunal, Decision of 23 March 2011, 4A_23/2011 at consid. 3.2, with further references; Gauch P., Schweizerisches Obligationenrecht, Zurich, 2008, 9th ed., n. 3248 et seq.).

Therefore, taking into consideration the above mentioned, it is correct to say that a set-off by the Club of a part of the salary with the Club's claim against the Player because of the breach of clause 7.1 of the Agreement is valid, unless it violates the limits permitted by Swiss law, in particular those set out in article 323b para. 2 of the Swiss CO.

According to article 323b para. 2 of the Swiss CO, the salary of an employee may be set-off only to the extent that it can be the subject of attachment in debt enforcement proceedings. However, such quantitative limitation is not applicable, and an employer can set off its claims against the whole salary in case the employer is setting-off a claim resulting from damages imputable to the intentional misconduct of the employee.

In brief, the salary may be set-off (i) for the part that is above the so-called minimum living wage and (ii) in full if the claim is for compensation of an intentional

damage. There is wilful damage when the employee has the intent of causing a damage to the employer (e.g. theft, forgery, fraud, …). The *dolus eventualis* is sufficient, for example when an employee has not the direct intent of causing a damage to his employer, but knows or should know that his behaviour will cause a damage to the employer, for example when he leaves his working place (that is, when he unilaterally terminates his employment contract) without just cause (Caruzzo P., Le contrat individuel de travail, Commentaire des articles 319 à 341 du Code des obligations, Zurich 2009, n. 8 p. 173; Streiff/von Kaenel, Arbeitsvertrag, Praxiskommentar zu Art. 319-362 OR, 6th ed., Zurich 2006, n. 6 ad Art. 323b CO, with further references; Staehelin/Vischer, *op. cit.*, no 15 ad art. 323b).

The Panel notes that the Player has not argued that the part of the salary paid to him was in any way insufficient for him to live. In fact, it has remained undisputed between the parties that the Club continued to pay part of the salary but also that considerable bonuses were paid to the Player until he left the Club.

Therefore, the Panel is satisfied that the set-off by the Club of its claim resulting from the breach of clause 7.1 by the Player against part of the Player's salary claim was in line with the restrictions set out in article 323b Swiss CO. Furthermore, the Panel is not satisfied that the Club was prevented to set-off its claim because of a "*general principle of law*", as argued by the Player.

Finally, based on the evidence produced by the parties, the Panel is satisfied that also the other requirements for a set-off mentioned above were met. In particular, it has remained undisputed between the parties that for several months the parties were discussing whether or not the Club, as employer, was or was not entitled to pay only a part of the salary. Therefore, not only for the Club but also for the Player it was clear that the Club had the intention, and in fact executed, a set-off of its claim based on clause 7.1 of the Agreement against the salary of the Player. Since, as mentioned above, Swiss Law and in particular article 124 of the Swiss CO does not request a formal notification of set-off, it cannot be argued by the Player, and in fact the Player did not raise this argument, that it was unclear for him that the Club had the intention to set-off the claim for compensation based on clause 7.1 of the Agreement with part of the salary. The Panel is well aware that in the past, there have been clubs that have tried to justify a failure to pay whole or part of the salary to a player, by alleging counterclaims. Such counterclaims, often raised only ex post, have been correctly considered as mere abusive attempts of clubs to justify their failure. However, based on the specific circumstances of the present dispute, the Panel is satisfied that the Claimant had no abusive intent when it declared to set-off its claim against part of the salary of the Player.

For all these reasons, the Panel concludes that the Club was entitled to set-off its claim against part of the salary of the Player, as it did. Accordingly, the Player was not entitled to terminate the Agreement as he did: the set-off by the Club of its claim based on clause 7.1 of the Agreement against the salary was not a breach of the Club of its obligations, even if the claim based on clause 7.1 was contested (cf. article 120 para. 2 Swiss CO).

The termination of the Agreement by the Player was therefore without just cause.

4. The consequences of the breach

At this stage, the Panel shall determine the consequences of the referred Agreement's termination without just cause, in accordance with the parties' petitions in this respect and the applicable rules.

In this respect the Panel notes that:

- The Claimant has requested that (i) the Player is ordered to pay a compensation, (ii) Desportivo Brasil and/or São Paulo and or any subsequent new club of the Player is held joint and severally liable to pay such compensation and (iii) it is acknowledged that sporting sanctions may be requested by the Club against the Respondent and Desportivo Brasil and/or São Paulo and/or any subsequent new club of the Player at the relevant FIFA Dispute Resolution Body in the future.

- The rules to be applied are those contained in the FIFA RSTP and Swiss Law, for the grounds already explained above.

4.1 The calculation of the compensation due to the Club

To such purpose the Panel shall take as standpoint the provisions of article 17.1 of the FIFA RSTP, which reads as follows:

The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated

with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

The referred article, extensively commented in CAS jurisprudence (inter alia, CAS 2007/A/1298, 1299 & 1300 Webster, CAS 2007/A/1358 & 1359 Pyunik, or CAS 2008/A/1519 & 1520 Matuzalem, sets the principles and method of calculation of compensations in case of breach of contract. Just for the reference, the recent award in the case CAS 2010/A/2145, 2146 & 2147 summarizes, in a brief and concise way, some of the most relevant CAS pronouncements on article 17 of the FIFA RSTP as follows:

60. The Panel notes that there have been a number of previous awards delivered by CAS panels on this very issue (Webster, Matuzalem, El-Hadary and Pyunik, to mention a few where the breach is on the part of the player). The Panel also notes both the different facts and outcomes in these awards, and the views of those panels in relation to the method of calculation, i.e. that "each of the factors listed in Article 17 is relevant, but that any of them may be decisive on the facts of a particular case... Article 17.1 does not require the judging authority... to necessarily evaluate and give weight to any and all of the factors listed therein" (paras 201 and 202 of El-Hadary); "Article 17.1 includes a broad range of criteria... some of which may be appropriate to apply to one category of case and inappropriate to apply in another" (para 135 of Webster); and "the task for the body assessing the entity of the compensation due is therefore to verify and analyze as carefully as possible all the elements above and take them in due consideration" (para 77 of Matuzalem).

61. The Panel also notes the "positive interest" principle that was referred to in Matuzalem and equally applied in El-Hadary, as such a panel "will aim at determining an amount which shall basically put the injured party in the position that the same party would have had if the contract was performed properly"(para 86 of Matuzalem).

62. As such, it is this Panel's role to consider each of the criteria within Art. 17.1 of the Regulations and indeed any other objective criteria in the light of the specific facts of this case and to determine how much weight, if any at all, to apply to each in determining the amount of compensation due in this particular case. In addition, the onus is on the parties to provide the evidence for the panel to carry out this task. The Panel notes the facts involved in the previous awards, and suspects that those in cases to follow, are and will be different from each other, but that the role of a panel remains the same, to apply all of the Art. 17.1 criteria and any other objective criteria to the specific facts and determine which are relevant and which are not and to ensure "the calculation made ...shall be not only just and fair, but also transparent and comprehensible" (para 89 of Matuzalem) […].

The Panel has thus analyzed the Agreement and the circumstances surrounding the present case in light of the terms of article 17 FIFA RSTP and the criteria gathered therein.

In performing such task it has been noticed that article 17 of the FIFA RSTP gives utmost importance to what the parties have agreed in the contract concerning the consequences of contractual breaches, even to the point of superseding the other criteria referred to in such article ("*unless otherwise provided for in the contract*").

Taking the above mentioned in mind, the Panel notes that the parties ruled on the consequences of a unilateral termination in clause 7.2.4 of the Agreement. Given that the termination occurred in the 3rd season of the Agreement, such consequences are to be determined in accordance with the FIFA RSTP as per the parties' will (para. b of clause 7.2.4).

However it is also observed by the Panel that the parties agreed on something else which in the Panel's view, has influence (even if indirectly) in the determination of the compensation for breach: the parties specifically agreed in clause 7.1 that if the Player did not agree to extend the Agreement for 1 extra year, he would pay to the Club of an amount equal to his salary in the 5th season. In the Panel's opinion, by doing so the parties, in mutual agreement, somehow quantified or gave a value to the loss of utility or the damage that the Club would suffer in case the Player decided not to extend the Agreement for 1 extra year, this in spite of being obliged to do so. This means that the Club (which agreed on such clause 7.1) was satisfied with the referred value for not counting with the Player's services during 1 year.

It is therefore reasonable to understand (or at least no valid reason to think otherwise has been brought by the parties in these proceedings) that if this was the parties agreed criterion to quantify the loss or damage consisting of not having the Player rendering his services for the Club in the 5th season, the same criterion was accepted by them, though in an implicit manner, to quantify the damages consisting of not counting on the Player in other periods, such as, in the case at stake, the period comprised between the termination date (17 May 2010) and the end of the contractual initial duration (30 June 2011), including all concepts. Following the above mentioned grounding and taking in mind the relevance given by article 17 of the FIFA RSTP to the agreement between the parties

in the determination of the compensation, the Panel considers that the compensation to be awarded to the Club as regards of the Player's premature termination of the Agreement shall take into due consideration the liquidated damages clause contained in the Agreement and can therefore under such particular circumstances be quantified as corresponding to the aggregate of the salaries that would have been payable to the Player during the period comprised between the termination date and the end of the contractual initial duration, consisting of 1 year and 44 days.

It is also stressed that in any case:

- This calculation of the compensation is, in the Panel's opinion, also consistent and in line with some of the objective criteria expressly mentioned in article 17.1 of the FIFA RSTP, such as the remuneration and other benefits due to the player under the existing contract or the time remaining on the existing contract,

- The compensation awarded is felt by the Panel as legally adequate and fair, so there is no need to correct or adjust it in accordance with the "*specificity of sport*" factor.

- As occurred in the so-called *Matuzalem* case, none of the parties have submitted to the Panel any compelling legal arguments according to which a national law could have an effect on the calculation of the compensation due, nor have they specified in particular any arguments of Ukrainian (or of Swiss) law which – within the meaning of the criterion – should be taken into due consideration by the Panel. Thus the Panel it is not in position to take the criterion of *" law of the country concerned "* foreseen in article 17 of the FIFA RSTP into further, due consideration.

This being said, the amount of the referred compensation, which shall be added to the amount to be paid by the Player for the breach of clause 7.1 (see above), shall be calculated as follows:

- Remaining 44 days of the 3rd contractual year: EUR 210.454,94 in accordance with the following breakdown:

- Salary: EUR 202.551,07 [138.103 + (138.103/30 x 14)]

- Accommodation payments: EUR 7.903,87 [5.389 + (5.389/30 x 14)]

- 4th contractual year: EUR 1.721.904 in accordance with the following breakdown:

- Salary: EUR 1.657.236 (138.103 x 12)

- Accommodation payments: EUR 64.668 (5.389 x 12)

This results in an aggregate amount of EUR 1.932.358,94 to be paid by the Player to the Club increased with the corresponding interest, which in accordance with article 102 *et seq.* of the Swiss CO and the request of the Club in this respect (" *condemn the Respondent to pay 5% annual interest on the amount awarded by the CAS from the date of the breach of contract in accordance with Swiss Law "*) is to be fixed in 5% per annum from the date of the Agreement's termination, i.e. as from 17 May 2010.

4.2 Other consequences

The Panel has now to return to the requests made by the Claimant in points 6 and 7 of its Statement of Claim's request for relief with regard to potential liabilities of Desportivo Brasil, São Paulo or any other new club of the Player and to potential sanctions to be imposed on such clubs and the Respondent:

6. We request the CAS find that Desportivo Brasil-SP and/ or São Paulo and or any subsequent "new club" with which the Player contracts to be jointly and severally liable to pay compensation.

To acknowledge that sporting sanctions may be requested by the Claimant against the Respondent and Desportivo Brasil-SP and/or São Paulo and/or any subsequent "new club" with which the Player contracts at the relevant FIFA Dispute Resolution Body in the future.

With regard to the pleadings made in point 6 of the Claimant's request for relief, the Panel is of the view that the request contained therein must be dismissed, for the following reason: neither Desportivo Brasil nor São Paulo nor any other third club have been party in the present proceedings. In fact, neither the Club nor the Player have called them to participate herein. Thus the Panel is therefore not in position to issue an order affecting a party that did not participate in these proceedings.

Concerning the request contained in point 7 of the referred request for relief, the Panel is of the opinion that it shall be dismissed with respect to Desportivo Brasil, São Paulo and any other third club for the same reason explained in para. 121 of this award: these entities have not been party in these proceedings and thus the Panel cannot issue an order affecting them. With respect to the Respondent, the Panel considers that if the Claimant believes that sporting sanctions shall be imposed to the Respondent, it may request

for them before the FIFA competent bodies. It is free to do so. However the Panel wishes to stress that this statement made in the present award (the fact that the Claimant may, potentially and in abstract, request for sporting sanctions before the FIFA competent bodies) does not mean at all that this Panel makes any pronouncement on (i) the admissibility of such a request in the referred bodies and (ii) the imposition or not of such sporting sanctions, as this does not fall within the scope of the present proceedings.

5. Conclusion

To summarize, the Panel has decided that:

- The claim filed by Shakhtar is partially upheld, and the Player is ordered to pay to Shakhtar the amount of EUR 3.572.558,80 (2.194.896 + 1.932.358,94 – 554.696,14) plus 5% interest per annum from the date of the Agreement's termination (17 May 2010).

- The counterclaim filed by the Player is rejected.

The above conclusion, finally, makes it unnecessary for the Panel to consider the other requests submitted by the parties to the Panel. Accordingly, all other prayers for relief are rejected.

C. Confidentiality

In the present procedure, at the hearing of 13 May 2011, both parties have agreed that the award shall be made public.

Therefore, the present award is not confidential and shall be published.

Arbitration TAS 2010/A/2220
Corina Mihaela Dumbravean c. Romaniei Agentia Nationala Anti-Doping (RANAD)
26 juillet 2011

Athlétisme ; soustraction à un contrôle antidopage ; conditions de la gratuité de la procédure devant le TAS ; recevabilité de l'appel ; compétence en matière de dopage d'une organisation autonome délégataire de la fédération nationale ; preuve de la violation du règlement antidopage ; sanction pour infraction multiple

Panel:
M. Bernard Foucher (France), Arbitre unique

Faits pertinents

Corina Mihaela Dumbravean ("*l'Athlète*" ou "*l'Appelante*") est une coureuse de demi-fond roumaine, titulaire d'une licence délivrée par la Fédération Roumaine d'Athlétisme (FRA).

La Romaniei Agentia Nationala Anti-Doping (RANAD) ("*RANAD*" ou "*l'Intimée*") est l'entité mise en place en Roumanie dans le cadre de la lutte anti-dopage ayant un pouvoir décisionnel autonome dans ce domaine. Elle fonctionne comme une entité publique avec personnalité juridique, sous la surveillance du gouvernement roumain.

En date du 16 novembre 2007, l'International Association of Athletics Federation (IAAF) a effectué un contrôle anti-dopage hors compétition sur l'Athlète. L'analyse des échantillons réalisée par le Laboratoire Suisse d'Analyse du Dopage à Lausanne a révélé que ceux-ci contenaient une substance interdite, soit de l'EPO recombinante de type Darbepoiétine-alpha (NESP).

L'IAAF a alors diligenté une procédure disciplinaire contre l'Athlète auprès de la FRA. Agissant en qualité de première instance de recours, la Commission des sanctions de la RANAD a, par décision du 10 septembre 2008, condamné l'Athlète à une suspension de 2 ans à compter du 16 novembre 2007 pour présence d'une substance illicite.

Par décision du 8 décembre 2008, la Commission d'appel de la RANAD a rejeté les appels formés respectivement par l'Athlète et son club, le Club Sportif Olimpic Sport Craiova ("*CS Craiova*").

Par sentence du 9 octobre 2009 (TAS 2009/A/1764), le TAS a rejeté l'appel formé par le CS Craiova à l'encontre de la décision du 8 décembre 2008 rendue par la Commission d'appel de la RANAD. L'Athlète a pour sa part également fait appel de ladite décision auprès du TAS. Parvenu hors délai au TAS, l'appel a toutefois été déclaré irrecevable.

Incluse dans le groupe-cible de l'IAAF, composé d'athlètes de très haut niveau ou d'athlètes ayant été sanctionnés pour le dopage ou dont le profil, notamment sanguin, peut susciter des soupçons, l'Athlète a fait l'objet d'un contrôle anti-dopage hors compétition en date du 10 mars 2010. Bien que concluant à un résultat négatif, le rapport du 1er avril 2010 établi par le Laboratoire Suisse d'Analyse du Dopage, à Lausanne, relève le caractère suspicieux des échantillons analysés.

Dans le cadre du programme de contrôles anti-dopage hors-compétition, la RANAD a été sollicitée pour effectuer un contrôle de l'Athlète. En date du 28 avril 2010, une première tentative de contrôle de l'Appelante et d'une autre athlète, Mme Liliana Barbulescu (ex-Popescu), a été conduite sans succès par deux agents de la RANAD. Cette tentative a fait l'objet d'un rapport de carence adressé à l'IAAF.

Faisant suite à cette première tentative infructueuse, deux agents de la RANAD, M. Corneliu Radulescu et Mme Ecaterina Ilica, se sont rendus en date du 18 mai 2010 au lieu d'entraînement de l'Athlète, soit à la Villa Olimpic Sport, dans la localité de Poiana Brasov (Roumanie), afin de faire subir à celle-ci, ainsi qu'à Mme Liliana Barbulescu (ex-Popescu) un contrôle anti-dopage inopiné hors compétition. Lorsqu'ils sont arrivés sur place, les deux agents de la RANAD n'auraient trouvé personne dans un premier temps. Ils auraient vu le Directeur général du club et ex-entraîneur de l'Athlète, M. Eleodor Rosca, vers 08h30, lequel leur aurait remis la carte d'identité de l'Athlète. Ils auraient ensuite procédé au contrôle de Mme Liliana Barbulescu.

Selon les dires des deux agents, l'Athlète se serait ensuite présentée à la station de contrôle (aménagée dans une chambre de la Villa Olimpic) à 09h05 et aurait alors réceptionné et signé le document d'invitation à passer un contrôle anti-dopage daté du même jour, 09h05.

Mme Ecaterina Ilica aurait alors accompagné l'Athlète dans la salle de bain de la chambre afin d'y récolter un échantillon d'urine pour analyse. Au moment du prélèvement de l'urine, Mme Ecaterina Ilica aurait remarqué que l'Athlète avait porté sa main libre dans le dos, comme si elle voulait y serrer quelque chose. L'agente de la RANAD aurait alors demandé à l'Athlète de bien vouloir ôter sa blouse ainsi que son survêtement pour vérification. L'Athlète se serait alors redressée en demandant si elle allait faire l'objet d'une fouille. Mme Ecaterina Ilica aurait répondu par l'affirmative tout en portant sa main à l'endroit de la zone lombaire de l'Athlète où elle aurait senti un tube et un emplâtre. L'Athlète aurait alors précipitamment quitté la salle de bain en criant *"Monsieur le professeur, je suis contrôlée !"* (propos supposés à l'adresse de M. Eléodor Rosca) et en jetant dans le lavabo le gobelet qu'elle avait commencé à remplir. Les deux agents de la RANAD auraient tenté en vain de rattraper l'Athlète qui n'est plus réapparue par la suite. M. Eleodor Rosca, serait arrivé sur les lieux du contrôle et aurait déclaré que l'Athlète avait été agressée par Mme Ecaterina Ilica.

S'agissant de la tentative de contrôle du 18 mai 2010, l'Athlète conteste dans son intégralité la version des faits présentée par les agents de la RANAD et résumée ci-dessus, indiquant ne pas avoir séjourné à Poiana Brasov ce matin-là. L'Athlète affirme en effet s'être trouvée à partir du 17 mai 2010 au soir chez une amie, Mme Elena Antoci (Iagar), et son mari, M. Alexandru Antoci, qui habitent à Brasov, localité distante d'une quinzaine de kilomètres. L'Athlète ne serait retournée à Poiana Brasov que le lendemain matin (18 mai 2010) un peu avant 11h00.

S'agissant de la signature apposée sur le document d'invitation à passer un contrôle anti-dopage daté du 18 mai 2010, 09h05, l'Athlète prétend que celle-ci serait fausse, affirmant n'avoir jamais signé pareil document.

La Commission d'audition de la RANAD a convoqué l'Athlète à une séance d'audition qui devait se tenir en date du 3 juin 2010. L'Athlète a, par l'intermédiaire de son club, le CS Craiova, demandé à ce que ladite audience soit ajournée. La Commission d'audition de la RANAD a accédé à cette demande et reporté l'audience d'audition au 11 juin 2010.

Toutefois, par décision n° 16 du 3 juin 2010, la Commission d'audition de la RANAD a constaté que l'Athlète, incluse dans les groupes cibles de l'IAAF et de la RANAD, était soumise aux Règles de l'IAAF ainsi qu'à la loi roumaine n° 227/2006 relative à la prévention et la lutte contre le dopage sportif en Roumanie ("l*oi n° 227/2006*") et a prononcé la suspension provisoire de l'Athlète en application de l'art. 31 de la loi 277/2006. L'Appelante a alors demandé à ce qu'une audition urgente soit tenue le 4 juin 2010. La Commission d'audition de la RANAD a également donné suite à cette requête. L'Athlète a participé à cette séance assistée d'un avocat, Maître Gabriel Ghita, et accompagnée de son ex-entraîneur, M. Eleodor Rosca. A l'issue de cette séance, la Commission d'audition de la RANAD a ordonné la production de différents documents en prévision de l'audience du 11 juin 2010.

La Commission d'audition de la RANAD s'est réunie en date du 11 juin 2010 pour procéder à l'audition finale de l'Athlète. A cette occasion, la Commission d'audition de la RANAD a également interrogé différents témoins et confronté l'Athlète avec les deux agents en charge du contrôle du 18 mai 2010.

Par décision n° 18 du 8 juillet 2010, la Commission d'audition de la RANAD a constaté l'applicabilité des dispositions relatives au refus de se soumettre ou à l'absence injustifiée à un contrôle anti-dopage ainsi qu'à la contrefaçon ou tentative de contrefaçon d'un échantillon et, au vu de ces éléments, ainsi que de la précédente condamnation de l'Athlète et du résultat analytique de l'échantillon prélevé le 10 mars 2010 par l'IAAF, a prononcé la suspension à vie de l'Athlète en se fondant sur l'art. 39 en relation avec l'art. 2 al. 2 lit. c) et e) de la loi 227/2006, lesquels correspondent aux Règles 32.2 lit. c) et e) de l'IAAF et à l'art. 2.3 et 2.5 du Code mondiale anti-dopage. La décision a été notifiée à l'Athlète en date du 15 juillet 2010.

En date du 3 août 2010, l'Athlète a fait appel de la décision n° 18/08.07.2010 auprès de la Commission d'appel de la RANAD. Par décision n° 6 du 10 août 2010, la Commission d'appel de la RANAD a rejeté pour incompétence l'appel de l'Athlète sur la base de l'art. 59 de la loi n° 227/2006 qui dispose que seule la voie de l'appel au TAS est ouverte dans le cas des athlètes de niveau international.

Par fax du 4 août 2010, l'Appelante a déclaré faire appel de la décision n°18 du 8 juillet 2010 auprès du TAS. L'Appelante a indiqué qu'elle déposerait ultérieurement les motifs de son appel, accompagnés des moyens de preuve qu'elle entendait faire valoir. Il est également précisé qu'elle s'acquitterait de la "*taxe d'enregistrement*" à une date ultérieure.

En date du 27 août 2010, l'Appelante a adressé au TAS son mémoire d'appel. Elle conclut à *"l'annulation (la cassation)"* de la décision de l'Intimée n° 18/08.07.2010 prononcée dans le dossier n°5/2010.

Par courrier du 12 novembre 2010, l'Intimée a estimé, qu'en vertu d'une délégation de l'IAAF, la RANAD était l'organisme roumain compétent en matière de lutte anti-dopage. Elle a également exposé ses arguments tendant à fonder le caractère international du litige et joint à son courrier une prise de position de l'IAAF datée du 12 novembre 2010. Selon cette dernière, la nature internationale du litige ne ferait pas de doute en l'espèce. L'Intimée conclut donc à ce que la présente procédure soit gratuite, conformément à l'art. R65.1 du Code. Enfin, l'Intimée a indiqué être favorable à la désignation d'une formation de trois arbitres.

Par courrier du 19 novembre 2010, le Greffe du TAS a fait savoir que le Secrétaire général estimait, *"au vu des explications par l'IAAF dans son courrier du 12 novembre 2010"*, que les conditions d'application de l'art. R65 du Code étaient remplies en l'espèce et que la procédure serait par conséquent gratuite.

Par courrier du 15 décembre 2010, le Greffe du TAS a fait savoir aux parties que le Président suppléant de la Chambre arbitrale avait décidé, au vu des difficultés financières alléguées par l'Appelante et des circonstances de l'affaire, de donner suite à la requête de cette dernière et de soumettre la procédure arbitrale à un arbitre unique.

Par ordonnance du 11 janvier 2011, le CIAS a décidé d'octroyer l'assistance judiciaire à l'Appelante.

Par courrier du 11 janvier 2011, le Greffe du TAS a informé les parties que la Formation appelée à se prononcer sur le litige serait composée d'un Arbitre unique en la personne de M. Bernard Foucher, Président de la Cour administrative de Douai, France.

Par courrier du 10 février 2011, l'Intimée a exprimé sa position sur les questions de nature internationale et de gratuité du litige de même que sur la composition de la Formation arbitrale. L'Intimée a sollicité qu'il plaise au TAS:

"I. Revenir à sa première décision exprimée dans votre fax du 19 novembre 2010 et confirmant la gratuité de l'arbitrage.

II. Reconsidérer la décision du Président suppléant de la chambre d'appel de confier cet arbitrage à un arbitre unique, dont le contenu a été relayé par votre fax du 15 décembre 2010, et compléter le corps arbitral avec les deux arbitres désignés par les parties en début de procédure".

Par courrier du 11 février 2011, le Greffe du TAS a informé les parties que le CIAS avait désigné Me Pascal de Preux en qualité d'avocat d'office de l'Appelante.

Par courrier du 15 février 2011, l'Appelante a pris position au sujet du courrier de l'Intimée daté du 10 février 2011 et rejoint l'avis de cette dernière en ce sens que le Tribunal arbitral aurait dû être composé de trois arbitres. L'Appelante conclut ainsi à ce que la présente procédure soit soumise à une formation arbitrale composée de trois arbitres.

Par courrier du 17 février 2011, le Président suppléant de la Chambre arbitrale d'appel a rappelé aux parties qu'elles s'étaient déjà exprimées en temps utile sur la question de la composition de la Formation arbitrale et que celle-ci, composée de M. Bernard Foucher en qualité d'Arbitre unique, ne pouvait plus être remise en cause, sous réserve des cas de récusation ou de révocation prévus par le Code.

L'audience s'est tenue le jeudi 14 avril 2011 à 9h30 au siège du TAS à Lausanne

Extraits des considérants

A. Compétence et pouvoir d'examen du TAS

La compétence du TAS n'est pas contestée en l'espèce et est notamment confirmée par la signature de l'ordonnance de procédure par les deux parties. En outre, l'art. 59 de la loi n°227/2006 prévoit expressément la compétence exclusive du TAS pour les décisions rendues par la Commission d'audition de la RANAD concernant les athlètes de niveau international. Partant, le TAS est compétent pour statuer sur le présent litige.

L'article R57 du Code dispose que:

"La Formation revoit les faits et le droit avec plein pouvoir d'examen. Elle peut soit rendre une nouvelle décision se substituant à la décision attaquée, soit annuler cette dernière et renvoyer la cause à l'autorité qui a statué en dernier. (…)"

Néanmoins, la Formation n'est pas habilitée à aller au-delà des conclusions des parties (statuer *ultra petita*). En effet, l'article 192 alinéa 2 lettre c de la Loi fédérale sur le droit international privé ("LDIP"), applicable à tout arbitrage dont le siège du tribunal arbitral se trouve en Suisse (article 176 LDIP), dispose qu'une partie peut recourir au Tribunal fédéral dans le cas ou le tribunal arbitral a alloué à une partie plus ou autre chose qu'elle n'avait demandé (*ultra* ou *extra petita*) et dans celui où il a omis de se prononcer sur des chefs de la demande ou de la reconvention. (Poudret/

Besson, Droit comparé de l'arbitrage international, Genève, 2002, § 807 pages 789 s.).

Aussi, la Formation est uniquement habilitée à examiner la question de la recevabilité de l'appel dirigé contre la RANAD et de la pertinence de la suspension de l'Athlète dans la limite des prétentions des parties.

B. Droit applicable

L'article R58 du Code dispose que

" La Formation statue selon les règlements applicables et selon les règles de droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit dont la Formation estime l'application appropriée ".

S'agissant d'un contrôle antidopage qui concerne une athlète de niveau international disposant d'une licence en athlétisme, les règles de l'IAAF et notamment la règle 30.4 du Règlement IAAF sont applicables. En l'absence de règles de droit choisies par les parties, la Formation peut appliquer le droit du pays où la RANAD a son siège. La RANAD ayant son siège en Roumanie, le litige peut être soumis au droit roumain, et en particulier à la loi n° 227/2006.

C. Applicabilité de l'art. R65 du Code de l'arbitrage

Selon l'art. R65. du Code, une procédure d'appel est gratuite dès lors qu'elle a pour objet des décisions de nature exclusivement disciplinaire rendues par une fédération ou une organisation sportive internationale ou par une fédération ou organisation sportive nationale agissant par délégation de pouvoir d'une fédération ou organisation sportive internationale. Une telle délégation doit porter sur un cas concret et être expressément formulée. Une règle générale ou l'implication d'une fédération internationale ne saurait suffire à établir que, dans un cas spécifique, une fédération nationale a initié une procédure disciplinaire en agissant non pas de son propre chef mais sur délégation de sa fédération internationale.

En l'espèce, il n'y a pas eu de délégation formelle de l'IAAF au profit de la RANAD.

Certes, il n'est pas contesté que l'Athlète était considérée par l'IAAF comme athlète de niveau international et qu'elle appartenait à ce titre, au groupe-cible d'athlètes retenus pour relever du programme de contrôles hors-compétition de l'IAAF, d'autant qu'elle avait déjà fait l'objet de sanctions pour violation des règles antidopage. Toutefois, ce critère, s'il est important pour déterminer le droit applicable, ne joue aucun rôle dans l'application ou non de l'Art. R65 du Code.

La même remarque vaut pour la décision n° 6 du 10 août 2010 de la Commission d'appel de la RANAD, qui a rejeté pour incompétence l'appel de l'Athlète sur la base de l'art. 59 de la loi n° 227/2006, qui stipule que seule la voie de l'appel au TAS est ouverte dans le cas des athlètes de niveau international.

Au vu de ce qui précède, l'Arbitre constate que l'appel est dirigé contre une décision rendue par une entité sportive nationale, agissant sans délégation de pouvoir expresse d'une fédération internationale et que l'art. R64 du Code s'applique en l'espèce.

D. Recevabilité de l'appel

S'agissant de la question de la recevabilité de l'appel, l'Arbitre unique constate tout d'abord que la position des parties est totalement contradictoire sur ce point.

Il est vrai que là encore, la question peut en effet prêter à discussion dans la mesure où l'art. 59 de la loi n° 227/2006 prévoit, à l'instar de l'art. R51 du Code, un délai d'appel de 21 jours alors qu'en vertu de la Règle 42.13 du Règlement IAAF le délai d'appel est de 45 jours.

De plus, une certaine ambiguïté peut également résulter de l'application de l'article R49 du Code à propos de la combinaison entre le mécanisme de déclaration d'appel et celui du dépôt du mémoire d'appel quand, comme en l'espèce, le délai conféré pour régulariser la déclaration d'appel excède celui du dépôt du mémoire d'appel. Le système prévu par cet article du Code est toutefois a priori relativement simple. Selon ces dispositions, il doit être fait appel, par une déclaration d'appel, avant l'expiration du délai de recours. En revanche, le mémoire d'appel doit être remis dans les dix jours suivant l'expiration du délai d'appel. Dans sa lettre du 12 août 2010, adressée à Mme Dumbravean, c'est bien ce système que le Secrétariat du TAS a expressément rappelé à l'Appelante tout en l'invitant à régulariser sa déclaration d'appel.

En l'espèce, en tout cas, conformément à la Règle 42.13 du Règlement IAAF, il convient de retenir un délai d'appel de 45 jours, ainsi – faut-il le rappeler- que Mme Dumbravean en a été informée par la lettre que lui a adressée l'IAAF, le 5 août 2010, précisant qu'étant une athlète de niveau international, elle pouvait faire appel de cette décision conformément aux Règles de l'IAAF, qui prévoient un délai d'appel de 45 jours. La déclaration d'appel ayant été faite en date du 4 août

2010, le droit de Greffe acquitté le 23 août 2010 et le mémoire d'appel (y compris les annexes) déposé le 27 août 2010, il y a lieu d'admettre que le délai de 45 jours prescrit par le Règlement IAAF a été respecté.

Au surplus, on rappellera qu'en présence de deux délais (21 jours, tels qu'indiqués dans la décision de sanction contestée et 45 jours, tels qu'indiqués dans la lettre de l'IAAF susvisée du 5 août 2010), l'un et l'autre formellement notifiés à l'Athlète, les principes généraux et tout particulièrement le principe de la bonne foi plaident en faveur du délai le plus favorable à l'Athlète, à plus forte raison dans une procédure dont l'issue est si primordiale pour elle et dans cadre de laquelle on l'avait officiellement informée de ce délai.

Au vu de ce qui précède, l'appel formé par l'Appelante contre la décision n° 18 de la Commission d'audition de la RANAD du 8 juillet 2010 est déclaré recevable.

E. Au fond

1. Compétence de la RANAD pour statuer

De l'avis de l'Appelante, la décision appelée aurait dû être prise par la FRA et non la RANAD, cette dernière ne jouissant d'aucune compétence en la matière.

Le Règlement IAAF prévoit en premier lieu une procédure devant les instances compétentes de la fédération nationale à laquelle appartient l'athlète (cf. notamment Règle 38.7 du Règlement IAAF). Il n'en demeure pas moins que le Règlement IAAF laisse expressément la possibilité pour la fédération nationale de déléguer à toute organisation tierce le pouvoir de connaître des cas de dopage sur le territoire de la fédération nationale concernée (cf. Règle 38.11 du Règlement IAAF).

Or et ainsi que le TAS a déjà eu l'occasion de le constater dans sa jurisprudence antérieure (cf. TAS 2009/A/1766), la RANAD est, selon le droit roumain, et notamment l'article 4 de la Loi n°227/2006, l'entité compétente pour décider de manière autonome de tout ce qui touche de près ou de loin à la lutte antidopage. A ce titre, elle n'a donc aucunement besoin d'en référer à la fédération nationale de l'athlète incriminé à laquelle elle n'est aucunement subordonnée.

Il ne fait dès lors aucun doute qu'en Roumanie, seule la RANAD et non la fédération nationale de l'athlète, en l'espèce la FRA, est compétente pour statuer en matière de lutte antidopage.

2. Validité de la procédure suivie devant la RANAD

L'Appelante se plaint de ne pas avoir bénéficié d'un procès équitable devant la RANAD, faisant notamment valoir une prétendue violation de son droit d'être entendue et un manque d'impartialité ou d'indépendance de la commission d'audition de la RANAD. S'agissant de ces griefs, l'Arbitre unique souligne que les moyens développés par l'Appelante sur ce point viennent essentiellement à l'appui de la décision de suspension provisoire prononcée à son encontre le 3 juin 2010. Or, l'appel faisant l'objet de la présente procédure est dirigé contre la décision de suspension définitive qui s'est substituée à la décision de suspension provisoire, laquelle n'a plus d'existence propre.

Dans la mesure toutefois où les moyens de l'Appelante visent également la décision de suspension définitive, ils ne sauraient non plus être retenus.

En effet, à supposer que les griefs de l'Appelante soient fondés, le plein examen de l'affaire devant le TAS – en fait et en droit – purgerait en tout état de cause les éventuels vices de forme qui pourraient avoir été commis (voir, par exemple, CAS 2010/A/1920, para 87 et les références citées).

3. Établissement des faits ayant motivé la sanction

S'agissant des faits, il est imputé à l'Athlète de s'être volontairement soustraite à un contrôle anti-dopage inopiné en prenant la fuite au moment où l'agente de la RANAD, Mme Ecaterina Ilica, lui aurait demandé de bien vouloir ôter sa blouse ainsi que son survêtement afin de vérifier si elle ne dissimulait pas un dispositif permettant de se soustraire au prélèvement d'urine qu'elle était en train d'effectuer dans les toilettes de la chambre de contrôle Pour sa part, l'Athlète nie tout simplement sa présence au contrôle. Au surplus, il peut être renvoyé à l'état de fait tel que décrit plus haut.

Le fait de refuser de se soumettre à un contrôle ou de se dérober à un prélèvement d'échantillon urinaire ou sanguin constitue indéniablement, tant au regard de la loi roumaine (Art.2.2.c) que des règles de l'IAAF, une violation des règles antidopage.

Mais il incombe toujours à l'autorité antidopage d'établir la preuve de cette violation. Lorsqu'un prélèvement corporel a été effectué, cette preuve résulte d'un élément objectif: la présence d'une substance interdite dans ce prélèvement. Il appartient alors à l'athlète de renverser cette présomption de preuve en démontrant notamment qu'un écart aux Standards internationaux est survenu ou en

démontrant l'existence de circonstances particulières pouvant expliquer comment la substance en cause a pénétré dans son organisme et justifier une réduction ou suppression de la sanction.

En l'espèce, la violation ne résulte pas de la présence d'une substance interdite dans un prélèvement corporel de l'Athlète, mais du fait qui lui est imputé de s'être dérobée à un prélèvement d'échantillon d'urine.

Les parties étant en totale contradiction sur les faits – la parole de l'une contre la parole de l'autre –, l'établissement de la preuve de ce fait s'avère donc déterminant pour l'issue de la présente procédure.

Si l'Intimée conserve bien la charge de cette preuve, le degré de cette preuve doit alors être, conformément à la Règle 33 de l'IAAF, plus important qu'une simple prépondérance des probabilités, mais moins importante qu'une quasi certitude.

Il convient donc d'apprécier si les éléments de preuve qu'apporte l'Intimée atteignent ce degré.

Celle-ci s'appuie sur des éléments matériels.

Il s'agit tout d'abord du procès-verbal établi par les deux agents de contrôle de la RANAD, Mme Ecaterina Illica et M. Corneliu Radulescu, attestant de leur mission le 18 mai 2010 au matin à la Villa Olimpic Sport et de leur rapport retraçant les faits de leur intervention et plus particulièrement les conditions dans lesquelles s'est déroulé le contrôle portant sur Mme Dumbravean. La circonstance alléguée par cette dernière selon laquelle ce rapport n'aurait pas été rédigé sur place, ne saurait suffire à démontrer que celui-ci est un faux et qu'il doit être écarté.

Il s'agit ensuite, au-delà du formulaire de contrôle antidopage établi au nom de Corina Dumbravean et produit au dossier, du formulaire d'invitation au contrôle dopage comportant la signature de l'Appelante, mais aussi du registre de contrôle comportant également cette signature. Certes, cette signature est apposée uniquement à partir des initiales de l'intéressée. Mais il lui appartient alors d'établir qu'il s'agirait, dans les deux cas, d'un faux. Or, les deux expertises graphologiques qu'elle produit et qui concluent à ce que la signature ne peut lui être attribuée, ne permettent d'y parvenir. En effet ces expertises sont contredites par une autre expertise produite par l'Intimée, qui à l'inverse, attribue, de manière affirmative, la signature en cause, à l'Appelante. Force est de constater que ces expertises graphologiques se contredisent, que l'audition des experts à l'audience n'a fait que conforter cette contradiction et qu'il n'est pas possible d'en retirer une certitude dans un sens ou dans un autre, ainsi d'ailleurs que le souligne le rapport demandé par la justice pénale et élaboré par un expert du service criminalistique de l'inspectorat de police du département de Brasov en concluant qu'il n'était pas possible d'avoir une certitude sur la signature en cause de l'invitation au test anti-dopage du 18 mai 20010 et du registre de la station de contrôle. Il convient toutefois de souligner que les deux expertises sollicitées par l'Appelante ont été effectuées sur la base de copies alors que l'expertise du 11 octobre 2010 produite par l'Intimée porte sur les documents originaux et de noter au surplus que, depuis cette affaire, l'Athlète, de manière non expliquée, ne signe plus avec ses initiales ce qu'elle ne conteste pas avoir fait auparavant.

Il s'agit enfin d'une pièce produite au dossier, consistant en la traduction de deux SMS en date du 18 mai 2010 dont l'envoi est imputé à l'Appelante et le destinataire identifié comme étant la présidente de la RANAD comportant le nom de Corina Dumbravean et ayant pour objet de solliciter l'aide de ladite présidente à la suite de "*l'erreur*" commise. L'Intimé se prévaut également d'un fax adressé à l'IAAF le 18 mai, après les faits en cause - ainsi que l'a reconnu dans son audition en tant que témoin M. Capdevielle - pour informer la fédération internationale d'une nouvelle localisation de l'Athlète. Là encore, il appartenait à l'Appelante de démonter l'absence de réalité ou l'inexactitude de ces pièces matérielles, ou à tout le mois d'apporter des éléments pour combattre et mettre en doute la pertinence de ces preuves apportées par l'Intimée. Or, à part se contenter d'alléguer que ces faits sont erronés, celle-ci n'apporte aucune démonstration ou tentative de démonstration sur l'inexistence ou l'inexactitude du fax envoyé à l'IAAF ou sur celles du SMS adressé à la Présidente de la RANAD, Mme Graziela Vajiala. Si l'Appelante entendait contester valablement ces éléments, elle aurait, à tout le moins, pu ou dû demander le suivi du fax en cause ainsi que le relevé de ses appels afin d'apporter la preuve contraire.

L'Intimée s'appuie également sur les déclarations des deux agents de contrôle de la RANAD éclairées par leur audition à l'audience en tant que témoins.

Le poids de ces déclarations dans l'établissement de la preuve à la charge de l'Intimée, doit s'apprécier par rapport au poids des déclarations faites par les témoins de l'Appelante.

Dans la pesée de ces déclarations réciproques, l'Arbitre considère que celle des agents de contrôle de la RANAD emportent une meilleure conviction.

Il relève en effet que leur version des faits, dûment consignée dans des procès verbaux à la suite des événements constatés, n'a pas varié tout au long de la procédure et des différentes auditions auxquelles ils ont été soumis tant devant les instances roumaines que devant le TAS. De plus, leurs témoignages sont circonstanciés, précis et détaillés. Par ailleurs, la considération de leur statut ne peut être totalement ignorée dans la mesure où ils ont agi en qualité de représentants officiels d'une institution sportive– qui plus est en l'espèce d'une institution étatique– . L'exercice de leur mission leur confère une position d'autorité et de responsabilité de nature à crédibiliser leur témoignage, à défaut bien sûr, de témoignages contraires suffisamment probants. L'organisation et le contrôle des activités sportives, ainsi que le bon déroulement des compétitions en résultant, impliquent en effet cette présomption de crédibilité, dès lors que les arbitres ou les représentants officiels de l'institution sportive disposent d'une compétence et d'une formation adéquates, sont investis d'une mission officielle de régulation et de contrôle de l'activité sportive et sont le garant de l'application et du respect des règles. Enfin, lors de la présente procédure, ils ont confirmé lors de leur déposition, en tant que témoins interrogés en application des dispositions de l'article R44.2 du Code qui les exposent notamment à l'engagement de leur responsabilité et à des sanctions en cas de faux témoignage. Dans ce cadre, il faut rappeler que les deux contrôleurs, M. Corneliu Radulescu et Mme Ecaterina Ilica, appelés par l'Arbitre à dire s'ils reconnaissaient formellement l'Athlète présente devant eux à l'audience comme étant celle présente au contrôle et qui s'est dérobée, ont répondu fermement et sans aucune expression de doute, qu'il s'agissait bien de la seule et même personne.

Face à ces déclarations et témoignages ceux dont se prévaut l'Appelante n'emportent pas, bien au contraire, la même conviction. Celui de M. Pauna n'apporte aucun élément déterminant. On dénombre de nombreuses incertitudes quant à l'explication de la configuration des lieux faite par ce dernier et on ne peut s'empêcher de relever une certaine approximation s'agissant des horaires indiqués

Le témoignage de M. Eleodor Rosca en particulier, n'emporte pas non plus la conviction. Ce témoignage souffre en effet de nombreuses contradictions avec ses déclarations antérieures. De plus, celui-ci affirme *"savoir beaucoup de choses"* mais ne pas être en mesure de pouvoir les révéler. En se référant à ce témoignage, il est ainsi impossible de savoir si l'Athlète est bel et bien venue sur place pour le contrôle ou si une autre personne s'est présentée. Dans certaines de ses déclarations devant les instances de la RANAD , il soutient ne pas savoir ce qui s'est passé après avoir donné aux contrôleurs la carte d'identité de Mme Dumbravean , puis dit ensuite connaître la personne qui se serait présentée à la place de cette dernière en ajoutant *"je ne pourrais les nommer maintenant"* (procès-verbal n°13); il déclare par ailleurs *"je pense qu'une autre personne a remplacé Corina"* (procès –verbal n°14) A en croire, M. Eleodor Rosca, il ne se serait pas lui-même rendu dans la chambre où a été effectué le contrôle, alors que les contrôleurs jurent le contraire. Il déclare dans son témoignage à l'audience du TAS que les contrôleurs ne l'auraient pas informé de l'incident; dans son audition devant les instances de la RANAD, il indique pourtant que ceux-ci lui ont dit *"quelque chose d'incohérent"* et qu'il leur a demandé de rester (sans d'ailleurs en indiquer la raison) tout en soutenant qu'ils ne lui ont pas parlé de l'incident. Il aurait également téléphoné à la Présidente de la RANAD le 18 mai 2010, mais les raisons et la teneur de leurs propos reste inconnue à ce jour malgré les questions posées en ce sens. Enfin, les raisons pour lesquelles M. Eleodor Rosca a remis la carte d'identité de l'Athlète aux contrôleurs de la RANAD demeurent également totalement floues.

Quant aux attestations fournies par l'Appelante, celles-ci indiquent toutes que l'Athlète n'était pas présente à la Villa Olimpic Sport la veille et, à l'exception d'une, ne font aucunement état de l'emploi du temps ou de la localisation de l'Athlète au moment des faits litigieux, soit entre 8 heures et 11 heures le 18 mai 2010. Elles ne peuvent donc suffire, en tant que telles, à établir que l'Athlète n'était pas présente ou ne pouvait être présente à la Villa Olimpic le matin du 18 mai entre 8 heures et 11 heures. Une seule, il est vrai, celle établie par Antoci Alexandru-Cristian et Antoci Elena indique que l'Athlète les aurait quittés le 18 mai vers 10 heures. Mais cette déclaration sommaire, nullement circonstanciée dans les faits et relativement imprécise quant aux horaires ne suffit pas à imposer la conviction certaine que l'Athlète ne pouvait pas être présente à la Villa Olimpic au moment du contrôle et des faits tels que rapportés par les agents de la RANAD.

Enfin l'Arbitre ne peut que s'interroger sur l'intérêt qu'il y aurait eu à ce qu'une autre personne remplace Mme Drumbavaen (hypothèse esquissée par l'Appelante) pour ensuite se dérober dans les conditions invoquées au contrôle.

Au vu de ce qui précède, l'Arbitre unique considère donc que les éléments apportés par l'Intimée atteignent bien le degré de preuve nécessaire en l'espèce – c'est-à-dire, moins qu'une quasi certitude mais plus qu'une prépondérance des probabilités, pour admettre que les faits de violation aux règles de

dopage doivent être considérés comme établis et que l'Athlète, s'est rendue coupable d'une violation des règles antidopage telles que définies par l'art. 2 al. 2 lit. c) et e) de la loi 227/2006, lesquels correspondent aux Règles 32.2 lit. c) et e) de l'IAAF et à l'art. 2.3 et 2.5 du Code mondiale anti-dopage et définissent *"le refus de se soumettre à un prélèvement d'échantillon ou fait de ne pas s'y soumettre sans justification valable après notification conforme aux règles antidopage en vigueur, ou fait de se soustraire à un prélèvement d'échantillon"* (art. 2 al. 2 lit. c) ainsi que *"la falsification ou la tentative de falsification de tout élément du contrôle du dopage"* (art. 2 al. 2 lit. e).

4. Sanction

S'agissant de la sanction prononcée par la RANAD, soit une suspension à vie pour une seconde infraction aux règles anti-dopage, il convient de rappeler qu'en présence d'infractions multiples dites *"standard"*, l'annexe de la loi n° 227/2006, à l'instar de la Règle 40 ch. 7 lit. a du Règlement IAAF, prévoit une suspension pouvant aller de 8 ans à la suspension à vie.

L'Arbitre unique est d'avis que la sanction de suspension à vie prononcée par la RANAD, bien que sévère et signifiant la fin de la carrière de l'Athlète, doit être retenue eu circonstances du cas d'espèce et dès lors, en tout état de cause qu'il n'est pas saisi de conclusions à fin de réduction de la sanction . Il rappelle par ailleurs qu'une suspension à vie ne vise pas uniquement à sanctionner l'Athlète sur le plan sportif, mais également à préserver sa santé d'une consommation abusive de substances toxiques.

Au surplus, la décision de la RANAD s'inscrit tout à fait dans le cadre de la jurisprudence du TAS en matière de sanctions de suspension à vie. Il a en effet été confirmé à maintes reprise qu'une suspension à vie était tout à fait en concordance avec les buts visés par la lutte contre le dopage (cf. notamment TAS 2008/A/1585; TAS 2008/A/1586; TAS; TAS 2002/A/383).

Arbitration CAS 2010/A/2275
Croatian Golf Federation (CGF) v. European Golf Association (EGA)
20 June 2011

Golf; expulsion of a member due to bankruptcy; expulsion of a member and violation of its right to be heard; obligation of federations to respect their members' right to be heard when making their decisions and within their internal proceedings; limits in the Panel's full power of review

Panel:
Mr. Dirk-Reiner Martens (Germany), President
Mr. Quentin Byrne-Sutton (Switzerland)
Prof. Denis Oswald (Switzerland)

Relevant facts

The Croatian Golf Federation (the "*Appellant*") is the federation of Croatian golf clubs and has its seat in Zagreb, Croatia.

The European Golf Federation (EGA or the "*Respondent*") is an association of national golf federations in Europe and has its seat in Höhenhof, Senningerberg, Grand-Duché de Luxembourg, Luxembourg.

The Appellant has been the EGA's member federation for the Republic of Croatia since October 1992. By resolution adopted at the EGA Annual General Meeting held in Luxembourg on 17 October 2010 (the "*AGM 2010*") the Appellant was expelled as a member of the EGA (the "*Resolution*"). The Resolution is the subject-matter of the present appeal (the "*Appeal*").

The present dispute finds its starting point on 26 February 2009. On this date, the Zagreb City Office of General Administration pronounced, according to the certified translation provided by the Appellant, that the Appellant must be deemed to have "*ceased its activities*" due to the opening of bankruptcy proceedings against it. According to the certified translation provided by the Respondent, it ordered the "*dissolution*" of the Appellant.

On 2 April 2009, the Appellant filed an appeal against the 26 February 2009 decision. This appeal was dismissed by the Croatian Central State Bureau for Administration on 4 May 2010. The Appellant's appeal against the latter decision before the Administrative Court of the Republic of Croatia, which was filed on 28 May 2010, is still pending according to the Appellant's submissions.

In September 2009, the EGA sent to its member federations the official agenda for the EGA Annual General Meeting 2009 (the "AGM 2009"). This agenda included the following item:

" 5. Decision on the exclusion of the Croatian Golf Federation in bankruptcy (see enclosed)"

Enclosed was a proposed resolution by the Executive Committee which reads, in relevant part, as follows:

"Considering that in accordance with article 3 of its Constitution, only a federation representing golf activites in its country is eligible for membership,

[…]

Considering that Croatia is currently represented by the Croatian Federation in Bankruptcy,

Considering that according to general principles of law, the only activity allowed associations in bankruptcy is the realization of assets in view of paying creditors,

That under these circumstances, the Croatian Golf Federation in Bankruptcy is in no position whatsoever to manage golfing activities in Croatia,

[…]

Considering that the Croatian national Olympic Committee, in a letter dated July 31, 2009, notes that the Croatian Federation in Bankruptcy is devoid of a constitution, has no institutional body and no longer fulfills requisites for a national sports federation,
That the Croatian National Olympic Committee, in the same letter, notes that the situation is on the verge of being liquidated from an administrative aspect,

Considering that, in application of article 6 of its Constitution, the European Golf Association may exclude a member no

longer fulfilling statutory conditions,

That this is manifestly the case of a national federation who can no longer exercise an activity as such,

Based on considerations mentioned above, the resolution proposed by the Executive Committee to the Annual General Meeting is to exclude the ***Croatian Golf Federation in Bankruptcy*** *from the European Golf Association".*

On 6 October 2009, the Appellant sent a letter to all members of the EGA, explaining its situation and arguing against its expulsion.

On 17 October 2009, the following decision by the EGA's Executive Committee (taken at its meeting on 15 October 2009) was presented to its member federations at the AGM 2009:

"Last September, the Executive Committee sent all member federations a resolution, proposing to exclude as member from the EGA the Croatian Golf Federation, due to information that they were in bankruptcy proceedings. The proposition was based on the fact that, to be a member of the EGA, you must be a national golf federation representing the golf activities of its country.

The Croatian Golf Federation in bankruptcy proceedings with due respect doesn't look like meeting that condition.

Up till now, the Executive Committee has not received formal proof whether the Croatian Golf Federation in bankruptcy is recognised by Croatian authorities. There is therefore a doubt affecting the legal situation of the entity.

The following proposal is based on discussions in zone meetings and the Executive Committee: to allow evidence to be brought forward by the federation and the Croatian authorities, the Executive Committee has decided to postpone its resolution to the next EGA General Assembly in 2010, hoping in the meantime to receive a clarification of the legal situation for the good sake of development of golf in Croatia".

The AGM 2009 unanimously agreed with the Executive Committee's proposal.

By letter dated 20 October 2009, the EGA's counsel informed the Appellant that it was its responsibility to submit proof of its legal situation and of its qualification as national federation recognised by the "*Croatian olympic authorities*" and by the Ministry of Science, Education and Sport.

By letter dated 22 July 2010, the Appellant informed the Respondent that the

"Croatian Golf Federation went out from the bankruptcy proceedings on 29 June 2010. […]

Our bankruptcy plan was voted unanimously with 100% of votes and was immediately confirmed in full by bankruptcy judge. Court issued formal decision in writing, effective immediately, ending bankruptcy proceedings. […] It became enforceable and valid on 20 July 2010. […]

I emphasise that Croatian Golf Federation is obliged to continue and permanently execute all activities as national sports federation for golf within Republic of Croatia; it is strictly stated in bankruptcy plan. That means organizing national championships, governing national teams and representing Croatian golf and itself at international golf institutions as main activities plus many others.

We are already doing that; Croatian Team Championship was completed on 27 June after six days of play during two months. Croatian Individual Championship is scheduled from 9 – 12 September this year".

It is undisputed that the EGA received this letter and was thus aware of the decision of the Zagreb Commercial Court to which the Appellant's foregoing letter referred. In the certified English translation on record, the decision's operative part reads, in relevant part, as follows:

"I The bankruptcy proceedings against the Bankruptcy Debtor "CROATIAN GOLF FEDERATION" [...] are concluded.

II Upon the issue of this Decision the functions of the Bankruptcy Trustee and members of the Board of Creditors cease to exist.

III The Debtor regains the right to avail itself of the bankruptcy estate".

On 3 September 2010, the EGA sent to its member federations the agenda for the 2010 AGM. The agenda did not include any item relating to the Appellant's expulsion.

On 7 September 2010, the Croatian Olympic Committee (COC) took the decision to terminate the Appellant's membership.

According to the Appellant's submissions which were not contested by the EGA, the Appellant was not heard before the decision was taken.
The main reasons given by the COC for the termination were that the Appellant's bodies were not elected (but appointed by the Zagreb Commercial Court by adopting the Insolvency Plan), that its statutes were not in accordance with the Croatian Sports Act and Association Act, that the majority

of golf clubs in Croatia had withdrawn from the Appellant and that the Appellant's debts had been "*rescheduled until 2023, which indicates that there were no material conditions for the Associations's proper functioning*".

By letter dated 16 September 2010, the COC informed the EGA that the Appellant's membership with the COC had been terminated and that the COC had decided to "*admit the Croatian Golf Association (HGU) to the associate members of the Croatian Olympic Committee*". In the same letter, the COC also outlined the reasons for the Appellant's expulsion.

On 13 October 2010, the Respondent's Executive Committee received a letter from the Croatian Ministry of Science, Education and Sport, which according to the certified English translation provided by the Respondent reads as follows:

"The Croatian Olympic Committee is defined by the Sport Act as the supreme nongovernmental national sport organization, which is autonomous in its operation and performs the following activities according to the Sport Act: provides conditions for undisturbed development of sport, provides consent to the Articles of Associations of its members that must be in conformity to the Articles of Association of the Croatian Olympic Committee, represents Croatian sport before the International Olympic Committee, and represents Croatian sport before the relevant international sport organizations and associations.

The Ministry of Science, Education and Sport is not competent in connection with status issues of organizations, but supports any efforts and measure of the Croatian Olympic Committee contributing to provision of conditions for undisturbed development and promotion of golf as a sport".

On 16 October 2010, Mr. Dino Klisovic, Chairman of the Appellant's Board of Directors, gave a report on the current state of golf in Croatia to the EGA South Zone meeting, *inter alia* mentioning that the Appellant was no longer in bankruptcy proceedings. The EGA's President, Mr. Luis Gonzaga Escauriaza, was present at the South Zone meeting in his role as the President of the Spanish golf federation. There were no specific questions raised as to the legal or financial situation of the Appellant. Also, no plans were mentioned to expel the Appellant the next day.

Just before dinner on 16 October 2010, the EGA's President and General Secretary explained to both of the Appellant's delegates (Mr. Klisovic and Mr. Bozidar Ivacic) that around 7 pm that evening, the EGA Executive Committee had decided to propose a resolution to the AGM 2010 to expel the Appellant. The General Secretary said that the EGA was in possession of documents from relevant Croatian authorities which compromised the Appellant's status as the representative national golf federation. However, the EGA General Secretary refused to hand over said documents to the Appellant's delegates. The EGA President offered as a reason for the expulsion that the Appellant had lost its membership with the Croatian Olympic Committee and the Secretary General reminded the Appellant's delegates of the bankruptcy proceedings.

The next day, during the AGM 2010, the EGA Secretary General reminded the members present of the decision of the Executive Committee the prior year to submit if necessary to the AGM 2010 a resolution on the expulsion of the Appellant. The Secretary General's speech is reproduced in the minutes of the AGM 2010 as follows:

"On behalf of the Executive Committee, the General Secretary wished to remind the assembly on the decision reached at the last Annual General Meeting held in Hamburg when it was decided to adjourn the decision on the resolution to exclude the Croatian Golf Federation from membership in the EGA. To allow evidence to be brought forward by the Croatian Golf Federation and Croatian athorities, it was decided to postpone the resolution to the Annual General Meeting 2010, hoping in the meantime to receive clarification of the legal situation for the good sake of the development of golf in Croatia. The proposition was based on the fact that to be a member of the EGA, you must be a national golf federation representing the golf acitivities of your country and recognised by the governing authorities for the sport in the country, in the present case, the Croatian Olympic Committee.

A few days prior to the meeting, the Executive Committee received formal proof that the Croatian Golf Federation, with due respect, does not meet that condition. This has been confirmed by our lawyers and legal experts. The Executive Committee consequently asked the Croatian Golf Federation to resign immediately from EGA membership. This offer being declined, according to article 16 of the EGA Constitution, the Executive Committee decided to submit the resolution on the exclusion of the Croatian Golf Federation. In order to be able to vote on this resoluation, according to third paragraph of article 16 of the constitution, it needs a two-thirds majority of those delegates present and represented".

In his presentation to the AGM 2010, Mr. Klisovic, Chairman of the Appellant's Board of Directors, unsuccessfully requested the EGA to immediately hand out to all delegates the proposed resolution and all documents it was based on.

In the subsequent vote, 81 votes were cast in favour of taking a vote on expulsion of the Appellant. Thereafter, 76 votes were cast in favour of the expulsion. The total number of votes present and represented was 108.

By letter dated 20 October 2010, the EGA informed the Appellant as follows:

"The European Golf Association (EGA) hereby informs you that during the last EGA Annual General Meeting held in Luxembourg on Sunday, 17th October 2010, delegates voted on the resolution to expel the Croatian Golf Federation from EGA membership.

Voting was carried out as follows:

According to paragraph 3 of article 16 of the constitution, delegates voted in favour of an immediate decision to be taken on the resolution to expel the Croatian Golf Federation from EGA membership.

Total number of votes present and represented: 108

Votes in favour: 81

Thereafter and according to article 6, delegates voted in favour of the expulsion of the Croatian Golf Federation from EGA membership.

Total number of votes present and represented: 108

Votes in favour: 76

The resolution was submitted to delegates based on following official documents:

Letter of the Republic of Croatia Ministry of Science, Education and Sport dated 13 October 2010.
Letter of the Croatian Olympic Committee dated 16 September 2010.

Republic of Croatia, City of Zagreb, City Office of Administration statement of 26 February 2010 regarding the dissolution of the Croatian Golf Federation.

Republic of Croatia, Ministry of Administration statement of 4 May 2010 regarding the appeal dismissal".

By letter dated 17 November 2010 and received by the Court of Arbitration for Sport (CAS) on the same day, the Appellant filed its Statement of Appeal with CAS against the Resolution.

By letter dated 1 December 2010, CAS granted, upon request by the Appellant of 29 November and 1 December 2010, an extension of the time limit to file the Appeal Brief until 9 December 2010. Upon a further application by the Appellant on 8 December 2011, the time limit was extended until 20 December 2010 by CAS' letter dated 10 December.

On 20 December 2010, the Appellant filed its Appeal Brief.

By letter dated 8 February 2011 and received by CAS on the same day, the Respondent filed its Answer.

A hearing was held in Lausanne on 3 May 2011 (the "*Hearing*").

The Appellant submitted the following prayers for relief to CAS:

"The Appellant hereby respectfully requests CAS to rule that:
1. The Decision is null and void
2. The Decision is, in any event, set aside
3. The Appellant is granted an Award for all proceeding costs".

The Respondent submitted the following prayers for relief to CAS:

"The Respondent hereby respectfully requests the Court of Arbitration for Sport to decide:

1. *That the decision taken by the Respondent excluding the Appelant [sic] of the EGA on October 17 2010 is confirmed and declared valid.*

2. *That the Croatian Golf Federation bears all costs relating to the appeal.*

3. *That the Croatian Golf Federation is ordered to pay to the European Golf Association all costs of the Arbitration, including, but not limited to the costs and fees of the Arbitral Tribunal, the costs and expenses of the European Golf Association related to the Arbitration, including attorney's and witnesses' fees as well as all internal costs".*

Extracts from the legal findings

The Panel finds that the Appeal is well-founded because the Resolution was either based on invalid reasons and/or the Appellant's fundamental right to be heard was clearly violated.

First of all, the Panel finds that it is not clear from the EGA's submissions and pleadings what exactly were the reasons for the expulsion at the time it was decided.

The Resolution itself does not expressly give any reasons. It merely refers to four attachments and states that the Resolution was submitted to the delegates on the basis of these attachments.

Two of the attachments concern the consequences of the bankruptcy proceedings, i.e. the decision that the Appellant is deemed to have ceased its activities or

(depending upon the translation) that it is dissolved. However, during the Hearing, the Respondent emphasized repeatedly that for the Respondent the Appellant's bankruptcy only served as an "*alarm bell*" but was, in itself, no reason at all for the Appellant's expulsion. If this is the case, however, it remains unclear why the Resolution was in its own words "*based*" (albeit *inter alia*) on said two attachments.

As to the remaining two attachments, the Panel finds that the relevance of the letter from the Ministry of Science, Education and Sport, which expressly states that the Ministry "*is not competent in connection with status issues of organizations*", lies (if anything) in its confirming that the constitution of the COC's members "*must be in conformity to the Articles of Association of the [COC]*". Therefore, the Ministry's letter obviously does not contain a reason for expulsion in itself, but must be read in conjunction with the COC's letter. In any event, the Panel finds it hard to understand why the Respondent deemed this letter to "*confirm that the decision by the [COC] was right*", as submitted in the Answer.

At the Hearing, the Respondent largely relied on the content of the letter from the COC, submitting that the Resolution was based on the Appellant's expulsion from the COC and alleging that the majority of Croatian golf clubs had left the Appellant and that it was not in a position to manage Croatia's golf activities.

It can be left open whether this uncertainty as to the grounds for the Resolution at the time it was taken can as such affect the Resolution's validity. Even if the Resolution was based (cumulatively or alternatively) on the bankruptcy proceedings, the expulsion from the COC, Croatian golf clubs leaving the Appellant and the Appellant's inability to manage Croatia's golf activities, these reasons could not, under the circumstances presented to the Panel, justify the expulsion of the Appellant from the EGA.

As for the bankruptcy proceedings, it is unclear whether such proceedings can per se justify the expulsion of a member under the EGA Constitution. Even if this was the case, the Panel doubts whether Article 16 par. 3 of the EGA Constitution would entitle the Respondent to take a vote on the Appellant's expulsion on the basis of its bankruptcy without including this item on the agenda. Article 16 par. 3 of the EGA Constitution reads as follows "*Any resolution which has not been properly notified and which does not alter the Constitution or Rules may be discussed, but it shall not be voted on except when a two-thirds majority of those present and represented, deems it to be of sufficient urgency to require an immediate decision*".

While in general terms Article 16 para. 3 of the EGA is no doubt in keeping with Luxembourg laws and pertinent for resolving many types of issues that may arise within an association, the Panel finds that with respect to resolutions which severely affect the basic rights of a member - such as a decision to expel a member - the application of this provision raises legal concerns linked to the right to be heard. In that relation, it is also noteworthy that the particular seriousness of an expulsion is underscored by the fact that the EGA's Constitution contains an express provision (Article 6) fixing the conditions of expulsion of members, which requires a "*violation*" of the EGA's Constitution and Rules.

Even if such legal concerns could be ignored in cases of extreme urgency, the Panel doubts whether a situation of urgency has been established in the present case. The Appellant's expulsion as a result of the bankruptcy proceedings had already been discussed on the AGM 2009 and was postponed until the AGM 2010. Hence, it was clear (as expressly submitted by the Respondent in its Answer) that this subject would again be broached at the AGM 2010. As acknowledged by the Respondent's President at the Hearing, even if the Appellant had not submitted any documents as requested by the EGA on 20 October 2009, the latter should nevertheless have informed its members of that fact and put the item on the agenda.

In summary, therefore, it is doubtful whether the application of Article 16 para. 3 of the EGA Constitution would be legally acceptable under the circumstances of this case.

However, the Panel finds that the questions raised in the previous paragraphs can eventually be left open. It is undisputed that the bankruptcy proceedings were lifted due to the decision of the Zagreb Commercial Court on 29 June 2010. The Respondent was notified by the Appellant of said court decision by letter dated 22 July 2010, i.e. nearly three months before the AGM 2010. Therefore, even if bankruptcy proceedings could generally justify an expulsion and even if Article 16 para. 3 of the EGA Constitution was applicable under the circumtances described above, the Resolution could not be based on the Appellant's bankruptcy proceedings because the Respondent was well aware that these proceedings were no longer pending when the Resolution was taken.

With respect to the Appellant's expulsion from the COC, it is doubtful whether this fact could in itself justify the Resolution. It has been held by CAS in the case CAS 2005/A/971 that:

"Unless relating to the participation of the national association's

athletes in the Olympic Games, the provisions of [Rules 26 and 28 of the Olympic Charter] do not vest any authority whatsoever in the NOCs which permit them to determine or co-determine the [...] expulsion of a national association by its IF. This does not prohibit the NOC from making a recommendation to the IF [...], but the IF is not required to follow such recommendation".

However, it is not necessary for the Panel to decide upon this issue in the present matter. Even if the Resolution was not based upon the expulsion from the COC as such, but – additionally or exclusively – on the reasons given in the COC's letter (mainly: a "*vast majority*" of Croatian golf clubs allegedly having left the Appellant and the Appellant's alleged inability to manage Croatia's golfing activities), the Resolution is invalid due to a blatant violation of the Appellant's right to be heard.

The right to be heard is a fundamental and general principle which derives from the elementary rules of natural justice and due process (see, for example, CAS OG 96/005, para 7; CAS 2001/A/317, para. 6). CAS has always protected the principle *audiatur et altera pars* in connection with any proceedings, measures or disciplinary actions taken by an international federation *vis-à-vis* a national federation, a club or an athlete (CAS 98/200, para. 58 with numerous references to CAS jurisprudence; see also CAS 2004/A/777, para. 20 with further references).

There is no doubt that the right to be heard is a legal principle which has to be respected by federations when making their decisions and within their internal proceedings (see CAS 91/53, in Reeb M. [ed.], *Digest of CAS Awards 1986-1998*, p. 79, 86 *et seq.*; CAS 2001/A/317, para 6) such as the Appellant's expulsion from the EGA.

As already mentioned above, it is doubtful whether Article 16 para. 3 of the EGA Constitution can be applied in the present case in view of the Appellant's right to be heard. However, even if this were the case and even if the letter from the COC contained information which would meet the "urgency" requirement in Article 16 para. 3 of the EGA Constitution, the Appellant's right to be heard would at the very least have required the EGA Respondent to immediately inform the Appellant (and the other members) that the EGA deemed the information received from the COC to be relevant for a possible expulsion of the Appellant at the AGM 2010. This course of action would have allowed the Appellant to prepare its defence against the Resolution, which is quite obviously of crucial importance to its future, and enabled the other members to consider the issue.

The letter from the COC is dated 16 September 2010.

Absent any evidence on record or any submission by the Respondent to the contrary, there is no reason to consider that the Respondent did not receive the COC's foregoing letter well in advance of the day on which the AGM 2010 took place.

Consequently, the Panel finds nothing that justifies the EGA having waited until the eve of the AGM 2010 before informing the Appellant, let alone its refusal to provide the Appellant with the relevant documents on that occasion and at the AGM 2010 itself.

In particular, the Panel finds that the letter from the Ministry of Science, Education and Sport which the Respondent, according to its Answer, received on 13 October 2010, does not constitute such justification. First of all, even if this letter did in fact, as submitted by the Respondent, confirm the legality of the COC's decision to expel the Appellant (which the Panel finds highly doubtful, see above), the question would remain whether the Appellant's expulsion from the COC could *per se* justify the Resolution in light of the CAS jurisprudence mentioned above. Because only then would the Ministry's letter have contained relevant information with regard to the Resolution.

However, the questions raised in the previous paragraph can be left open. Given that the AGM 2010 was at best one month ahead when the Respondent received the COC's letter, time was of the essence in order to provide the Appellant with the opportunity to prepare its defence. The Respondent was therefore obliged to inform the Appellant immediately upon receipt of any information which could later form the basis for a resolution to expel the Appellant. Waiting for a confirmation of any sort could not discharge the Respondent from this obligation given the fundamental importance of the right to be heard. Also, immediate notification would not have hurt any reasonable interests of the Respondent. If the sought-after confirmation would not have been received before the AGM 2010, the Respondent could have decided either – if it deemed the available information sufficient – to nonetheless take a vote on the Appellant's expulsion or – if it deemed the confirmation a *conditio sine qua non* for the expulsion – to postpone the vote once again.

Hence, in view of the fact that the Resolution was (at least *inter alia*, if not exclusively) based on the information contained in the letter from the COC, the Respondent was obliged to immediately notify the Appellant thereof. The outstanding confirmation from the Ministry did not justify the Respondent's

waiting until the eve of the AGM 2010 before informing the Appellant that its expulsion would be sought on the basis of facts which had come to the Respondent's knowledge weeks before. Even less could it justify the Respondent's refusal to provide the Appellant with the documents on which the Resolution was taken, even after being expressly requested to do so on both 16 and 17 October 2010. This course of action constituted a severe violation of the Appellant's right to be heard.

Unlike in other cases (see CAS 2004/A/714, para. 11 or CAS 1920/A/2009, para. 87 with further references), the *de novo* proceedings before CAS (in accordance with R57 of the CAS Code) cannot be deemed to have cured the violation of the Appellant's right to be heard. The vote taken by the AGM 2010 on the Resolution is not a decision which was largely determined by legal standards and which the Panel could therefore take in lieu of the delegates.

Article 6 para. 1 of the EGA Constitution reads as follows:

"All members shall observe the Constitution and Rules of the Association. In the event of their violation any member may be expelled by a majority of two-thirds of those present and represented voting at an Annual General Meeting or an Extraordinary General Meeting".

Article 6 para. 1 of the EGA Constitution might or might not stipulate that the facts presented to the delegates by the Respondent's Secretary General justified the expulsion of the Appellant (this can be left open here). In any event, it is still very much a "political" decision within the discretion of the delegates whether or not to expel a member. In particular, it follows from the wording of Article 6 para. 1 of the EGA Constitution ("*may be expelled*", emphasis added) that the delegates certainly did not have a legal duty to vote in favour of the Appellant's expulsion.

As has been established in the case CAS OG 96/005, paras. 10 *et seq.*

"the Panel's function is to review the propriety, in the broadest sense, of the decision of the decision maker; it is not to become the decision maker itself. […] There are, of course, exceptional cases when a body such as this Panel, can overlook a clear departure from due process because it can determine that the decision would have been the same in any event; i.e. that there was nothing that the victim of the decision could have said to persuade a reasonable decision maker to change his mind. But the law has always recognized that such cases are rare […]"

Pursuant to Article 6 para. 1 of the EGA Constitution, the Annual General Meeting is the decision maker with regard to the expulsion of members. The Panel would only be able to cure the violation of the Appellant's right to be heard if it could exclude the possibility that this violation had a bearing on the outcome of the case (cf. also CAS 2004/A/777 para .58).

In this case the Panel finds that it cannot exclude such possibility, since had the Appellant been given the chance to prepare its case a few weeks before the AGM 2010 began, the Appellant might very well have succeeded in convincing enough members in order to prevent a two-thirds majority in favour of the Resolution. This is especially true given that the vote was relatively close and in view of the fact that the EGA's delegates, as its witness Mr. Pfeiffer testified, understandably do not take a vote on the expulsion of a member "*light-heartedly*".

In 2009, when the Appellant sent a letter to all of the EGA's members arguing against its expulsion, the vote on the expulsion was postponed. The Panel is not in a position to judge whether this result was a consequence of the Appellant's efforts back then or not. However, the Panel considers that affording the Appellant the opportunity to defend itself again in 2010 and to comment on the documents invoked by the EGA would at least have left the possibility that some additional members would have voted against the Resolution. This might have prevented a two-thirds majority in favour of the Appellant's expulsion.

For these reasons, the Panel finds that the Resolution is illegal. Either, if based on the bankruptcy proceedings, the Resolution is illegal because this allegation was, as the Respondent was aware, no longer accurate at the time the Resolution was taken. Or, if based on any or all of the circumstances contained in the letter from the COC to the Respondent, the Resolution is illegal because the procedure leading to the Resolution clearly violated the Appellant's fundamental right to be heard.

Arbitration CAS 2011/A/2384
Union Cycliste Internationale (UCI) v. Alberto Contador Velasco & Real Federación Española de Ciclismo (RFEC)
&
Arbitration 2011/A/2386
World Anti-Doping Agency (WADA) v. Alberto Contador Velasco & RFEC

6 February 2012

Cycling; doping/Clenbuterol; food supplement contamination; admissibility of the testimony of a protected witness; admissibility of the polygraphe examination; new evidence; adverse analytical finding; burden of proof (principle); balance of probability standard; proof of negative fact; meat contamination; disciplinary sanction; starting point of the period of ineligibility

Panel:

Mr. Efraim Barak (Israel), President
Mr. Quentin Byrne Sutton (Switzerland)
Prof. Ulrich Haas (Germany)

Relevant facts

The Union Cycliste Internationale (UCI) is a non-governmental association of national cycling federations recognized as the international federation governing the sport of cycling in all its forms, with its registered office in Aigle, Switzerland.

The World Anti-Doping Agency (WADA) is the independent international anti-doping agency, constituted as a private law foundation under Swiss Law with its seat in Lausanne, Switzerland, and having its headquarters in Montreal, Canada, which aim is to promote, coordinate and monitor, on an international level, the fight against doping in sports in all its forms.

Mr Alberto Contador Velasco ("*Mr Contador*" or the "*Athlete*") is a professional cyclist of the elite category and has the Spanish nationality. He is an Elite Pro license holder (n°2247396) and is currently a rider of the Saxo Bank Sungard ProTeam.

The Real Federación Española de Ciclismo (RFEC) is the governing body of cycling in Spain with its headquarters in Madrid, Spain. The RFEC is a member of the UCI.

Mr Contador, then a member of the ProTeam Astana, participated in the 2010 Tour de France, a stage race on the UCI's international calendar that took place from 3 July to 25 July 2010. Mr Contador won the 2010 Tour de France.

On 21 July 2010, a rest day following the 16th stage of the 2010 Tour de France, the UCI submitted Mr Contador to a urine doping test pursuant to the UCI Anti-Doping Regulations (the "*UCI ADR*") between 20:20 and 20:30 in the city of Pau, France.

Mr Contador confirmed on the doping control form that this sample (Sample number 2512045) (the "*Sample*") had been collected in accordance with the regulations.

The Athlete's A Sample was analysed on 26 July 2010 at the WADA-accredited Laboratory for Doping Analysis - German Sports University Cologne in Cologne, Germany (the "*Cologne Laboratory*").

It resulted from the certificate of analysis of 19 August 2010 that Mr Contador's A Sample (A-2512045) contained clenbuterol in a concentration of 50 pg/mL. Clenbuterol is a Prohibited Substance classified under Article S1.2 (other Anabolic Agents) of the 2010 WADA Prohibited Substances List.

On 24 August 2010, UCI informed Mr Contador by telephone of the adverse analytical finding. Mr Contador was also informed that he was provisionally suspended from the date of receipt of the official notification in accordance with Article 235 UCI ADR. Furthermore, a meeting was arranged between UCI and Mr Contador on 26 August 2010.

The meeting of 26 August 2010 was arranged in order to deliver Mr Contador the official notification of the adverse analytical finding, the full documentation package of the A Sample analysis (Documentation Package A-2512045), the notification of the

provisional suspension and also to explain the management process of the case. On this occasion, Mr Contador requested the opening and analysis of the B Sample (B-2512045) and acknowledged the decision that he was provisionally suspended. During this meeting, the Athlete explained that the origin of the Prohibited Substance must have been contaminated meat.

On 8 September 2010, in the presence of Mr Contador's representatives, Dr de Boer and Mr Ramos, the B Sample analysis took place. The result of the Analysis of the B Sample confirmed the A Sample result.

As a consequence of the low concentration of clenbuterol found in Mr Contador's A and B Samples and the fact that the samples that had been collected prior to 21 July 2010 did not contain clenbuterol, the UCI, as well as WADA, decided to conduct a series of investigations in an attempt to understand the finding obtained and, in particular, whether the finding might indicate that other anti-doping violations could have been committed than just the presence of clenbuterol.

Following the investigation conducted together with WADA (WADA issued a report on 5 November 2010), the UCI concluded that the file contained a sufficient basis to proceed with the case as an apparent anti-doping rule violation. Therefore, by letter of 8 November 2010, and pursuant to Article 234 UCI ADR, the UCI asked the RFEC to initiate disciplinary proceedings against Mr Contador.

A. Proceedings Before the CNCDD of the RFEC

On 10 November 2010, the acceptance of the documentation submitted by UCI led to the fact that the *Comité Nacional de Competición y Disciplina Deportiva* (the "*CNCDD*") of the RFEC, which sanctioning responsibilities for the processing of this case are delegated by said international organisation, agreed to the initiation of the Disciplinary Proceeding with number 17/2010 against Mr Contador, for the alleged breach pursuant to Article 21(1) and (2) UCI ADR.

On 26 November 2010, Mr Contador was heard by the CNCDD of the RFEC.

The silence of the UCI and WADA in relation to the request for documentary and scientific collaboration made by the CNCDD led the Examining Judge, and later on the CNCDD to conduct the preliminary investigation of the case and, respectively, to issue its decision solely on the notification of the adverse results and the evidence presented by the Athlete.

On 25 January 2011, the examining judge of the CNCDD made a proposition to Mr Contador aiming at imposing to him a one year licence suspension.

On 7 February 2011, Mr Contador refused the proposal made by the examining judge of the CNCDD.

On 14 February 2011, the CNCDD rendered a decision according to which Mr Contador was acquitted (the "*Decision*").

B. Proceedings Before the Court of Arbitration for Sport

On 24 March 2011, the UCI filed an appeal at the Court of Arbitration for Sport (CAS) against Mr Contador and the RFEC with respect to the Decision pursuant to the Code of Sports-related Arbitration 2010 edition (the "*Code*").

In its statement of appeal, the UCI nominated Dr Quentin Byrne-Sutton, attorney-at-law in Geneva, Switzerland, as arbitrator.

On 29 March 2011, WADA filed an appeal at the CAS against Mr Contador and the RFEC with respect to the Decision pursuant to the Code. In its statement of appeal, WADA nominated Dr Quentin Byrne-Sutton as arbitrator.

On 31 March 2011, the CAS Court Office suspended the time limit for the UCI to file its appeal brief pending an agreement of the parties or a decision from the President of the CAS Appeals Arbitration Division, or his Deputy, on the issues of the consolidation and of the procedural calendar.

On 4 April 2011, following the parties' agreement, the CAS Court Office informed that both appeals shall be consolidated and be heard by the same Panel. Furthermore, the CAS Court Office informed the parties that all their letters on the procedural calendar were forwarded to the President of the CAS Appeals Arbitration Division, or his Deputy, in order for a decision to be taken in this respect.

On 5 April 2011, the CAS Court Office informed the parties that the Deputy President of the CAS Appeals Arbitration Division had decided to fix the deadline for the Appellants appeal briefs on 18 April 2011. Moreover, the Deputy President of the CAS Appeals Arbitration Division had decided that since the parties did not agree on a full procedural calendar, it will be for the Panel, once constituted, to decide

on the Respondents' requested extension of the time limit to file the answers.

On 11 April 2011, the RFEC requested that Dr Byrne-Sutton, arbitrator nominated by the Appellants, disclose the number of cases in which he was nominated by an anti-doping organization or any other party acting against a person accused of having committed an anti-doping violation since the enactment of the World Anti-Doping Code (WADC), and the number of cases in which he was appointed as a CAS arbitrator by a party represented by the Counsel for WADA or the latter's law firm.

On 11 April 2011, the RFEC confirmed that the Respondents jointly nominated Prof. Ulrich Haas as arbitrator.

On 18 April 2011, both the UCI and WADA filed their respective appeal briefs.

On 20 April 2011, pursuant to Article R54 of the Code, and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter was constituted by: Mr Efraim Barak, attorney-at-law in Tel-Aviv, Israel, as President; Dr Quentin Byrne-Sutton, attorney-at-law in Geneva, Switzerland; and Mr Ulrich Haas, Professor in Zurich, Switzerland, as arbitrators.

On 26 April 2011, Mr Contador filed with the CAS a petition for challenge of the nomination of Dr Byrne-Sutton, pursuant to Article R34 of the Code.

On 4 May 2011, the ICAS Board rendered its decision on petition for challenge rejecting Mr Contador's challenge against the nomination of Dr Byrne-Sutton filed on 26 April 2011.

On 4 May 2011, the file has been transferred to the Panel.

On 10 May 2011, the Panel rendered its decision on the Respondents' requests for an extension to submit their answers, granting them until 27 May 2011. Also, the Panel rejected a request for disclosure from the RFEC.

On 26 May 2011, the Panel requested the UCI and the Respondents to provide their position with respect to WADA's request concerning the protected witness and the modalities of his/her examination.

On the same date, the UCI informed the CAS Court Office that it had no objection to WADA's request concerning the protected witness.

On 31 May 2011, both Respondents filed their comments on WADA's request concerning the protected witness, objecting to such request.

On 1 July 2011, Mr Contador requested a new extension of the deadline to file his answer until 8 July 2011 as a significant proportion of the evidence he intended to file could not be finalized by 4 July 2011.

On the same date, the Panel decided to grant the Respondents a last and final extension until 8 July 2011 midday Swiss time to file their answers. The Panel, in consideration of the fact that together with this final extension the Respondents had been granted, in total, a period of more than seventy days to file their answers, informed the Respondents that no further extensions would be granted.

On 1 July 2011, the RFEC filed its answer.

On 8 July 2011 midday, Mr Contador filed his answer. In his answer, Mr Contador made new requests for further information.

On 15 July 2011, after considering all the submissions of the parties with respect to the issue of the protected witness, the Panel decided to deny WADA's request to hear such witness in a protected manner. The parties were informed that the grounds for this decision would be provided in the present award.

On 22 July 2011, WADA requested that a second round of submissions be permitted to address certain specific issues raised by the Respondents in their answers (the transfusion theory and the probability of clenbuterol-contaminated meat in Europe), indicating a new procedural calendar (the Appellants to file complementary briefs on those specific issues by 22 August 2011 and the Respondents to file their answers to such supplementary briefs within 35 days following the receipt of the Appellants' briefs), and that the hearing of 1, 2 and 3 August 2011 be postponed. WADA indicated that all of the other parties confirmed their agreement to such requests.

On 25 July 2011, the Panel decided to deny Mr Contador's requests for further information of 8 July 2011, considering that the documents requested did not exist or that the explanations sought could be addressed at the hearing.

On the same date, the parties were informed that the Panel did not object to the new procedural calendar proposed unanimously by the parties. The Panel noted the conditions surrounding the request for the postponement of the hearing and advised the parties

that it did not have any particular objection against any of them. The Panel also noted that the existence of a second exchange of written submissions may allow a significant reduction of the number of witnesses to be heard. The Panel also proposed to the parties to hold the hearing between 1 and 4 November 2011 provided that the second exchange of submissions is concluded by the end of September 2011.

On 22 August 2011, the Panel fixed the hearing dates from 21 November 2011 midday until 24 November 2011 midday and granted to the parties a deadline until 9 September 2011 to file with the CAS their lists of experts and witnesses as well as an indicative hearing schedule.

On 22 August 2011, WADA filed its supplementary brief.

The UCI did not file any additional submission.

On 29 September 2011, Mr Contador requested an extension of 10 days to file his additional submissions, i.e. until 14 October 2011, and indicated that the Appellants did not object to such request. Therefore, the President of the Panel, by letter dated 30 September 2011, confirmed such extension.

On 13 October 2011, Mr Contador requested a further extension until 19 October 2011 to file his additional submissions due to the fact that he was still waiting for two expert reports which were not yet completed.

On 14 October 2011, the President of the Panel decided to exceptionally grant such extension.

On 19 October 2011, Mr Contador filed his second written submission.

The RFEC did not file any additional submission.

On 4 November 2011, the Panel decided to deny the Respondents' request for private expert conferencing.

On 8 November 2011, Mr Contador requested WADA to present a clarification as to the testimony of Mr Javier Lopez, as no evidence was brought by this witness. Finally, Mr Contador requested CAS to enable the parties' experts to engage in an open discussion in front of the Panel and the parties during their allocated examination time.

On 9 November 2011, WADA presented a general description of the testimony of the above-mentioned witness and argued that the filing of witness statements is not mandatory before CAS, and that there was no need to be more specific. Furthermore, WADA agreed to Mr Contador's proposal for the parties' experts to engage in an open discussion in front of the Panel, each party and the Panel being permitted to ask questions to the experts during such discussions.

On 11 November 2011, Mr Contador filed a clarification of its objection against the hearing of WADA's witness and expressed its concern that new evidence might be presented by this witness and expressed its objection in that regard.

On the same date, WADA submitted its position on the hearing of its witness and clarified its argument that it had acted in accordance with the Code.

On the same date, the Panel presented an amended tentative hearing schedule taking into consideration the issues raised by Mr Contador in his letter of 8 November 2011. The Panel also decided to authorize the hearing of Mr Javier Lopez under the condition that WADA provide a brief summary of the expected expertise/expert opinion of the witness. Finally, the parties were informed of the Panel's intention to hear the experts in experts' conferences, during which all the experts addressing the same issue would be present.

The RFEC, Mr Contador, WADA and UCI returned duly signed Orders of Procedure on 10, 11, 11 and 14 November 2011 respectively.

On 15 November 2011, WADA presented a brief summary of the expected testimony of Mr Javier Lopez as requested by the Panel on 11 November 2011.

On 16 November 2011, Mr Contador presented a recently published news story to which the Athlete intended to refer during the course of the hearing. This issue was dealt with as a preliminary matter on the first day of the hearing.

In its statement of appeal of 24 March 2011, the UCI indicated that its appeal *"aims at:*

- *having the contested decision annulled and reformed,*

- *having Mr Alberto Contador Velsaco sanctioned in accordance with UCI's anti-doping rules".*

In its appeal brief of 24 March 2011, the UCI made the following requests for relief:

- *"To set aside the contested decision;*

- *To sanction Mr. Contador with a period of ineligibility of two years starting on the date of the Panel's decision;*

- *To state that the period of provisional suspension from 26 August 2010 until 14 February 2011 shall be credited against the period of ineligibility;*

- *To disqualify Mr. Contador from the 2010 Tour de France and to disqualify any subsequent results;*

- *To condemn Mr. Contador to pay to the UCI a fine amounting to 2'485'000.- Euros in addition to 70% of the variable part of his image contract;*

- *To condemn Mr. Contador to pay to the UCI the costs of the results management by the UCI, i.e. 2'500.- CHF;*
- *To condemn Mr. Contador to pay to the UCI the cost of the B-sample analysis, i.e. 500.- Euros;*

- *To order Mr. Contador and RFEC to reimburse to the UCI the Court Office fee of CHF 500.-;*

- *To condemn Mr. Contador and RFEC jointly to pay to the UCI a contribution to the costs incurred by the UCI in connection with these proceedings, including experts' and attorneys' fees".*

In its statement of appeal of 29 March 2011, WADA made the following requests for relief:

" 1 The Appeal of WADA is admissible.

2. The Appealed Decision rendered on 14 February 2011 by the RFEC Competition and Sports Discipline National Committee in the matter of Mr. Alberto Contador Velasco is set aside.

3. Mr. Alberto Contador Velasco is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any period of ineligibility, served by Mr. Alberto Contador Velasco before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served.

4. Mr. Alberto Contador Velasco is disqualified from the Tour de France 2010 with all of the resulting consequences including forfeiture of any medals, points and prices. In addition, all competitive results obtained by Mr. Alberto Contador Velasco from 21 July 2010 through the commencement of the applicable period of ineligibility shall be disqualified with all of the resulting consequences including forfeiture of any medals, points and prices.

5. WADA is granted an award for costs".

In his answer of 8 July 2011, Mr Contador made the following requests for relief:

" (a) Confirmation of the decision of the RFEC dated 14 February 2011;

(b) Dismissal of the Appeal raised by WADA;

(c) Dismissal of the Appeal raised by the UCI;

(d) Appellants to be ordered to reimburse the Rider's legal costs on the following grounds:

(i) The Rider was cleared of any wrong-doing at first instance. These proceedings are the result of the Appellants' lack of objectivity;

(ii) The Appellants' attempts to use this Appeal as a platform to raise allegations of other unrelated anti-doping rule violations are an abuse of process and have forced the Respondent to spend a disproportionate amount of resource addressing the Appellants' submissions; and

(iii) he Appellants' attempts to dilute the Rider's account that contaminated meat caused his positive test by advancing fantastical alternative theories, has compelled the Rider to spend a disproportionate amount of time and resource rebutting those theories.

The Rider respectfully requests the right to file separate costs submissions on completion of the hearing process.
In the event the Panel decides to impose any period of ineligibility on the Rider, he respectfully requests that:

(a) further to UCI ADR Article 313, fairness requires that his results achieved since 14 February 2011 remain undisturbed; and

(b) further to UCI ADR Article 315, any period of ineligibility imposed be backdated to the date of sample collection, 21 July 2010.

In the event the Panel imposes a two-year ban on the Rider and determines that Article 326(1)(a) of the UCI ADR is valid and can be validly applied in the present case, the Rider respectfully requests that determination of the amount of the fine be argued at a separate proceeding".

In its answer of 1 July 2011, the RFEC made the following requests for relief:

" (a) That the appeal filed by the World Anti-Doping Agency against the decision of the CNCDD of the RFEC dated February 14, 2011, is set aside.

b) The appeal filed by the Union Cycliste Internationale against the decision of the CNCDD of the RFEC dated February 14, 2011, is set aside.

c) *The resolution file dated February 24, 2011, issued by the CNCDD of the RFEC is confirmed in all respects.*

d) *The decision rendered by CAS, specifically orders the appellant organizations to pay the costs.*

e) *In the unlikely hypothesis that CAS considers that the athlete has committed a violation of the ADR, the RFEC is exempted from the costs".*

A hearing was held from 21 November 2011 until 24 November 2011 in Lausanne, Switzerland.

At the outset of the hearing, the RFEC reiterated its objection to the appointment of Dr Quentin Byrne-Sutton as arbitrator by the Appellants. However, as this issue was decided already by the ICAS, which is the competent body according to the CAS Code to deal with, and decide on such objections (See R34 of the Code), the Panel informed the parties that it would not deal with this objection. The other parties did not raise any objection as to the constitution and composition of the Panel.

During the hearing, the parties unanimously requested that the issue of the fine to be imposed on Mr Contador, in the event he is sanctioned for an anti-doping rule violation, should be dealt with in writing by way of a new round of submissions. The parties also agreed that the Panel would then render, if relevant, another partial award on this issue only on the basis of the parties' written submissions. The Panel took note of the parties' agreement and confirmed it. Therefore, this award is a partial award in respect of UCI's requests and, except for the matter of costs, is a final award in relation to the requests submitted by WADA. Considering the outcome of the present procedure UCI and the Respondents will be granted (in a separate communication by the CAS) a new deadline to submit their submissions on the issue of the fine.

Extracts from the legal findings

A. Applicable Law

Article R58 of the Code provides as follows:

" The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

Article 1 UCI ADR provides that *"These Anti-Doping Rules shall apply to all License-Holders".* Furthermore, pursuant to Article 2 UCI ADR " *Riders participating in International Events shall be subject to In-Competition Testing under these Anti-Doping Rules".*

The UCI ADR in the version that entered in force in 2010 shall be applicable to the present case as Mr Contador was tested on 21 July 2010.

Article 344 UCI ADR provides that "[t]*he CAS shall have full power to review the facts and the law. The CAS may increase the sanctions that were imposed on the appellant in the contested decision, either at the request of a party or ex officio*". This provision finds an echo in Article R57 of the Code according to which "[t]*he Panel shall have full power to review the facts and the law. (...)*".

Article 345 UCI ADR provides that "[t]*he CAS shall decide the dispute according to these Anti-Doping Rules and additionally Swiss law".*

It follows that this dispute will be decided according to the UCI ADR and additionally Swiss Law.

B. Preliminary Issues

1. The Protected Witness

The parties' positions with respect to the issue of the protected/anonymous witness may be summarised as follows:

- On 11 May 2011, as previously announced in its appeal brief, WADA filed a witness statement from an anonymous witness. WADA indicated that such witness did not accept to reveal his/her identity as he/she feared the consequences his/her revelations may have for him/her and his/her family.

- The UCI did not object to the submission of the statement and the examination of this witness as a protected witness.

- Mr Contador considered that allowing an unnamed witness to provide evidence would be contrary to a fair hearing, notwithstanding the fact that such testimony is irrelevant in the present factual circumstances and that the present matter only concerns how clenbuterol entered Mr Contador's body while the witness statement of the anonymous witness deals with events that allegedly happened in 2005 and 2006 which are, according to Mr Contador, totally irrelevant to this case. Mr Contador therefore requested that such testimony be declared inadmissible or,

alternatively, that the name of the witness be disclosed.

- The RFEC indicated it had no interest in knowing the identity of such witness. It requested to be able to put questions to him/her in an efficient manner, however preserving his/her identity.

The starting point to determine the applicable law on matters of evidence is – for all international arbitrations having their seat in Switzerland – Art. 184.1 of the Private International Law Act ("*PILA*").

Art. 184.1 of the PILA provides that the Panel *"… itself shall conduct the taking of evidence"*. The Panel considers that in keeping with this provision it is competent to decide whether or not a given evidence adduced by one of the parties is admissible or not (Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 2nd ed, 2010, no 1205; Poudret/Besson, Comparative Law on International Arbitration, 2nd ed, 2007, no 643; Kaufmann-Kohler-Rigozzi, International Commercial Arbitration, 2nd ed, 2010, no 478).

Inasmuch as the PILA (or the Code) contains a lacuna regarding the rules on evidence, the Panel has the powers to fill it. This follows from Art. 182.2 of the PILA, according to which the Panel is entitled to fill a (procedural) lacuna either *"directly or by reference to a statute or to rules of arbitration"*.

However, this power of the arbitral tribunal is not unlimited as has been expressed by a Panel in another CAS case (CAS 2009/A/1879, no. 102):

"Le pouvoir discretionnaire de la Formation de combler toute lacune est – en l'absence de règles expresses dans les articles 176 ss LDIP et le Code TAS – limité que par l'ordre public procédural et les droits procédureaux des parties (Kaufmann-Kohler/Rigozzi, Arbitrage International, 2006, Rn. 464). Selon la jurisprudence du Tribunal Féedéral l'ordre public procédural n'est pas facilement violé. Selon le Tribunal Fédéral, l'ordre public procédural n'est violé que ,lorsque des principes fondamentaux et généralement reconnues ont été violés, ce qui conduit à une contradiction insupportable avec les valuers reconnues dans un Etat de droit"(TF Bull ASA 2001, 566, 570).

The issue of the anonymous witness is linked to the right to a fair trial guaranteed under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe (the "ECHR"), notably the right for a person to examine or have examined witnesses testifying against him or her (Article 6.3 ECHR). As provided under Article 6.1 ECHR, this principle applies not only to criminal procedures but also to civil procedures.

The Panel is of the view that even though it is not bound directly by the provisions of the ECHR (cf. Art 1 ECHR), it should nevertheless account for their content within the framework of procedural public policy.

In addition, it is noteworthy that Article 29.2 of the Swiss Constitution guarantees the same rights, aimed at enabling a person to verify and discuss the facts alleged by a witness.

Admitting anonymous witnesses potentially infringes upon both the right to be heard and the right to a fair trial of a party, since the personal data and record of a witness are important elements of information to have in hand when testing his/her credibility.

Furthermore, it is a right of each party to assist in the taking of evidence and to be able to ask the witness questions (KuKo-ZPO/Schmid, 2011, Art. 155 no. 4; BSK-ZPO/Guyan, 2010, Art. 155 Rn. 14; Weibel/Nägeli, in Sutter-Somm/Hasenböhler/Leuenberger, ZPO, 2011, Art. 155 no 13 and 173 no. 2).

However, not all encroachments on the right to be heard and to the right to a fair trial amount to a violation of those principles or of procedural public policy. In a decision dated 2 November 2006 (ATF 133 I 33), the Swiss Federal Tribunal decided (in the context of criminal proceedings) that the admission of anonymous witness statements does not necessarily violate the right to a fair trial as provided under Article 6 ECHR.

According to the Swiss Federal Tribunal, if the applicable procedural code provides for the possibility to prove facts by witness statements, it would infringe the principle of the court's power to assess the witness statements if a party was prevented from the outset from relying on anonymous witness statements. The Swiss Federal Tribunal stressed that the ECHR case law recognises the right of a party to use anonymous witness statements and to prevent the other party from cross-examining such witness if *"la sauvergarde d'intérêts dignes de protection"*, notably the personal safety of the witness, requires it.

The Panel considers that these principles apply also to civil proceedings. The Panel is comforted in its view by the content of Art. 156 of the Swiss Code of Civil Procedure (CCP), which provides that a court is entitled to take all appropriate measures (cf DIKE-Komm-ZPO/Leu, 2011, Art. 156 no. 12; KuKo-ZPO/Schmid, 2011, Art. 156 no. 4; CPC-Schweizer,

2011, Art. 156 no. 11 ff) if the evidentiary proceedings endanger the protected interests of one of the parties or of the witness.

There is no doubt that the personality rights as well as the personal safety of a witness form part of his/her interests worthy of protection (CPC-Schweizer, 2011, Art. 156 Rn. 6). However, according to the predominant view an abstract danger in relation to these interests is insufficient. Rather there must be a concrete or at least a likely danger in relation to the protected interests of the person concerned (DIKE-Komm-ZPO/Leu, 2011, Art. 156 Rn. 8). Furthermore, the measure ordered by the tribunal must be adequate and proportionate in relation to all interests concerned. The more detrimental the measure is to the procedural rights of a party the more concrete the threat to the protected interests of the witness must be.

Referring to ECHR case law (the Doorson, van Mechelen and Krasniki cases), the Swiss Federal Tribunal considered that the use of protected witnesses, although admissible, must be subject to strict conditions: the witness shall motivate his/her request to remain anonymous in a convincing manner; and the court must have the possibility to see the witness. In such cases, the right to a fair trial must be ensured through other means, namely a cross-examination through "*audiovisual protection*" and an in-depth verification of the identity and the reputation of the anonymous witness by the court. Finally, the Swiss Federal Tribunal stressed that the ECHR and its own jurisprudence impose that the decision is not "*solely or to a decisive extent*" based on an anonymous witness statement.

Again referring to the ECHR jurisprudence, the Swiss Federal Tribunal concludes that (i) the witness must be concretely facing a risk of retaliations by the party he/she is testifying against if his/her identity was known; (ii) the witness must be questioned by the court itself which must check his/her identity and the reliability of his/her statements; and (iii) the witness must be cross-examined through an "audiovisual protection system".

The above-mentioned jurisprudence and principles established by the ECHR and the Swiss Federal Court led CAS in a previous case and based on the merits and specific circumstances of that case to allow the testimonies of protected witnesses (CAS 2009/A/1920).

However, in this case, in light of the above-examined criteria, the Panel found that, in the form requested, the measure requested by WADA was disproportionate in view of all the interests at stake. In particular the Panel found that it was insufficiently demonstrated that the interests of the witness worthy of protection were threatened to an extent that could justify a complete protection of the witness' identity from disclosure to the Respondents, thus, curtailing the procedural rights of the Respondents to a large degree.

The Panel sought an alternative solution by proposing to the parties a manner of hearing and cross-examining the witnesses that it deemed would more adequately balance the interests at stake. The proposal would have enabled the Panel to be satisfied that it could hear the witness' testimony in a reliable form, while sufficiently accounting for Mr Contador's defence rights, including his counsels' need to prepare the cross examination in an efficient manner given the witnesses' severe accusations against Mr Contador. However, neither WADA nor Mr Contador agreed to the Panel's proposal.

Given the above circumstances and in light of all the submissions of the parties, the Panel decided to deny WADA's request to hear such witness without the disclosure of his/her identity to the opposing party.

2. Witness statement of Mr Javier Lopez

On the first day of the hearing (21 November 2011), the Respondents declared not to object the summary of Mr Lopez' expected testimony presented by WADA on 15 November 2011.

3. Admissibility of newly presented evidence

Mr Contador considered that the recently published news he filed on 16 November 2011, concerning cattle contamination in Denmark, established that clenbuterol contamination is a worldwide problem and that he intended to rely on such documents during the course of the hearing.

WADA considered the news story to be irrelevant. The meat in this news story was pork and not veal or beef. Furthermore, according to the article, Denmark only exported meat contaminated with salmonella and not clenbuterol-contaminated meat.

Considering the positions of both the Athlete and WADA, the Panel decided to admit the news story to the file, taking into account the position of WADA regarding its irrelevancy.

C. Merits

1. Applicable regulatory framework

According to Article 21 UCI ADR *"The following constitutes anti-doping rule violations:*

1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.

1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping violation under article 21.1.

Warning:

1) Riders must refrain from using any substance, foodstuff, food supplement or drink of which they do not know the composition. It must be emphasized that the composition indicated on a product is not always complete. The product may contain Prohibited Substances not listed in the composition.

2) Medical treatment is no excuse for using Prohibited Substances or Prohibited Methods, except where the rules governing Therapeutic Use Exemptions are complied with.

1.2 Sufficient proof of an anti-doping rule violation under article 21.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample.

1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Rider's Sample shall constitute an anti-doping rule violation.

1.4 As an exception to the general rule of article 21.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

1.5 The presence of a Prohibited Substance or its Metabolites or Markers consistent with the provisions of an applicable Therapeutic Use Exemption issued in accordance with the present Anti-Doping Rules shall not be considered an anti-doping rule violation.

2. (…)"

On 21 July 2010, at the occasion of the second rest day of the 2010 Tour de France, following the 16th stage, Mr Contador was subjected to a doping test and requested to file a urine sample. Both the A and B test results were positive for clenbuterol. Clenbuterol is a non-threshold prohibited substance that appears in Article S1.2 (*other Anabolic Agent*) of the 2010 WADA Prohibited List.

Article 22 UCI ADR provides the following regarding the burden and standard of proof applicable to anti-doping organisations in order to establish an anti-doping rule violation:

" The UCI and its National Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the UCI or its National Federation has established an anti-doping rule violation to the comfortable satisfacstion of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where these Anti-Doping Rules place the burden of proof upon the License-Holder alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in articles 295 and 305 where the License-Holder must satisfy a higher burden of proof ".

The Panel notes that Articles 295 (concerning the regime of elimination or reduction of the period of ineligibility for specified substances under specific circumstances) and 305 (aggravating circumstances) UCI ADR do not apply in the present matter.

In his answer, Mr Contador states that *"in circumstances where the concentration of the Prohibited Substance is extremely low, as in this case, and deliberate use is ruled out, the presence of the Prohibited Substance alone is sufficient to establish that an anti-doping rule violation has occurred".*

It is therefore undisputed that Mr Contador has committed an anti-doping rule violation and that the Appellants have met the standard of proof given the analytical reports made by the Cologne Laboratory and the confirmation of the adverse analytical finding by the B Sample.

Article 293 UCI ADR determines the consequence of an anti-doping rule violation:

" The period of Ineligibility imposed for a first anti-doping rule violation under article 21.1 (Presence of a Prohibited Substance or its Metabolites or Markers), article 21.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or article 21.6 (Possession of a Prohibited Substance or Prohibited Method) shall be

2 (two) years' Ineligibility

unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met ".

The Athlete seeks to eliminate or reduce the 2-year period of ineligibility based on Articles 296 and 297 UCI ADR. These Articles provide the following:

Article 296 UCI ADR:

"If the Rider establishes in an individual case that he bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of a Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility eliminated. In the event this article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under articles 306 to 312 ".

Article 297 UCI ADR:

"If a License-Holder establishes in an individual case that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than 8 (eight) years. When a Prohibited Substance or its Markers or Metabolites is detected in a Rider's Sample as referred to in article 21.1 (presence of Prohibited Substance), the Rider must also establish how the Prohibited Substance entered his system in order to have the period of Ineligibility reduced".

The strict liability principle of the above-quoted Article 21.1.1 UCI ADR is applicable to the present dispute. The contention that the prohibited substance did not have a performance enhancing effect on the Athlete and that he must have ingested the substance inadvertently does not preclude the application of the strict liability principle.

Consequently, pursuant to Articles 22, 296 and 297 UCI ADR and according to established CAS jurisprudence (CAS 2005/A/922, 923 & 926, CAS 2006/A/1067, CAS 2006/A/1130), in order for the athlete to escape a sanction, the burden of proof shifts to the athlete who has to establish;

1) how the prohibited substance entered the athlete's system; and

2) that the athlete in an individual case bears no fault or negligence, or no significant fault or negligence.

Pursuant to Art. 22 UCI ADR, and as it is for the athlete to establish the above mentioned facts:

"Where these Anti-Doping Rules place the burden of proof upon the License-Holder alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability,…"

2. The issues that need to be decided

As already explained, the results of the tests and the presence of the Prohibited Substance in Mr Contador's body were not contested. Therefore, pursuant to the regulatory framework as descried above and the submission of the parties, the main questions to be resolved by the Panel in the present dispute are:

- Taking into account that an anti-doping rule violation has been established by the Appellants, did Mr Contador establish, considering the required standard of proof, how the prohibited substance entered his system?
- If Mr Contador is able to convince the Panel with the required standard of proof how the prohibited substance entered his system, does he, in such circumstances, bear no fault or negligence or no significant fault or negligence?
- If necessary, what must be the sanction imposed on Mr Contador? Particularly, how long shall the period of ineligibility last, when would such period commence and which results would have to be disqualified, leading to loss of prize money and ranking points?

3. The aplication of the burden and standard of proof in the circumstances of this case

As previously explained, in this case Mr Contador alleges that the Prohibited Substance entered his

body as a result of eating a piece of contaminated meat (without the Athlete knowing that the meat was contaminated).

Although arguing that under the UCI ADR they are under no duty to establish how the Prohibited Substance entered the Athlete's body, the Appellants nevertheless decided to put forward alternative theories as to the possible sources of the Prohibited Substance and to try and establish that those sources were more likely to be the reason for the presence of the Prohibited Substance in the Athlete's system than the ingestion of allegedly contaminated meat.

Therefore, the Panel will begin by examining how the term "balance of probability" shall be interpreted and how the framework regarding the burden and standard of proof is to be applied in a case in which the Appellants do not limit themselves to arguing that the Respondent has failed to establish the reality of his own contentions regarding how the Prohibited Substance entered his body. As these various issues are closely related, they will be dealt with together.

3.1 UCI

In its appeal brief of 18 April 2011, the UCI alleges that it is neither the burden of the UCI to suggest possible routes of ingestion, nor to show how likely any of the possible routes of ingestion might be. To the contrary, it is the burden of Mr Contador to show that his thesis of meat contamination is correct, or at least, that 1) his thesis of meat contamination is more likely than any other possible route of ingestion; and 2) meat contamination is more likely to have occurred than not to have occurred. Therefore, the UCI does not have the burden to show that another possible route of ingestion exists and is more likely than the route proposed by Mr Contador (meat contamination).

According to the UCI, meeting the standard of the balance of probability means that it is established that something is more likely to have happened than not to have happened. For the purpose of having the period of ineligibility eliminated under Article 296 UCI ADR or reduced under Article 297 UCI ADR, Mr Contador puts forward one single possibility as the route of ingestion. The circumstance that such route of ingestion is materially possible and can explain as such the presence of clenbuterol is not enough to satisfy the standard of balance of probability; Mr Contador has to show that this possible route of ingestion is more likely to have happened than not to have happened.

Where various possible routes of ingestion exist, the circumstances of the particular case will provide indications for the greater or lesser degree of likelihood of each of them. The result of the assessment and comparison of the degree of likelihood of each of the possible routes of ingestion may be that one of these possible routes of ingestion is accepted as being more likely than any of the other possibilities.

However, the burden of proof that is on Mr Contador is not met by merely alleging and invoking evidence that a given route of ingestion occurred; in addition to that he has to show that this contended route of ingestion, as such, is more likely to have occurred than not to have occurred. It is in this way the UCI understands § 5.9 of CAS 2009/A/1930.

"In view of these provisions, it is the Panel's understanding that, in case it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof regarding the means of ingestion of the prohibited substance. In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred. The Player thus needs to show that one specific way of ingestion is marginally more likely than not to have occurred".

3.2 WADA

WADA alleges in its appeal brief of 18 April 2011 that the balance of probability standard entails that the athlete has the burden of convincing the Panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence. WADA also refers to § 5.9 of CAS 2009/A/1930.

According to WADA, the first instance body did not apply this test correctly and erred as it considered, in essence, that the food contamination was established because no contrary explanation was supposedly proven. The first instance body placed *de facto* the burden of proof upon the anti-doping organisation instead of upon the athlete; the assumption of food contamination alleged by Mr Contador was accepted because it was not excluded by other evidence. Such reasoning is contrary to the balance of probability test: the question is not to know if the theory of the athlete can be excluded, but rather to determine if it is more likely than not that the alleged scenario has occurred.

The Decision seems to be based on the erroneous assumption that the UCI and WADA are required to eliminate the theoretical possibility of a case of clenbuterol-contamination meat in Europe, Spain or the Basque Country, whereas in reality it is the Athlete who has the burden of proving that it is more likely than not that the meat he ate was contaminated with clenbuterol.

In his closing submissions, WADA's Counsel alleged that the fact that WADA is the Appellant and it put forward and tried to establish alternative theories and possibilities to the theory of the Respondent, does not, in any way, effect the principle of who bears the burden of proof in this case. The question remains if the burden of proof was met by the Athlete.

According to WADA an adequate subscription of the balance of probability is given in CAS 2008/A/1515 p 23. n°116, according to which "*the balance of probability standard entails that the athlete has the burden of persuading the Panel that the occurrence of the circumstances on which the athlete relies is more probable than their non-occurrence or more probable than other possible explanations of the positive testing* (see e.g. CAS 2006/A/1067, para. 6.8; CAS 2007/A/1370 & 1376, para. 127)". The Athlete's theory must be established taking into account other alleged possibilities, but the Panel must be careful not to shift the burden to the Appellants.

The Athlete must prove more than only a mere possibility of the occurrence of his theory; he has to prove how the prohibited substance entered his system. The Athlete has to establish facts that could convince the Panel, on a balance of probabilities, that indeed, in this case: (a) he ate contaminated meat; and (b) the contaminated meat was indeed the source of the prohibited substance found in his body. Here, the missing link in the Athlete's theory, according to WADA, is proof that the meat he ate was contaminated.

3.3. Mr Contador

In his answer of 8 July 2011, Mr Contador's primary submission is that he has shown enough evidence that it was more likely than not that clenbuterol originated from contaminated meat that he ate. Rather than conceding the likelihood that contaminated meat was the cause of his positive test, the Appellants have proposed various alternatives during various stages of the proceedings against him, no matter how unlikely those alternatives may have been. The Appellants focus their appeal predominantly on their blood transfusion theory, while their supplements theory is merely a fall-back position. This approach appears to be aimed at countering the Athlete's contention that clenbuterol came from contaminated meat.

It is notable that the Appellants have not actually ruled out contaminated meat as a possibility (because they cannot do so) but that they have merely asserted that the blood transfusion theory and the supplement theory are more likely to have been the source of the prohibited substance. This leaves the Panel faced with a choice of three possibilities as to how the clenbuterol entered the Athlete's system.

The Athlete alleges that even though Swiss law governs this arbitration, the "*balance of probability*" standard applicable to this dispute is a common law concept. Under Swiss law, the standard of proof is governed by the rules of law applicable to the merits of the dispute, here Swiss law and the UCI ADR. Under Swiss substantive law, the standard of proof is either the default standard generally referred to as the "*judge's persuasion*" ("*conviction du juge*") or any lower standard of proof if so provided for by the relevant substantive rule itself or by the courts. In any event, the actual standard of proof to be applied to a specific fact must be determined taking into account the meaning and the spirit of the law. In particular, a reduced standard of proof must apply when procedural fairness (*prozessuale Billigkeit*) so requires, for example because the relevant facts are particularly difficult to establish.

The following reduced standards of proof (*preuve facilitée*) are generally applied under Swiss law:

a) high likelihood/plausibility (haute vraisemblance; hohe Wahrscheinlichkeit), which *"is fulfilled when according to the judge's assessment there is no serious room left for any version of facts diverging from the alleged version"*.

b) Simple likelihood/plausibility (*vraisemblance; einfache Wahrscheinlichkeit, Glaubhaftmachung*), which is satisfied when the existence of a fact is supported by important/significant elements, even if the judge cannot rule out that – based on less important/significant elements – the alleged fact did actually not occur.

Several provisions of Swiss substantive law explicitly call for the application of such a reduced standard of proof. In the present case, the relevant substantive provision is Article 22 UCI ADR, which sets forth a reduced standard of proof of "*balance of probability*". This reduced standard of proof is based on the WADC and is deliberately different from that generally used under Swiss law. Indeed, the original French translation of the WADC refers neither to "*vraisemblance*" nor to "*haute vraisemblance*" and rather

uses the very different phrase "*simple prépondérance des probabilités*".

It is thus submitted that the WADC – which was originally drafted in English by common law lawyers – used the words "*balance of probability*" to indicate the well-known standard of proof principle that applies in common law jurisdictions. The application of this lower standard of proof is not inconsistent with Swiss law since, as mentioned above, Swiss law provides that the standard of proof is an issue governed by the rules of law applicable to the merits of the dispute.

In his legal opinion, Professor Riemer confirms that, as an association incorporated in Switzerland, the UCI is indeed entitled to provide for a specific standard of proof which does not necessarily correspond to the standard of proof that would be applicable before Swiss courts. Accordingly, the Athlete referred to common law cases to illustrate how the "balance of probability" must be applied.

In arguing their case as to other possible causes of the adverse analytical finding, the Appellants fundamentally mischaracterise and/or misunderstand the operation of the burden and standard of proof in a context such as the present one. As a matter of principle, the starting point is that the legal burden of proving an offence is on the accusing regulatory authority. Where a regulatory authority accuses an individual of a doping offence, the standard of proof required of the regulatory authority for a finding of guilt is "*comfortable satisfaction*". That is not as high as the criminal standard of "*beyond reasonable doubt*", but is a higher standard than the private law standard of the "*balance of probabilities*". This is due to the seriousness of the charge of cheating and the consequences that a conviction entails. This is reflected in Article 22 UCI ADR.

The importance and difficulty of the struggle against doping in sport has however brought about a qualification to these two normal indispensable precepts of justice. That qualification is that once a strict liability doping offence is established by demonstrating no more than the presence of a prohibited substance in an athlete's sample, the burden shifts onto the athlete to establish how the substance came into his body and that he bore no fault or negligence for its presence (see Article 296 UCI ADR and Article 10.5.1 WADC). In essence, the athlete must prove his innocence. This significant incursion into the rights of the accused is however justified by the need to protect sport and the difficulty faced by the regulatory authority to actively prove the method of ingestion and the athlete's degree of fault. That this is such a significant incursion is reflected, first of all, in the fact that the standard of proof that the athlete has to discharge in these circumstances is described as the balance of probabilities (see Article 22 UCI ADR and Article 3.1 WADC). It would not be justifiable to require a higher standard from the athlete because, against the background of strict liability and the difficulties already faced by the athlete in relying on Article 296 UCI ADR, that would be a step too far. The anti-doping regulations are proportionate, but only just so. They are balanced, but on the edge of the precipice of unfairness and arbitrariness.

According to Mr Contador, the issue of whether something has happened in the past cannot be subjected to any measure of probability: it either already happened or it did not. It is important to bear this in mind when one seeks to understand and apply the concept of a balance of probabilities to an *ex post*, historical, analysis. What an *ex post* analysis involves is ascertaining what is most likely to have happened, on the basis of all the evidence available after it has happened. It is critical then to that exercise that one does not confuse the probability of something happening *ex ante* (in the future) with the evaluation of evidence as to what happened *ex post* (in the past). Not making that distinction would produce an invalid result. To examine only the future likelihood of meat being contaminated with clenbuterol and being eaten by an athlete who is then tested would produce a wholly invalid result, because it would not take into account the evidence that the athlete did in fact eat meat and was tested and did test positive for clenbuterol in circumstances where everyone accepts that deliberate ingestion can be ruled out, so indicating that meat contamination is likely or at least possible. Put differently, the proposition that something happens only rarely does not advance matters if other evidence indicates that this may have been one of those rare occasions. The fact that someone is unlikely to be struck by lightning is of no relevance when a person is found dead in a field with a scorch mark from head to toe.

The second factor that is critical to the exercise is that the assessment as to which of the proposed scenarios is the most likely cannot be undertaken in the abstract. Rather, it is necessarily a comparative assessment. The hypothesis advanced on the evidence by the party bearing the burden (here the Athlete) must be compared to the rival hypotheses (to the extent that any others exist). While the Athlete contends that there is in fact only one possibility (meat contamination), the Appellants contend that (1) it is unlikely that clenbuterol came from contaminated meat; and (2) two other potential sources also fall to be considered (blood transfusion and supplements). There are no other possibilities alleged by the parties;

clenbuterol can only have entered the Athlete's system by one of these three routes of ingestion. The Panel's task is to make a decision as to which of those three is the most likely to have caused the positive test. That comparative exercise may bring the decision-maker to a conclusion which had it been measured *ex ante*, might have been thought improbable.

Finally, to the extent that there is any disagreement or ambiguity as to the application of the balance of probability, the principle of *contra preferentem* applies, such that the construction to be preferred is the one that favours the Athlete.

There is a further relevant aspect regarding the way in which the common law standard of balance of probability operates. That is the concept of the "*evidential*" as opposed to the "*legal*" burden. Where a party has a legal burden, it may of course satisfy that burden in a range of ways. At one extreme the party may only just satisfy the burden; at the other extreme the hypothesis advanced may be shown to be nearly certainly correct. In seeking to discharge the burden, the party comes to a point, in a sense a "*tipping point*", where the material that the party has put forward in support of the hypothesis advanced would, without more, be sufficient to convince the decision maker that the hypothesis was correct. The "*legal*" burden would be discharged. At that point, the other party shoulders an "*evidential*", or practical, burden: it must adduce contrary evidence that sufficiently contradicts the hypothesis advanced to tip the balance back, or lose the case on the evidence. That is, of course, what the Appellants have set out to do in first criticising the hypothesis advanced by the Athlete that the source was contaminated meat, and secondly advancing the alternative hypothesis that a contaminated plasma transfusion was the cause, together with their fall-back position, that a contaminated supplement might have been the cause.

It is not sufficient for the Appellants simply to raise an alternative scenario, uncorroborated, and then to say that the Athlete must disprove it; doing so amounts to no more than mere speculation. If the Appellants' objective, as it appears to be, is to contradict the Athlete's alleged more likely scenario to a degree that tips the evidence back in their favour, they must present sufficient proof; and in assessing whether they have done this, two things need to be borne in mind:

a) The normal standard imposed on regulatory authorities at the outset is of course "*comfortable satisfaction*". Further, it is that standard that applies where a burden has shifted from the athlete back onto the regulatory authority. On no basis, therefore, would it be sufficient for the regulatory authorities simply to raise speculative alternatives.

b) When an athlete is seeking to establish the source of a substance on the balance of probabilities, CAS panels have accepted submissions from the authorities to the effect that a mere speculation as to a source is insufficient (see CAS 2006/A/1130 and CAS 2007/A/1413). The principle of equal treatment requires authorities to be held to the same high standards. So here, for example, when the Appellants speculate without any evidence whatsoever that the source may have been a contaminated supplement, CAS must remember the scepticism with which it would regard a similar argument coming from an athlete.

3.4 RFEC

The RFEC alleges that the UCI and WADA in their appeal briefs state that the burden of proof is on Mr Contador, and that it is not met by indicating the most likely route of ingestion, since the Athlete must demonstrate that this route of ingestion is more likely to have occurred than not to have occurred; the RFEC ends this argument with the following assertion, *"Indeed the circumstance that a possibility is more likely than other possibilities does not mean that this relatively more likely possibility is also more likely to have occurred than not to have occurred"*.

According to Article 296 UCI ADR and the arguments made by both the UCI and WADA, the Athlete is required to prove in this case, not only that he ate meat as the most likely possibility of the presence of clenbuterol in his bodily samples, but also that it contained clenbuterol (and that this substance is also the one that appeared in the adverse analytical finding) so there is a direct relation between the presence of the substance in his bodily sample and the one that, in turn, had been fed to the animal which meat was eaten by the Athlete, something which is quite impossible, since the single piece of evidence has disappeared, *i.e.* the meat. Adducing this particular element of evidence, obviously, is impossible for the Athlete and, if it is unfeasible, cannot be demanded by international organisations of Mr Contador or of other athletes. Otherwise, not only is the "*onus probando*" reversed but in many cases the proof becomes a "*probatio diabolica*", due to having to prove the non-existence of alleged acts.

Therefore, it is necessary to make an appropriate and prudent interpretation and application of the provisions set forth in Article 22 UCI ADR, accounting for both science and the law when

assessing the balance of probabilities. In achieving this two preliminary considerations must be accounted for:

a) First, given the universal principle of the presumption of innocence; nobody can be convicted without benefitting from due process; i.e. from a proceeding that respects the principles of a fair hearing, of equality and of the right to be heard.

b) Second, the different value of the evidence presented at the stage of proceedings before the CNCDD of the RFEC.

In this case, two opposing sets of scientific evidence are confronted, which are relevant when it comes to assessing the situation.

On the one hand, the tests of the Cologne Laboratory, which has the most advanced technology in the world to detect clenbuterol below the levels required of other laboratories (2 pg/mL), prove the presence of clenbuterol in the bodily sample of the Athlete, but do not enable to determine how it entered the latter's body, despite such determination being necessary because of the strict liability principle.

On the other side, the evidence produced by the Athlete, who has made considerable efforts to adduce written expert evidence of a type which would not even be accessible to more than a few professional athletes with significant income, and who has thus scientifically proven before the CNCDD of the RFEC that the cause of the adverse analytical finding was a food contamination, even though this origin can only remain a probability due to the absence of any direct and positive proof. This probability prevails over other scenarios, in light of the evidence presented by the Athlete.

Furthermore, although it is true that authoritative scholars and the jurisprudence of CAS qualify the criteria laid down under the WADC as entailing the strict liability of athletes, this does not mean that the subjective element is completely absent in the interpretation of the standard. It only means that the "*onus probando*" is inversed. An athlete can escape sanctioning nonetheless if he/she proves that: a) there is absence of fault or no significant fault (Article 9 WADC); and b) he/she did not seek to improve his/her performance (Article 10.4 WADC). In this case, the problem is that both parameters are subject to interpretation.

If one wants a cold justice, scientific and detached from the fundamental principles of the sanctioning law and from fundamental human rights, the judge, in this case the Panel, should give priority to the literal meaning of the words and direct evidence. If, however, one aspires to a different, more human and equitable sports justice, which respects and protects the fundamental rights of athletes to participate in doping-free activities, to promote their health and always ensure equity and equality in sports, the award must be based on the purpose or will of the legislator, favouring judicial discretion to the detriment of the ultimate predictability of the award.

The RFEC emphasises that the evidence put forward in the proceedings before the CNCDD was different from the evidence put forward in the present CAS proceeding. The procedure followed before the CAS allows the parties, according to Article R57 of the Code, to bring new evidence that has not been presented and examined in the first instance proceeding and is not known to this party. Accordingly, it is clear that one faces two different evidentiary scenarios, one which arose in front of the disciplinary body of the federation of which the Athlete is a member (the CNCDD of the RFEC) and another which is submitted in the appeal to the CAS. Therefore, the balance of probabilities discussed in the first instance by the CNCDD of the RFEC could have some variation in light of new evidence presented in this second instance, to which the sanctioning body of the RFEC never had access.

Even though the CNCDD of the RFEC made its decision on the basis of a different evidentiary scenario from the one elaborated in front of the CAS, i.e. taking into account the evidence presented by the Athlete and the absence of other evidence apart from the adverse analytical finding itself, the new evidence presented by the Appellants on appeal in front of the CAS is insufficient to tip the balance of probability towards an anti-doping rule violation by food contamination. Thus, the determination of the CNCDD of the RFEC as to the balance of probabilities was correct in the first instance and remains valid.

3.5 Position of the Panel

3.5.1 The point of departure

The Panel notes that it is not in dispute that the Appellants successfully established that Mr Contador committed an anti-doping rule violation. Neither is it disputed that in order for the Athlete to escape a two-year sanction, he must establish, on a balance of probability:

- how the Prohibited Substance entered the Athlete's system; and

- that he bears no fault or negligence, or no significant fault or negligence.

Consequently, the burden of proof shifts to the Athlete and the standard of proof for the Athlete to establish his theory how the prohibited substance entered his body is, pursuant to Article 22 UCI ADR, on a "*balance of probability*".

The parties to these proceedings are in dispute as to how the term "*burden of proof* " is to be understood and what obligations derive therefrom.

The applicable regulations do not define the term "*burden of proof* ".

Despite the notion of "*burden of proof* " being tied to the taking of evidence, the predominant scholarly opinion is that – in international cases – burden of proof is governed by the *lex causae*, i.e. by the law applicable to the merits of the dispute and not by the law applicable to the procedure (Poudret/Besson, Comparative Law of InternationalArbitration, 2nd ed, 2007, no 643; Kaufmann-Kohler/Rigozzi, Arbitrage International, 2nd ed., 2010, no 653a; Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 2nd ed, 2010, no 1203).

Therefore, the first question to be determined is which is the applicable law to the merits, other than the UCI Regulations, to which the Panel can turn for any necessary clarifications concerning the content of the " *burden of proof* ".

While Art. 345 UCI ADR points – at least subsidiarily – to Swiss Law, Art. 369 of the UCI ADR provides that "[T]*hese Anti-Doping Rules shall be interpreted as an independent and autonomous text and not by reference to existing law or statutes*". Despite the contradiction in the regulations the Panel will seek guidance from Swiss law to the extent that this is compatible with international standards of law.

Under Swiss law, the "*burden of proof* " is regulated by Art. 8 of the Swiss Civil Code ("*CC*"), which, by stipulating which party carries such burden, determines the consequences of the lack of evidence, i.e. the consequences of a relevant fact remaining unproven (*non liquet*, cf BSK-ZGB/Schmid/Lardelli, 4th ed., 2010, Art 8 no 4; KuKO-ZGB/Marro, 2012, Art. 8 no 1).

Indeed, Art. 8 CC stipulates that, unless the law provides otherwise, each party must prove the facts upon which it is relying to invoke a right, thereby implying that the case must be decided against the party that fails to adduce such evidence. Furthermore, the burden of proof not only allocates the risk among the parties of a given fact not being ascertained but also allocates the duty to submit the relevant facts before the court/tribunal. It is the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal (ATF 97 II 216, 218 E. 1; BSK-ZGB/ Schmid/Lardelli, 4th ed 2010, Art 8 no 31; DIKE-ZPO/Glasl, 2011, Art 55 no 15).

The question of who bears the risk of a certain fact not being ascertained only comes into consideration if the fact submitted by the party bearing the burden of proof is contested by the other party.

Therefore, a crucial question is what efforts a party must make in order to validly contest the allegations made by the other party.

According to Swiss Law a valid contestation of facts needs to be specific, i.e. it must be directed and attributable to an individual fact submitted by the party bearing the burden of proof (DIKE-ZPO/ Leu, 2011, Art 150 no 59). Whether in addition to that, the contesting party needs to substantiate its submission, in particular whether the contesting party is under an obligation to give an explanation of why it thinks that the facts it contests are wrong, is not clearly regulated. The new CPC appears to point in that direction (DIKE-ZPO/Leu, 2011, Art 150 no 59). However, the threshold for meeting such an obligation to specify the contestation is – under normal circumstances - rather low, since it must be avoided that the prerequisites for contesting an allegation result in a reversal of the burden of proof (BSK-ZPO/Guyan, 2010, Art 150 no 4; BSK-ZGB/ Schmid/Lardelli, 4th ed, 2010, Art 8 no 30).

Nevertheless, there are exceptions to this low threshold.

The exceptions concern cases in which a party is faced with a serious difficulty in discharging its burden of proof ("*état de nécessité en matière de preuve*", "*Beweisnotstand* "). A cause for the latter may be that the relevant information is in the hands or under the control of the contesting party and is not accessible to the party bearing the burden of proof (cf ATF 117 Ib 197, 208 et seq). Another reason may be that, by it very nature, the alleged fact cannot be proven by direct means. This is the case whenever a party needs to prove "*negative facts*".

According to the Swiss Federal Tribunal in such cases of "*Beweisnotstand*" principles of procedural fairness demand that the contesting party must substantiate and explain in detail why it deems the facts submitted by the other party to be wrong (ATF 106 II 29, 31 E. 2; 95 II 231, 234; 81 II 50, 54 E 3; FT 5P.1/2007 E. 3.1; KuKO-ZGB/Marro, 2012, Art 8 no 14; CPC-Haldy, 2011, Art 55 no 6). The Swiss federal Tribunal has described in the following manner (ATF 119 II 305, 306 E 1b) this obligation of the (contesting) party to cooperate in elucidating the facts of the case:

*"Dans une jurisprudence constante, le Tribunal fédéral a précisé que la règle de l'*art. 8 CC *s'applique en principe également lorsque la preuve porte sur des faits négatifs. Cette exigence est toutefois tempérée par les règles de la bonne foi qui obligent le défendeur à coopérer à la procédure probatoire, notamment en offrant la preuve du contraire (ATF 106 II 31 consid. 2 et les arrêts cités). L'obligation, faite à la partie adverse, de collaborer à l'administration de la preuve, même si elle découle du principe général de la bonne foi (*art. 2 CC*), est de nature procédurale et est donc exorbitante du droit fédéral - singulièrement de l'*art. 8 CC *-, car elle ne touche pas au fardeau de la preuve et n'implique nullement un renversement de celui-ci. C'est dans le cadre de l'appréciation des preuves que le juge se prononcera sur le résultat de la collaboration de la partie adverse ou qu'il tirera les conséquences d'un refus de collaborer à l'administration de la prevue".*

In its decision the Swiss Federal Tribunal makes it clear that difficulties in proving "*negative facts*" result in a duty of cooperation of the contesting party. The latter must cooperate in the investigation and clarification of the facts of the case. However, according to the Swiss Federal Tribunal the above difficulties do not lead to a re-allocation of the risk if a specific fact cannot be established. Instead, this risk will always remain with the party having the burden of proof.

Furthermore, the Swiss Federal Tribunal states that in assessing and determining whether or not a specific fact can be established, the court must take into account whether or not the contesting party has fulfilled its obligations of cooperation.

The Panel considers that the foregoing interpretation of the concept of "*burden of proof*" is compatible with international standards of law and therefore should apply in these proceedings and that by applying the above principles any danger that the First Respondent would be burdened with a a kind of "*probatio diabolica*" - as feared by the RFEC - can be avoided.

3.5.2 Applying the above principles to the case at hand

In the case at hand the First Respondent has – according to the applicable provisions - the burden of proof to establish how the prohibited substance entered his system.

In the context of discharging this burden of proof the First Respondent submits that he ate contaminated meat. Proving this fact is – from an objective view – difficult, since the meat that was allegedly contaminated is of course no longer available for inspection. Furthermore, none of the teammates of First Respondent that ate the meat were tested along with the First Respondent. Therefore, direct proof that the First Respondent ate contaminated meat resulting in an adverse analytical finding is not possible.

Hence, the First Respondent can only succeed in discharging his burden of proof by proving that (1) in his particular case meat contamination was possible and that (2) other sources from which the Prohibited Substance may have entered his body either do not exist or are less likely. The Panel finds that the latter involve a form of negative fact that is difficult to prove for the First Respondent. Since in such respect the First Respondent is in a type of "*état de nécessité en matière de prevue*" or "*Beweisnotstand*", the above mentioned principles apply, according to which the party contesting the facts must contribute through substantiated submissions to the clarification of the corresponding facts of the case.

The Panel finds that the Appellants have fulfilled their obligation of cooperation by submitting and substantiating two additional (alternative) routes as to how the prohibited substance could have entered the First Respondent's system. The Panel will therefore examine whether in view of all of the parties' submissions and evidence (1) the ingestion of contaminated meat by the First Respondent was possible and (2) which of the three suggested scenarios is most likely to have occurred.

In the context of the allegations relating to point (2), the Panel underlines that in light of the jurisprudence of the Swiss Federal Tribunal the Appellants do not have the burden of establishing that other alternative scenarios caused the adverse analytical finding, since the risk that the Respondents' scenario cannot be ascertained remains with them. The likelihood of alleged alternative scenarios having occurred is, however, to be taken into account when determining whether the Athlete has established, on a balance of probabilities, that the source he is alleging of

entry into his system of the Prohibited Substance is the more likely. It is in this manner that the Panel understands § 5.9 of CAS 2009/A/1930.

This implies that if, after carefully assessing all the alternative scenarios invoked by the parties as to the source of entry of the Prohibited Substance into the Athlete's system, several of the alleged sources are deemed possible, they have to be weighed against one another to determine whether, on balance, the more likely source is the one invoked by the Athlete. However, in the extreme situation that multiple theories were held to be equally probable, the burden of proof, i.e. the risk that a certain fact upon which a party relies cannot be established, would rest with the Athlete.

Thus, it is only if the theory put forward by the Athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario, that the Athlete shall be considered to have established on a balance of probability how the substance entered his system, since in such situations the scenario he is invoking will have met the necessary 51% chance of it having occurred.

4. The Meat Contamination Scenario

Mr Contador alleges that the presence of clenbuterol in his system originated from eating contaminated meat. As determined above, it is for Mr Contador to establish on a balance of probability that this was the source of the presence of clenbuterol in his bodily Sample of 21 July 2010.

Therefore, the Panel will carefully assess this scenario first.

The meat contamination scenario as alleged by the Athlete is based on the following sequence of events, which will be dealt with separately below:

- the Athlete ate meat on both 20 and 21 July 2010;
- there are sufficient grounds and evidence to consider that the meat the Athlete ate was contaminated with clenbuterol;
- consuming clenbuterol-contaminated meat in the specific circumstances of this case will cause a positive doping test.

4.1 Did the Athlete eat meat on both 20 and 21 July 2010?

In its written submissions, WADA stated that it is prepared to accept that Mr Cerrón, an acquaintance of Mr Contador, purchased meat from Larrezabal butcher's in Irún, Spain, during the late afternoon of 20 July 2010, and that such meat was then transported on the same day to Pau in France. It is also agreed by the parties that the meat which was purchased weighed 3.2 kg.

By letter of 27 July 2011, both Appellants informed the Panel that they also agreed to the fact that Mr Contador consumed the purchased meat on the evening of 20 July 2010 and at lunchtime on the following day, on the basis of the evidentiary measures provided by the Athlete before CAS.

The Panel therefore accepts, based on the agreement between the parties as to those facts, that on the evening of 20 July 2010 and at lunchtime on 21 July 2010 Mr Contador ate the meat that was bought by Mr Cerrón at Larrezabal butcher's in Irún, Spain.

4.2 Possibility that the meat the Athlete ate contaminated with clenbuterol?

In its appeal brief of 18 April 2011, the UCI stated that it referred to and endorsed WADA's appeal brief and exhibits on the possibility of meat contamination. Therefore, reference will only be made to the UCI's position in as far as it differs from the position of WADA.

WADA is not prepared to accept that the meat the Athlete ate was contaminated with clenbuterol. In its appeal brief, WADA seeks to highlight the extreme unlikelihood that any meat which the Athlete consumed on the relevant dates was contaminated with clenbuterol. According to WADA's position, this extreme unlikelihood originates from 1) an analysis of the supply chain of the meat in question; 2) the regulatory framework in Europe and Spain with respect to the use of clenbuterol to fatten livestock; and 3) reports at European, national and regional level, showing the results of the controls carried out on animals for various banned substances (including clenbuterol).

4.2.1 As to the supply chain of the meat in question

The Submissions of the Parties

WADA and UCI refer to an executive report on the provenance of the meat purchased from Larrezabal butcher's on 20 July 2010 by Mr Cerrón (the "*Executive Report*") that confirms in all material respects the findings of the independent and official report of the Basque government (the "*Traceability Report*") conducted by a Health Inspector of the Public Health Department of the Basque Government. The material

conclusions of these reports are the following:

- It follows from the price of the meat purchased by Mr Cerrón (EUR 32 per kg) that it could only have been a veal "*solomillo*". Not only is this consistent with the sworn declarations of both Mr Cerrón and Mr Olalla (the Astana team cook), who were witnesses for Mr. Contador; it was also confirmed by Mr Zabaleta (Managing Director of Larrezabal butcher's) to the Health Inspector and during the hearing;

- An analysis of the delivery notes and invoices of Larrezabal between the period commencing 15 June 2010 and ending 21 July 2010 reveals that, of the various suppliers, Carnicas Mallabia SL ("*Mallabia*") is the only one that sold solomillo of veal to Larrezabal during the relevant period. Mr Zabaleta confirmed that Mallabia is consistently the major supplier of veal to Larrezabal;

- By using the ear tags of the relevant calves sold to the Larrezabal butcher's by Mallabia, the Health Inspector was able to trace the animals back to the Felipe Rebollo slaughterhouse; the Felipe Rebollo slaughterhouse is situated in the region of Castilla y Léon;

- Using the internal reports of the Rebollo slaughterhouse and the "*Health Control Registry Book*", it was possible to trace the animals back to their ultimate source, the farmer known as "*Lucio Carabias*";

- All the animals belonging to the relevant batch of animals were subject to both *ante-mortem* and *post-mortem* evaluations, such information being recorded. *Ante-mortem* evaluations examine every animal for external symptoms or indications of administration of prohibited substances, *e.g.* unusual muscle configuration and/or behaviour. No samples of the relevant animals were taken in this instance as no suspicious behaviour was recorded.

WADA considers it therefore established that the relevant calf was reared and slaughtered in Spain.

The Athlete raised doubts regarding Lucio Carabias' farm being the ultimate source of the meat on the basis that the heaviest of the relevant animals weighed only 312 kg and therefore could not have produced a solomillo of 3.2 kg, as the animal would have to weigh in excess of 350 kg to produce a solomillo of this size.

In the opinion of Mr Zabaleta, sole shareholder and administrator of the Carnicerias y Charcuterías Larrezabal SL Company, who testified at the hearing, the solomillo of veal would ordinarily constitute circa 2% to 2.4% of its overall weight and this proportion could vary due to the natural variance in physical proportions of calf. It is understood that a solomillo is ordinarily taken from a half calf; in other words, the piece of solomillo purchased by Mr Cerrón is likely to have been approximately half of the solomillo of the entire calf. If the solomillo purchased by Mr Cerrón weighed 3.2 kg, then the solomillo from the entire calf would have weighed roughly 6.4 kg. Assuming that the solomillo was 2.2% (the average between 2% and 2.4%) of the total weight, then the animal concerned should have weighed circa 290 kg. It is also not unusual that parts of the contiguous "lomo" or the fat of the solomillo are sold as part of the solomillo itself, a practise which would mean that it is perfectly feasible that part of the 3.2 kg solomillo purchased by Mr Cerrón was actually comprised of lomo of solomillo fat. On that basis, it is perfectly possible that a calf of under 290 kg would produce two half veals each yielding a 3.2 kg piece of solomillo.

The conclusions of the Executive Report and the Traceability Report are also confirmed by the findings of the Winterman detective Report produced by WADA. This report also reaches the conclusion that no part of the supply chain of the veal in this case has suffered a non-compliant result in respect of clenbuterol.

Mr Contador has submitted that the brother of Mr Lucio Carabias (Mr Domingo Carabias) was implicated in 1996 and condemned in 2000 in a clenbuterol fattening case (the "*1996 clenbuterol case*"). In particular, it was stated that the two brothers co-managed a farming company known as Hermanos Carabia Muñoz SL. The implication of these references is that the farmer who supplied the veal supposedly eaten by the Athlete should be tainted by association with his brother.

WADA invited the Panel to look at the 1996 clenbuterol case in its proper context and to not attribute any prejudicial weight to it within the context of this case: a) the 1996 clenbuterol case did not involve Lucio Carabias, only his brother; b) Domingo Carabias passed away in April 2010, *i.e.* before the time when the relevant dose of clenbuterol would have been given to the animal concerned which is a firm indication that the late Domingo Carabias had for some time not had any operational input into the farming business of his brother; c) the facts behind the 1996 clenbuterol case occurred some fifteen years ago and, importantly, prior to the implementation of the European Directives in Spain,

which will be addressed in detail below - although the use of clenbuterol in Spain was prohibited in livestock farming prior to such implementation, it was sanctioned only through the imposition of administrative sanctions (*i.e.* a fine) and not at a criminal level through, for example, imprisonment; d) Lucio Carabias has also been subjected to a number of controls without a positive case of clenbuterol or any other beta-agonist. In particular, six random samples of his animals were taken by the veterinarians of the Felipe Rebollo slaughterhouse throughout 2009 and 2010.

In addition to WADA's arguments, the UCI puts forward that the circumstance that the brother of the farmer who supplied the animal was fined is of no avail because if any association with the brother of Mr Lucio Carabias Muñoz were to be made, it would have led to targeted and more frequent controls and this was not the case.

Mr Contador submitted that the animal in question could also have come from a different supplier. According to the Report revealed by Castellana Detectives, the origin of the meat is not certain and could in fact even have been supplied by another supplier. The uncertainty of the precise origin of the meat means that if it was not the product of an animal reared in Spain, there also exists the possibility that it could have been the product of a cow reared in South America. This uncertainty means that it is impossible to know for certain what controls were in place at the location of the animal's location of origin.

However, whether the meat came specifically from Mr Lucio Carabias Muñoz, or from an unknown location in Spain, or even South America, it remains that the risk that the animal from which the meat came was treated with clenbuterol is not only conceivable but is likely, first, because there is clenbuterol in the Athlete's system, second because the clenbuterol cannot plausibly have come from any other source, and third because of the history of clenbuterol abuse in each of the potential sources.

Even assuming the Appellants had conducted the necessary degree of investigation to confidently come to such a conclusion, they presume that because there is no history with clenbuterol, the meat is unlikely to have been contaminated. According to Mr Contador, that is a surprising conclusion of the Appellants; in order to try and demonstrate their allegation, the counsels for Mr Contador asked the following question and invited the Panel to consider it by analogy: Would the Appellants conclude that an athlete did not dope or had been the victim of food supplements contamination on the basis that he passed 500 doping control tests before failing one? They do not.

The Athlete argues that the Appellants cannot plausibly suggest, as they appear to, that it is sufficient to ask those involved in the supply chain whether they have had any problems with clenbuterol to conclude that the meat is unlikely to have been contaminated. It is surprising that the Appellants would consider such a level of proof sufficient to come to such a conclusion. In any event, it is unlikely that a butcher or its distributors would know that meat handled by them had been contaminated with clenbuterol. A more appropriate approach by Winterman Detectives would have been to enquire as to the number of meat samples collected from the butcher and meat supplier which had been analysed for the presence of clenbuterol. However, no evidence is advanced that such spot checks for the presence of clenbuterol have ever taken place.

Mr Contador submits that given that the precise source of the meat remains unresolved, it cannot definitely be traced back to the Felipe Rebollo slaughterhouse, Lucio Carabias Muñoz or even necessarily to being Spanish meat. The alternative is that it came from a different meat distributor, a different slaughterhouse, a different farm and a different country in respect of which there is no information as to what controls, if any, were in place at the point of origin.

Mr Contador further submits that of course, any discussions in relation to the supply chain are irrelevant if the animal from which the meat originated was one of the 99.98% animals not tested in Spain in 2010. Moreover, Mr Contador asserts that the animal identified by the Traceability Report and the Appellants as the one most likely to have been the source of the meat did not undergo any testing before or after slaughter.

According to Mr Contador, the fact that Mr Domingo Carabias, the brother of Mr Lucio Carabias Muñoz and formerly joint director, had in fact previously been sanctioned for the illegal use of clenbuterol to fatten cattle is of utmost importance. Taken against a context in which the Athlete ate the meat and then tested positive for clenbuterol, this could mean one of two things: 1) the meat did indeed come from an animal reared by Mr Carabias Muñoz that was treated with clenbuterol; or 2) if it did not, the fact of the Carabias Muñoz family's previous history with clenbuterol abuse is not just an astonishing coincidence, but is in fact an indicator of the prevalence of clenbuterol abuse in the Spanish farming industry.

The RFEC basically supports the arguments put forward by Mr Contador, but provides Special Report number 14/2010, which has been developed by the European Court of Auditors concerning the Commission's Management of the System of Veterinary Checks for Meat Imports following the 2004 Hygiene Legislation Reforms. According to the RFEC, this report is more recent, specific, concrete and comprehensive than the reports presented by WADA, which refer to studies that are not updated.

Findings of the Panel

Based on the submissions, evidence and reports before it, the Panel finds it highly unlikely that the meat in question was imported from South America and considers it very likely that the supply chain of the relevant piece of meat can indeed be traced back to Lucio Carabias' farm, although the Panel cannot entirely rule out the possibility that the meat came from another unknown location in Spain. Furthermore, the Panel is convinced by the fact that veal is highly unlikely to have been imported from South America. Therefore, in light of all the evidences submitted to the Panel and the assessment of the evidences, the likelihood of the relevant piece of meat that was consumed by the Athlete being contaminated with clenbuterol has considerably diminished in the opinion of the Panel. The fact that clenbuterol was found in the Athlete's system can be an indication of the meat contamination theory being possible, it is also an indication of the theories of the Appellants being possible and is therefore no argument in itself. The plausibility of the clenbuterol having derived from another source will be assessed at a later stage in assessing the likelihood of the theories altogether. Finally, the Panel is not convinced by the argument that the brother of Mr Lucio Carabias was found guilty of illegally fattening his cattle with clenbuterol. The Panel noted that in 1996 it was not uncommon for farmers to use beta-agonists to fatten their cattle. However, as will be discussed below, the Panel is convinced that this practise diminished considerably after the implementation of the EU Regulations and the severe sanctions included in the Spanish criminal code in recent years. In conclusion, from the perspective of the supply chain, the Panel considers it unlikely (even if theoretically possible) that the meat came from another source than the farm of Mr Lucio Carabias.

4.2.2 As to the regulatory framework

Submissions by the Parties

According to the Appellants, the European regulatory framework strictly forbids the administration of *inter alia* beta-agonists, including clenbuterol, to animals which meat is intended for human consumption, except for certain limited derogations for therapeutic or zootechnical purposes. The regulatory background in Spain has been summarised in more detail in an Expert Report prepared by Senn Ferrero, Associados Sports & Entertainment SLP. The Respondents waived their right to cross examine Mr Inigo de Lacalle who was supposed to testify on this expert opinion. According to this regulatory background, it is required that veterinarians under the control of the competent authorities are present at the slaughterhouses. Furthermore, the Spanish legislation provides for unannounced testing at all stages of the supply chain. Finally, EC Regulations 178/2002 and 1760/2000 require the implementation of systems that provide for the identification and registration of bovine animals and labelling of beef (and beef products). The aim and effect of these regulations is that one can locate and follow the trace, through all the stages of production, transformation and distribution, of a bovine animal which meat is intended for human consumption.

In the event of a breach of the prohibition, the sanctions in Spain are both wide-ranging and severe. Such conducts are considered criminal offenses, punished with imprisonment of up to four years, a fine, total disqualification from carrying out trade, industry, business or activity for a period ranging from three to ten years and indefinite closure of the relevant premises. At the hearing, Mr Javier Lopez confirmed these consequences. In addition to these mandatory regulations, Mr Lopez testified that slaughterhouses also carry out tests themselves to prevent being responsible for a positive test. If such a voluntary test would find a positive clenbuterol test, this would undoubtedly become known to the police. Next to the sanctions imposed by the authorities if a positive test is found, Mr Lopez testified at the hearing that the market itself would paralyse the responsible persons. Therefore, according to WADA, this regulatory backdrop is plainly a significant deterrent to the use of clenbuterol for the purpose of fattening livestock.

Mr Contador asserts in his answer that clenbuterol is a known contaminant in meat. The Athlete is supported by Prof. Vivian James who mentioned in his expert report that the contamination of meat products by clenbuterol is well-documented, as clenbuterol is a drug of choice for making the meat of cattle and other animals leaner. Mr Contador also gives numerous examples of illicit use of clenbuterol and other growth agents in Spain. Furthermore, in China and Mexico even though severe sanctions are imposed for illegal fattening of cattle, the problem

in those countries is rampant. Since the level of clenbuterol testing in Spain is so low, it is not only plausible, but it is likely that dishonest farmers who wish to improve the size and leanness of their animal would resort to using clenbuterol, which is also mentioned by Dr Tomás Martín-Jiménez in his expert report. According to Mr Contador, the Castellana Detectives' report also proves that clenbuterol can be easily purchased on the Internet, without the need for official documents.

Therefore, Mr Contador concludes that it cannot be disputed that there exists, to this day, an illicit practice of clenbuterol use in stockbreeding countries around the world and that humans are exposed to the risk that they might consume meat from an animal treated with clenbuterol. The Appellants' argument that farmers are not using clenbuterol because it is banned in Spain is not grounded in reality.

Findings of the Panel

The Panel took note of the fact that the sanctions imposed on farmers using clenbuterol or other beta-agonists to fatten their cattle became much more severe after the implementation in Spain of the mandatory EU Regulations but finds that the existence of more severe sanctions today does not, in itself, disqualify the meat contamination theory. That said, the Panel finds that the statistics regarding the use of clenbuterol or beta-agonists in general corroborate the allegation of the Appellants that after the implementation of these Regulations, the illicit practise of illegally fattening cattle using clenbuterol became very rare in Spain. This fact is also corroborated by the figures and statistics contained in the report of Castellana Detectives submitted by Mr Contador and by the testimony of Mr Martin of Castellana Detectives who testified at the hearing.

4.2.3 As to the statistics

Submissions by the Parties

WADA submitted that, based on the amount of clenbuterol present in the bodily sample of the Athlete, the meat consumed would have had to have been contaminated to a level significantly in excess of the minimum detection levels in the EU within the context of the National Residue Monitoring Plan ("*NRMP*"), most probably around ten times the maximum permitted residue limit under EC Regulation EC 2391-2000. The estimation of the level of contamination of the meat is in the range of 1 ug/Kg according to the expert report of Dr Rabin. From this report it can also be derived that these levels of contamination mean that the relevant animal would have been slaughtered immediately or shortly after the administration of the last dose of clenbuterol. This is a pre-requisite to the meat contamination theory advanced by the Athlete which makes little sense in the eyes of WADA. On the one hand, the animal would not "benefit" from the substance to the fullest extent and on the other hand, it increases the risk for the farmer of being caught through the routine and random evaluations and inspections carried out at the slaughterhouse.

According to WADA, the *Commission Staff Working Document on the Implementation of National Residue Monitoring Plans in the Member States in 2008* (the "*EU 2008 Report*") is concrete evidence of the extreme rarity of the use of clenbuterol in livestock farming in Europe. Nearly three hundred thousand tests conducted on animals in 2008 across the Member States have not resulted in a single confirmed case of clenbuterol.

The EU 2008 Report provides even more detailed figures with respect to tests specifically carried out on bovines for the purpose of detecting beta-agonists. 23,966 targeted and suspect samples were conducted on bovines for beta-agonists in 2008 and not a single non-compliant sample involving clenbuterol has been finally confirmed; one case in Italy remains under investigation. Indeed, out of the 41,740 samples across all relevant animal types which were specifically analysed for beta-agonists, there were only two non-compliant samples, both in the Netherlands and neither involving clenbuterol.

WADA further point out that the samples recorded in the EU 2008 Report fall into two categories: "*Targeted Samples*" and "*Suspect Samples*". Whereas the latter category relates to samples taken as a direct result of previous non-compliant samples or the suspicion of illegal treatment at any stage of the food chain (and is therefore, it is submitted, much more likely to produce further non-compliant results than a random sampling methodology), even the former category (*i.e.* Targeted Samples) is aimed at the categories and types of animals most likely to produce non-compliant results.

Even 1) assuming that all of the samples recorded in the EU 2008 Report were random and that the clenbuterol case in Italy was confirmed (as opposed to being merely a suspect sample); and 2) taking only the statistics specifically relating to beta-agonists in bovines, the necessary conclusion is that out of 23,966 samples, only one contained clenbuterol. Therefore, based on these figures, the probability that a given bovine in Europe would be contaminated with clenbuterol at a level capable of being detected

pursuant to EC Regulation 2391-2000 would be 0.0042%.

This percentage would have to be further reduced to take into account the fact that the samples recorded in the EU 2008 Report (both the Suspect and the Targeted Samples) are not random but pre-selected to be more likely to produce a non-compliant result. Indeed, one should also consider that the presence of clenbuterol within livestock at a farm would not necessarily result in contaminated meat after the slaughter of such livestock (*i.e.* if the animals are slaughtered after the clenbuterol has exited their system); the "s*uspect sample*" case of clenbuterol in Italy was in fact taken at a farm and based therefore on living animals. The percentage of contaminated meat available at retail outlets (*e.g.* butchers) would therefore be smaller still. The actual percentage possibility of a piece of bovine meat bought at a retail outlet in Europe being contaminated with clenbuterol is therefore according to WADA's submissions and based on the most recently published European statistics, substantially less than the level mentioned above.

An analysis of equivalent reports (to the EU 2008 Report) from previous years reveals that Spain has had just one positive case of clenbuterol since (and including) 2004, such case occurring in 2006. A summary analysis of these reports from previous years also reveals a marked decreasing trend in terms of beta-agonist contamination in targeted bovine samples. The following percentages of such samples were positive for any beta-agonist (as opposed to just clenbuterol): 2005: 0,08%, 2006: 0,06%, 2007: 0,01%, 2008: less than 0,009%. It is therefore logical to assume that this clear trend continued in 2009 and 2010.

According to WADA, the above statistics alone are sufficient to conclude that the possibility that a given piece of meat bought in Europe is contaminated with clenbuterol is vanishingly thin.

The statistics at regional level in Spain confirm that clenbuterol contamination is extremely unlikely in the relevant regions of the Basque Country and Castilla y Léon. In Castilla y Léon, official figures of the Health Ministry of the "*Junta de Castilla y Léon*" reveal that between 2006 and 2010, 7,742 bovine samples were taken specifically to detect beta-agonists and not a single positive of clenbuterol has occurred during this period. Between 2006 and 2009 (inclusive), 396 bovine samples were analysed for beta-agonists, again without a single positive clenbuterol finding.

WADA reminded the Panel that it is of course not able (nor required) to prove (statistically or otherwise) that there is not a single piece of contaminated meat in Europe, Spain or the Basque Country.

WADA is supported in its conclusions by Dr Martin-Pliego López, as he concludes that the probability of a bovine animal being contaminated with clenbuterol has been zero or almost zero in Spain during the last few years.

In his written submissions, Mr Contador contends that the arguments used by WADA are erroneous and misguided. The EU 2008 Report contains severe limitations and the dangers of relying on it are outlined in detail in a report prepared by Prof. Sheila Bird:

a) The *"analysis at EU-level tacitly assumes – but does not evidence – that the member states' random sampling plans are all of the requisite standard and are comparably robust";*

b) The EU's testing regime is based on low-frequency random testing of bovines; she explains that "*Low-frequency tests, unlike universal testing, have low deterrence-value and they are more readily avoided, or results falsifiable";*

c) The EU implements such a low minimum random sampling rate of bovines to be tested for clenbuterol per member state (only 125 need be clenbuterol tested per 1 million slaughtered bovines) that its random surveillance "*can only have low deterrence value*"; and

d) The EU 2008 Report fails "*properly to report how many random bovine samples were actually subject to clenbuterol testing*". This is a fundamental figure which has not been reported.

The cases mentioned by Mr Contador regarding the illicit use of clenbuterol and other growth agents in Spain show that it remains a significant problem to this day. Yet, the figures relating to Spain reported in the EU 2008 Report clearly do not reflect that, which means either that the reporting of positive results is inaccurate or the level of testing is inadequate, or both.

The official figures from the Basque Country and Castilla y Léon also have severe limitations according to Prof. Bird:

a) The *"meagre"* number of 353 samples tested for clenbuterol at the Felipe Rebollo slaughterhouse(s) between 2006 and 2010, cannot rule out a clenbuterol contamination rate

as high as 1 out of 100 slaughtered veal calves;

b) *"It is prudent to rely on the combined evidence from random and on-suspicion testing"* because *"the possibility of misdirected on-suspicion testing cannot, of course, be ruled out"*.

c) Only 213 bovines were randomly tested for clenbuterol between 2006 and 2009 in the Basque Country. Again, Prof. Bird concludes that such a low number of tests is insufficient to rule out a clenbuterol contamination rate as high as 1 per 100 bovines; and

d) The level of confidence with which one might claim a rate of abuse of clenbuterol of less than 1 in 1,000 in the Basque Country and Castille y Léon is "*statistically low*".

WADA refers to a letter from the Basque authorities dated 12 April 2011 in which it confirms that there was no positive case of clenbuterol in 2010 in the Basque Country. However, Castellana Detectives uncovered evidence that there was in fact a positive test for clenbuterol in the Basque Region in late 2009 that was never reported in the official statistics, nor acknowledged by the Basque authorities in their letter to WADA. Such "*official*" statistics are therefore reliable only to the extent that the reporting is accurate and true. Here, it was not.

The statistics presented by WADA, by way of the EU 2008 Report and Dr Lopez' report, only take account of the meat from cattle reared in Europe and not the meat of cattle reared in South America. The statistics, to the extent that they offer comfort to WADA, therefore do so in relation to meat from cattle reared in the EU. *"EU's random testing regime at slaughterhouses does not cover imported meat"*. Meat purchased in Spain may have been reared elsewhere in the EU or sourced outside of the EU. Its importation into the EU rests on EU-approval of the source nation's surveillance regime. However, according to Prof. Bird, *"the EU's own surveillance regime leaves much to be desired"*.

As to WADA's contention that the *"likelihood to eat meat contaminated in Europe is almost close to zero"*, Prof. Bird comments *"This is wrong. In view of the above, no such guarantee applies at the level of member-state, let alone for regions within member-states"*.

Mr Contador considers it therefore evident that the statistics on which the Appellants rely have little evidentiary value and do nothing to diminish the Athlete's case that clenbuterol originated from contaminated meat.

In the second round of submissions by WADA, Dr Javier Martin-Pliego López addressed a response to the expert report of Prof. Bird. The main critique can be summarised as follows:

a) NRMP does not use random sampling, but targeted sampling;

b) Taken in isolation, the *ex ante* probability of a test on bovine meat in Castilla y Léon producing a positive for clenbuterol is 0.0065% or 1 in 15,485;

c) Prof. Bird identifies a required theoretical minimum percentage of tests for beta-agonists mandatorily imposed by EU Regulations. However, she seems to ignore that the actual number of beta-agonist tests on bovines is seven times higher than the theoretical minimum. The minimum number is therefore strictly irrelevant;

d) According to Prof. Bird, only 1 in 20 beta-agonist tests would be capable of detecting clenbuterol. However, even if such a minimum threshold did exist for clenbuterol *quod non*, laboratories would have no reason to exclude clenbuterol from the results of the multi-residue testing, which would detect clenbuterol at no extra cost;

e) Without any clear justification all tests in the Basque region which were not conducted on slaughterhouses are discarded.

In Mr Contador's second submission, Prof. Bird notes that the majority of the criticism of Dr López is based on the constitution of the right denominator. WADA's interpretation of what constitutes a relevant denominator is much wider:

"In essence, WADA has pooled together data across age-groups, sample-sources and Member States. […] Pooling across sample-sources should be avoided and so I stand by my decisions because denominators should not be artificially inflated by non-slaughterhouse samples that pertain to potentially different slaughter years or different countries, not by slaughterhouse samples from targeted surveillance in Member States other than Spain".

In summary, according to Prof. Bird, the more defined the numerator and denominator, the more accurate the inference that may be drawn from the rates calculated (provided the sample population is large enough). WADA's decision to pool together large amounts of data, without regard to the specific category under examination serves only to artificially inflate its denominators, which in turn WADA utilises to produce self-serving, sensationalist statistics.

Findings of the Panel

In respect of the above, the Panel notes that the Appellants do not argue that the meat contamination theory is totally impossible *per se*. The Appellants merely tried to convince the Panel of the very low probability of this theory having occurred and in doing so arguing that Mr Contador did not establish to the relevant standard of proof, i.e. on a balance of probabilities, how the prohibited substance entered his system.

As a preliminary matter, the Panel notes the contradictory needs of statistics in general. On the one hand, the denominator must be made as accurate as possible, which requires being selective with the data, while on the other hand, in seeking that accuracy, the denominator can become so low that no safe statistical conclusions can be drawn from the figures.

The Panel notes that regardless of whether a low denominator is used in tests conducted in the Felipe Rebollo slaughterhouse, or whether a high denominator is used in tests conducted in the entire EU, in all the statistics presented to the Panel, the amount of clenbuterol positive results is very low. As a follow-up for the "*limited*" tests at the Felipe Rebollo slaughterhouse, the experts agreed that it would be appropriate to up the scale to the relevant region, then the country and finally the EU.

The Panel further notes that Prof. Bird's figures concerning the Felipe Rebollo slaughterhouse are based on an assessment of a number of tests in which zero positive results were found, but in the denominator causes that no "*safe*" conclusions can be drawn. Therefore, the Panel considers that 1/100 is an extreme figure; if an average chance on a positive result is calculated, this figure would be much lower than 1/100.

The Panel considers the tests conducted on bovines in the Felipe Rebollo slaughterhouse highly important. These statistics exclude most of the irrelevant data as the results only include tests of bovines at the relevant slaughterhouse in the relevant year. The results show that this slaughterhouse did not have any clenbuterol positive tests.

Furthermore, even if the Panel ups the scale to an entire region, to Spain or even to all the Member States of the European Union, the statistical chance of a cow being contaminated with clenbuterol remains very low.

In addition, independently from the various statistics invoked by both parties, the Panel finds it unlikely that in practice a farmer would slaughter any illegally fattened animals shortly after administering the product intended to fatten them.

For all the above reasons, the Panel agrees with the submissions of UCI and WADA that the possibility of a piece of meat being contaminated in the EU cannot entirely be ruled out, but that the probability of this occurring is very low.

4.3 The pharmacokinetics

The Panel notes that, although initially disputed, at the hearing, the parties informed the Panel that the UCI and WADA did no longer dispute the pharmacokinetics of the meat contamination theory, *i.e.* the Appellants accepted that a piece of meat contaminated with clenbuterol could cause an adverse analytical finding.

The Panel is therefore accepts that a piece of meat being contaminated with clenbuterol could cause an adverse analytical finding of 50 pg/mL of clenbuterol in Mr Contador's bodily sample.

4.4 Panel's conclusions regarding the meat contamination theory

The Panel is satisfied that Mr Contador ate meat at the relevant time and that if the meat that he ate was contaminated with clenbuterol it is possible that this caused the presence of 50 pg/mL clenbuterol in a urine doping sample.

In that relation, on the basis of all the evidence adduced, the Panel considers it highly likely that the meat came from a calf reared in Spain and very likely that the relevant piece of meat came from the farming company Hermanos Carabia Muñoz SL.

As the parties agreed that it is possible that a contaminated piece of meat could cause an adverse analytical finding of 50 pg/mL of clenbuterol, the only remaining element (the "*missing link*") is whether that specific piece of meat was contaminated with clenbuterol. The Panel is not prepared to conclude from a mere possibility that the meat could have been contaminated that an actual contamination occurred.

More specifically, the Panel finds that there are no established facts that would elevate the possibility of meat contamination to an event that could have occurred on a balance of probabilities. Unlike certain other countries, notably outside Europe, Spain is not known to have a contamination problem with clenbuterol in meat. Furthermore, no other cases of

athletes having tested positive to clenbuterol allegedly in connection with the consumption of Spanish meat are known. On the contrary, the evidence before this Panel demonstrates that the scenario alleged by Respondents is no more than a remote possibility.

In reaching this conclusion the Panel has taken into account the very low likelihood of a piece of meat from a calf reared on a Spanish farm being contaminated with clenbuterol as well as the fact that the slaughter of the animal would have had to have occurred shortly after the administration of clenbuterol in order to have the alleged effect. The Panel also notes that regardless of whether a low denominator is used in a test conducted in the Felipe Rebollo slaughterhouse, or whether a high denominator is used in tests conducted in the entire EU, in all the statistics presented to the Panel by the parties, the amount of clenbuterol-positive results is either very low or practically non-existent.

The Panel therefore considers that although the meat contamination scenario is a possible explanation for the presence of clenbuterol in Mr Contador's Sample, in light of all the evidence adduced - and as explained above, it is very unlikely to have occurred.

At this stage, it is noteworthy reminding (as already explained above) that if the Respondents were able to show that the contaminated meat theory is the only possible one (or the most likely scenario to have occurred), this additional fact could elevate the scenario from a possible one to a likely one meaning that the percentage of the chance that it indeed occurred would be over the threshold of 50% (which is the required standard under the regime of the balance of probability). Being the single possible scenario (or the most likely one among different scenarios) carries evidential weight in the assessment of the balance of probabilities. Therefore, in this case, the assessment must be done also in reference and in comparison to the other scenarios put forward by the Appellants. If the Panel were to conclude that the other two theories are impossible or less likely, then the Panel would be prepared to consider the meat contamination scenario as sufficient proof. However, as already expressed above the burden of proof that the meat contamination scenario is more likely than other (possible) scenarios remains always on the shoulders of the Athlete and the Standard under which all the theories will be assessed is the balance of probabilities.

5. The Blood Transfusion Scenario

The Appellants submit that it is more likely that the adverse analytical finding of Mr Contador was caused by the result of the application of doping methods than by meat contamination.

The scenario put forward by the Appellants in this regard is the one of blood transfusion (the "*blood transfusion scenario*").

In this relation it is alleged that Mr Contador undertook a transfusion of red blood cells on 20 July 2011 and then - in order to preserve a natural blood profile and mask the use of such transfusion, which can be detected through the Athlete's Biological Passport (the "*ABP*") - the next day (21 July 2010) injected plasma (to hide the variation of haemoglobin values) and erythropoiesis stimulation (to hide the variation of reticulocytes) into his system. According to the Appellants, it is the transfusion of plasma of 21 July 2010 which would have contaminated the Sample with clenbuterol, resulting in the adverse analytical finding. The Appellant base their conclusions on the following evidence: the environment of the Athlete (A), the Athlete's blood parameters (B), and the traces of phthalates (C). The Respondents contest the conclusions and the evidence of the Appellants.

5.1 The alleged tainted environment of the Athlete

Submissions by the Parties

WADA begins its argumentation by indicating that it is not unusual for an athlete to take clenbuterol in order to enhance his/her performances.

Between 2008 and 2010 alone, almost 250 clenbuterol adverse analytical findings have been reported, of which 18 in cycling. Compared to the figures related to contaminated meat with clenbuterol, these statistics show that it is more likely for an athlete to test positive for clenbuterol for doping reasons rather than as the result of ingestion of contaminated meat.

Mr Contador stated in his defence, among others, the following:

"I have never taken doping substances in my life. And not only have I not taken doping substances, but I have always been surrounded by people (cyclists, doctors, trainers, etc.) who categorically reject the use of doping substances".

WADA disagrees with this statement.

In its appeal brief WADA presented a list of 12 former or current team-mates of Mr Contador who have been banned for doping and states that criminal investigations are pending against the Astana Team and the Athlete's former team manager, Mr Manolo Saiz, while in the "*Puerto*" criminal investigations,

initials corresponding to those of Mr Contador were found in certain handwritten documents of Dr Fuentes and Mr Jörg Jaksche testified accordingly in his own doping case. Finally, Mr Contador's current team manager, Mr Bjarne Riis admitted to having used performance-enhancing drugs during his career.

WADA does not argue that these alleged facts are sufficient in themselves to establish that Mr Contador should be sanctioned for an anti-doping rule violation. However, according to WADA, the tainted environment in which the Athlete lives, enhances the likelihood that the source of the adverse analytical finding is doping rather than a contaminated piece of meat. Furthermore, these facts contradict the statement of the Athlete who misleadingly claims that he has always been surrounded by *"people (cyclists, doctors, trainers, etc.) who categorically reject the use of doping substances"*. The statement of Mr Contador, claiming that he does not know the highly controversial Dr Fuentes is also undermined by the admissions of his former team-mate Mr Jörg Jaksche.

Mr Contador submits that the Appellants' attempt to fashion his guilt by association is not only unacceptable but also carries no evidentiary weight. Prof. Hans Michael Riemer concludes in his expert report that reliance on such evidence would be contrary to Swiss law. *"One could argue that relying on the fact that former teammates committed a doping offence in the past to rebut the contention that a prohibited substance was ingested by meat contamination would amount to a finding of guilt by association. Moreover, taking into account behaviours or conducts for which the accused person is not responsible is intrinsically in violation of the requirement of due process because the accused person is deprived of his or her right to defence, given that he or she has no influence or control over the relevant facts. […] Relying on the fact that doping is allegedly widespread in cycling at any stage of the legal reasoning leading to the imposition of a sanction would not only be arbitrary as such, but also run against the principle nulla poena sine lege certa".*

Findings of the Panel

The Panel considers that the tainted environment of the Athlete should carry no evidentiary weight in assessing whether Mr Contador underwent a blood transfusion or not.

No person in the "*environment*" of Mr Contador saw or alleged that Mr Contador underwent a blood transfusion. No person submitted that Mr Contador knew of their wrongdoings or that they acted in part or entirely in concert with each other. This is all the more surprising since the blood transfusion scenario implies that at least a group of people must have been involved (Athlete, donor of plasma, somebody harvesting the plasma, somebody storing the plasma and blood bags, somebody re-injecting the plasma and the blood, etc).

Being in "*bad company*" is no more or less of an indication of illicit behaviour for an athlete than family ties are between cattle farmers (see supra). In saying that, the Panel also notes that being in "*good company*" is no indication whatsoever that an Athlete is not involved in doping. The same applies, in principle, to the evidentiary value of personal declarations by an athlete alleging that he has never doped before.

Finally, the Panel does not ignore the fact that Mr Contador himself used a similar argument in putting forward several investigations of the Spanish police regarding meat contamination cases in order to make it more likely that the farm of Mr Lucio Carabias illegally fattened its cattle. However, in view of its above-developed reasoning concerning the meat contamination theory, the Panel did not give any specific evidentiary weight to the said investigations either, and finds that the actions of certain persons, or certain general circumstances, should not in principle affect the way the evidence concerning a specific person or case is taken into consideration and evaluated. The same standard of assessment is therefore applied to the arguments of both sides in this dispute.

5.2. The Athlete's blood parameters

Submissions by the Parties

WADA submits that following the introduction of the ABP in cycling, professional cyclists have admitted to masking practices that hide the use of blood transfusions.

In that relation, it submits that the variation of blood parameters can be manipulated in order to obtain a blood profile consistent with natural values. Blood transfusions can be detected notably because they lead to an increase of haemoglobin values. The spike in haemoglobin values can however be artificially diminished by an addition of plasma to dilute blood. After a transfusion, a diminution of the reticulocytes values is observed. In order to mask this variation, athletes use microdose injections of an erythropoiesis stimulating agent.

According to WADA, Mr Contador chose to rebut the accusation of doping in the proceedings before the CNCDD of the RFEC by referring to his blood parameters. These parameters would supposedly

illustrate that his blood values are consistent with a natural profile. In the course of the first instance proceedings, Mr Contador filed two reports related to his biological passport and haematological profile during the 2009 and 2010 seasons.

While Mr Contador's experts focused on the blood parameters available during the 2009 and 2010 seasons, Dr Michael Ashenden analysed the values of the samples collected during the 2010 Tour de France in a much broader perspective, taking into account 55 blood results from 2005 through 2010. Dr Ashenden found on such basis that Mr Contador's reticulocyte values collected during the 2010 Tour de France were atypical because:

a) they are higher than his natural (out of competition) reticulocyte values, while they should normally be lower in competition;

b) they are also significantly higher than the values measured during his previous victories at the Tour de France (2007 and 2009), the 2008 Vuelta and the 2008 Giro, while they should be comparable.

With respect to the haemoglobin concentration, Dr Ashenden concludes that the 2010 Tour de France values are not normal for Mr Contador compared to the values collected during the seasons 2007 and 2008. They are higher than normal, like the reticulocyte values. However, Mr Contador's haematological values during the 2010 Tour de France do not, in themselves, provide indications of transfusion or manipulation. In that respect, Dr Ashenden agrees with Mr Contador's expert.

WADA argues that, in contradiction to what the Athlete is trying to suggest, the analysis of his blood values certainly does not support the contention that he would not manipulate his blood, but, on the contrary, when taken in an overall context, include variations that are difficult to reconcile with physiological variations and provide indications which could be consistent with blood doping.

Regarding the blood parameters, Mr Contador points out as a preliminary matter that this is not an ABP case and that the Appellants cannot be permitted to argue such a case. Mr Contador submits that attempting to do so is an abuse of process; the only subject matter of the appeal being how clenbuterol entered his system between the evening of 20 July 2010 and 21 July 2010. Any allegations and claims relating to other alleged anti-doping violations should have been made on their own merit and could only have been the object of different proceedings.

The Athlete points out that WADA itself concedes in § 129 of its appeal brief that *"Contador's haematological values during the 2010 Tour de France do not evidence per se traces of transfusion or manipulation"*. In that respect, the Athlete's ABP expert, Mr Paul Scott, comes to the same conclusion in his expert report.

This concession alone should already have been sufficient to persuade the Appellants not to pursue the blood transfusion theory any further.

The Appellants' fixation with the theory has compelled the Athlete to apportion a disproportionate amount of time and resource to addressing the observations made by Dr Ashenden in his report, when in reality they have nothing to do with the subject matter of the present case.

In his expert report, as well as during his testimony at the hearing, Mr Scott agrees with Dr Ashenden that if the speculative blood transfusion scenario had happened, it would have boosted the total red blood cells in the Athlete's blood while leaving his haematological parameters largely unchanged, or at least keeping any changes well inside the "*cut-offs*" for the ABP.

However, Mr Scott does not agree with Dr Ashenden's assessment that the Athlete's 2010 Tour de France haemoglobin concentration or reticulocyte percentages are atypical or suspicious; Mr Scott finds them decidedly not atypical.

Mr Scott agrees that on the basis of blood values alone, the blood transfusion theory described by Dr Ashenden cannot be ruled out as impossible. However, other data make this scenario implausible.

Mr Scott's main argument in his expert report is that there is no such thing as "*natural*" reticulocyte percentages. Instead, that "*natural*" value must be expressed with a reasonable range bracket and that range bracket must include experimental error and expected physiological variation. This range bracket is accounted for in setting thresholds in ABP and 3G models, but is not accounted for in an analysis of the form Dr Ashenden conducted with regard to Mr Contador's 2010 Tour de France samples. To determine if Mr Contador's 2010 Tour de France samples are atypical with regard to reticulocyte percentages, the use of ABP or 3G analysis is necessary in order that the appropriate range bracket is taken into account.

During the hearing, in the framework of the experts' conference, Dr. Ashenden and Mr Scott discussed the method of calculation of these natural values.

Mr Scott notes that during the February 2006 tests run in the Lausanne WADA-accredited Laboratory, six collections were taken and not three as alleged by Dr Ashenden. Calculating Mr Contador's natural value based on these six collections does not lead to a significant difference compared to the data presented by Dr Ashenden based on three collections. However, without adequate explanation as to why some values were excluded and others were not, Mr Scott feels it is only appropriate to use the full set of data available.

Another argument put forward by Mr Scott is that Dr Ashenden refers to two papers that indicate that the expected reticulocyte percentage values should be lower than those of an athlete's out-of-competition values. None of the papers makes any attempt to evaluate a "*natural*" value for an athlete's reticulocytes nor makes any claims regarding such a "*natural*" value. Furthermore, those papers are only studies and there is no controlled experiment to test a hypothesis.

Based among others on this expert report of Mr. Scott, the Athlete concludes that, as acknowledged by the Appellants, his blood profile does not evidence any transfusion or blood manipulation. The Athlete concludes that this point does not therefore merit any further examination.

During the hearing, the discussion between Dr Ashenden and Mr Scott mainly focussed on how the Athlete's "*natural*" blood values are to be established. If the normal procedure is followed and the comparison is made against the whole range of data in Mr Contador's ABP, no abnormal results are found. However, if Mr Contador's blood values during the Grand Tours between 2007 and 2010 are taken separately, then the values during the 2010 Tour de France are "*unusual*".

In his closing submissions, the UCI noted that the Athlete's blood values may well be within the limits as argued by Mr Scott. However, the UCI added that this is not surprising because it is the purpose of manipulation.

Findings of the Panel

After considering the positions of all the parties and the expert reports of Dr Ashenden and Mr Scott, the Panel comes to the conclusion that the Athlete's blood parameters cannot establish a blood transfusion. The Panel understands that the Appellants do not want to prove *per se* that the Athlete underwent a blood transfusion but only argue that a blood transfusion is more likely to have caused the presence of clenbuterol than the meat contamination scenario.

It is noted that Dr Ashenden sliced the results of former blood values of Mr Contador, *i.e.* he used the samples taken during or shortly before or after the Grand Tours. The Panel is not convinced that the comparison conducted by Dr Ashenden is a sufficiently secure method of establishing inconsistencies in Mr Contador's ABP.

More specifically, after considering the positions of all the parties and the expert reports of Dr Ashenden and Mr Scott, the Panel finds that the inconsistencies that Dr Ashenden sees in Mr Contador's ABP are not conclusive and are deducted from too many uncertain blood parameters and comparisons, making them too speculative and insufficiently secure to rely on as convincing supporting evidence that an athlete underwent a blood transfusion.

However, even if no inconsistencies in the Athlete's ABP were established, in the opinion of the Panel, this does not make the blood transfusion scenario impossible, bearing in mind, among others, as the UCI rightly mentioned, that preventing inconsistencies in one's ABP is precisely the purpose of transfusing plasma. This leads the Panel to the examination of the issue of the traces of phthalates.

5.3 Traces of phthalates

Phthalates are additives that are widely used in plastics and other materials, primarily to make them more flexible. They are used in industry as well as in medical and consumer products.

Different kinds of phthalates (also referred to as plasticisers or DEHP) are detected by laboratories in the anti-doping field, including: Mono-(2ethyl-5-hydroxyhexyl) phthalates (5OH-MEHP), Mono-(2ethyl-5-oxohexyl) phthalates (5OXO-MEHP) and Mono-(2-ethylexyl) phthalates (MEHP). An elevated concentration of phthalates after blood transfusion has been shown in several recent studies. Some blood bags used for transfusion contain plasticizers, which can easily migrate into the blood.

In relation to the samples collected from the Mr Contador the following findings are undisputed:

The day before Mr Contador tested positive to clenbuterol, *i.e.* on 20 July 2010, he provided another sample (n°2512049). This sample was tested by the Cologne Laboratory, which detected that it contained an extremely high concentration of phthalates. The concentration of 5OH-MEHP reported for the Athlete's Sample was 478.5 ng/mL; for 5OXO-MEHP, the concentration was 208.6 ng/mL. These figures had been corrected and were based on a

specific gravity of 1.020. Without this correction, the concentrations of 5OH-MEHP and of 5OXO-MEHP were respectively 741.7 ng/mL and 323.3 ng/mL (with the effective specific gravity of 1.031 measured in the sample of 20 July 2010). These two concentrations are extremely high; one of them being more than twice as high as the maximum concentration detected by the Barcelona Laboratory in a study.

The peak of phthalates which appears on 20 July 2010 is consistent with the data obtained after a blood transfusion.

The Appellants submitted a letter to the Panel from Dr Hans Geyer, Deputy Head of the Cologne Laboratory. According thereto, the Cologne Laboratory analysed in 2010 and 2011 approximately 11,000 doping control samples. Out of this number, only 5 samples showed abnormally high concentrations of phthalates from sports where it is assumed that blood transfusions have no beneficial effect.

Furthermore, the Appellants submitted a recent study by the Barcelona WADA-accredited Laboratory showing that the average concentration for 5OH-MEHP is 36.6 ng/mL and the maximum concentration is 256.5 ng/mL. For 5OXO-MEHP, the average is 27.9 ng/mL and the maximum is 198.8 ng/mL.

According to WADA, the result obtained from the Athlete is not conclusive in itself but is an important indication of the occurrence of a blood transfusion when seen in the light of the positive test for clenbuterol in a different sample the next day, at a moment when the Tour de France was reaching a climax in difficulty, the riders were tired and the lead of Mr. Contador was very tight, *i.e.* such peak is much more likely to be the consequence of blood manipulation than of an extraordinary sequence of two unrelated atypical and fortuitous events. The Appellants submit that it is conceivable that plasma, which could come from a donor, would have been contaminated with a sufficiently high quantity of clenbuterol to trigger the positive test.

The plausibility of this theory has been confirmed by Dr Ashenden and Dr Geyer.

According to Dr Ashenden, in order for this theory to be plausible it is necessary that 1) separate bags of red blood cells and plasma were used; 2) a pouch of plasma was contaminated with clenbuterol; and 3) an ability to boost the reticulocyte percentages during the event. After having assessed all these elements, Dr Ashenden came to the conclusion that *"Based on unequivocal evidence that professional cyclists harvest and store separate bags of red cells and plasma, there is a plausible scenario whereby the clenbuterol found in the sample collected on July 21st 2010 originated from a bag of contaminated plasma"*.

According to Dr Geyer, the Athlete's sample of 20 July 2010 shows much higher concentrations of DEHP metabolites than all other samples of the Athlete collected during the Tour de France between 5 and 25 July 2010. Additionally, the concentrations of DEHP metabolites 50H-MEHP and 5OXO-MEHP of this sample exceed the upper reference limits (99.9% confidence) both of a control group (n=100) and an athlete group (n=468). Therefore, Dr Geyer considers that *"these data are consistent with data obtained after blood transfusion"*.

Additionally, Dr Geyer mentions that: *"According to our knowledge all actually approved blood bags are flexible polyvinyl chloride (PVC) products. The most commonly used plasticiser in flexible PVC is di-(2-ethylhexyl) phthalate (DEHP)"*.

During the hearing, the UCI added how extremely rare plasticiser peaks are in doping samples. Such statement was confirmed by Dr Ashenden and Mr Scott at the hearing.

Mr Contador disputes that the adverse analytical finding could have been caused by a blood transfusion, and invokes contrary evidence basing himself in particular on the results of a polygraph examination he underwent, on other scientific explanations for the presence of phthalates and on expert opinions and scientific factors demonstrating that the blood transfusion theory is pharmacologically and toxicologically impossible, each of which will now be examined in turn.

5.3.1 The Polygraph Examination

In order to corroborate his assertion that he did not undergo a blood transfusion of any kind at the relevant time, the Athlete voluntarily underwent a polygraph examination on 3 May 2011. In doing so, Mr Contador was asked and answered two series of question as follows:

- *"Did you undergo a transfusion on July 20 or July 21, 2010? (No)*
- *On July 20 or July 21, 2010 did you receive a transfusion? (No)*
- *Did you submit to a transfusion on July 20 or July 21, 2010? (No)"*

and*;*

- *"Did you knowingly ingest clenbuterol on July 20 or July 21, 2010? (No)*

- *Between July 20 and July 21, 2010 did you deliberately ingest clenbuterol? (No)*

- *Were you aware that clenbuterol was entering your body, in any way, on July 20 or July 21, 2010? (No)"*

Dr Louis Rovner concluded in his expert report, and confirmed during the hearing, that "*it is my professional opinion that Alberto Contador was telling the truth when he answered the relevant questions above, and, as such, that he did not undergo a transfusion of blood, plasma, or any other substance on either July 20, 2010 or July 21, 2010".*

The polygraph results and video of the polygraph were sent for independent review to Dr Palmatier, polygraph credibility consultant, who concluded in his expert report, and confirmed during the hearing by videoconference, that: *"After a complete review of all of the materials supplied, and both a semi-objective and objective assessment of the recorded physiological data, I concur with Dr Rovner's findings that Alberto Contador was truthful when he responded to the relevant questions asked in each of his […] examinations".*

The Appellants did not dispute the admissibility of the polygraph examination itself, but referred to CAS 2008/A/1515 § 119 where it is stipulated that: *"[…] A polygraph test is inadmissible as per se evidence under Swiss law. Therefore, the CAS Panel may take into consideration the declarations […] as mere personal statements, with no additional evidentiary value whatsoever given by the circumstance that they were rendered during a lie detector test. (TAS 99/A/246 par. 4.5; CAS 96/156, par. 14.1.1)".*

During the hearing, Mr Contador drew the attention of the Panel to Article 23 UCI ADR and the corresponding Article 3.2 of the WADC providing that: *"Facts related to anti-doping rule violations may be established by any reliable means, including admissions".*

Mr Contador also underlined that the admissibility of a polygraph test in arbitration procedures is far less stringent as in courts. As Mr Contador considers the polygraph examination to be a reliable method, he argues that the evidence should be admitted by the Panel. Moreover, according to the Athlete, the polygraph examination in CAS 2008/A/1515 was not admissible for another reason: the two CAS awards referred to in the CAS 2008/A/1515 case are irrelevant as those awards were rendered before the entering into force of the WADC.

The Panel notes that the Appellants did not oppose the admissibility of the polygraph examination, but only argued that it has no more evidentiary weight than a personal statement of the Athlete.

Based on its powers to administrate proof under Art. 184 PILA and given the Appellants acceptance that the polygraph examination is admissible as evidence per se, the Panel considers that the results of the polygraph examination undergone by Mr Contador in this case are admissible.

In respect to the probative value of the polygraph test the Panel notes that the examination was conducted by Dr Louis Rovner, a highly experienced polygraph examiner who alleges to be 95% accurate and that the remaining 5% were false positive results. The Panel also notes that the polygraph examination was reviewed by Dr Palmatier, an experienced polygraph credibility consultant who came to the conclusion that "*the examinations were professionally conducted and in compliance with professional associations and organizational standards. More important, the examinations were conducted in a manner supported by empirical research".*

In light of the foregoing, the Panel takes good note of the fact that the results of the polygraph corroborate Mr Contador's own assertions, the credibility of which must nonetheless be verified in light of all the other elements of proof adduced. In other words, the Panel considers that the results of the polygraph add some force to M Contador's declaration of innocence but do not, by nature, trump other elements of evidence.

In coming to its conclusions, the Panel took note of the former CAS awards regarding polygraph examinations. However, as already mentioned, two of these awards (TAS 99/A/246 and 96/156) were rendered before the entering into force of the WADC. The third award (CAS 2008/A/1515) simply refers to these two previous cases with no specific reference to the applicable procedural provisions for the admissibility of evidence and to article 3.2 of the WADC. This jurisprudence does not prevent the admissibility of the polygraph examination in the case at hand.

5.3.2 The scientific possibility

The Athlete asserts that the elevated levels of DEHP can be caused by a range of different circumstances.

In his expert report Dr Holger Koch emphasised that *"foodstuff is widely considered the primary source of exposure for the general population".* Dr Koch also sets out a number of studies in which some of the DEHP

values of subjects that did not undergo any medical treatment or transfusion are similar to those of the Athlete.

In any case, the Athlete considers the levels of DEHP in his 20 July 2010 sample immaterial, since that sample did not contain any clenbuterol. That he may have had elevated levels of DEHP in his 20 July 2010 sample is not an offence and does not explain how clenbuterol entered his system on his 21 July 2010 test.

Also, Mr Contador assesses that the Appellants' reliance on the levels of DEHP in his samples in fact provides conclusive evidence that clenbuterol could not have entered his system by way of transfusion. As reported by Dr Koch's "*If the clenbuterol had entered the athlete's system via contaminated blood/plasma and was therefore detectable in the urine sample collected on July 21, 2010, there would need to have been enough time for the clenbuterol to be excreted via urine. However, if this was the case, significant levels of DEHP metabolites should have been detectable in the urine samples. Therefore, the detection of clenbuterol in the urine sample collected on July 21, 2010 and the low phthalate metabolites levels from that same sample actually contradicts the theory that clenbuterol might have entered the athlete's system via a blood or plasma transfusion".*

The Appellants' blood transfusion theory is thus not a possibility and may be eliminated from the Panel's assessment as to how clenbuterol entered the Athlete's system. For the sake of completeness, however, the Athlete nevertheless exposed other reasons for which the transfusion theory is impossible.

In the Athlete's answer, the argument was raised that transfusions will always result in a spike of plasticisers. Therefore, had the Athlete transfused plasma between his test on 20 July 2010 and his test on 21 July 2010, the levels of plasticiser in his 21 July 2010 test would necessarily have spiked. However, the levels of plasticiser in that sample were normal and corroborate, therefore, the Athlete's contentions that he did not undergo any transfusion.

In addition, it was put forward by the RFEC in its answer that there is no direct relationship between a certain level of phthalates and the existence of a possible blood transfusion. If this is not used as a doping detection practise today, it must simply be because it is not a valid and scientific method. Therefore, the Panel must take into consideration that in order for the level of phthalates to be used as a method of recognizing doping, which proves the use of blood transfusions, such method needs to be properly approved by the scientific community.

During the hearing, WADA requested the opportunity to address questions to its expert Dr Ashenden in relation to the issue of the possible use of phthalate-free bags for transfusion of plasma.

The Athlete opposed this request mainly on the ground that this issue was not dealt with by Mr Ashenden in his expert opinion.

The panel decided to deny the request, based on the two following reasons:

- Under Article R51 of the CAS Code, if WADA wanted Dr Ashenden to testify on this issue this should have been included in his expert opinion, and addressing questions to him on that issue at such a late stage is not allowed in principle under Article R56 of the CAS Code and in this case would be unfair.

- As the experts were heard, at the request of the parties, by means of an expert conference, the Panel issued on 11 November 2011 a detailed and precise explanation as to the manner and order of examination of the experts. None of the parties raised any objection as to the modalities of examining the experts as provided in the order by the Panel, meaning that, if allowed, the request of the Appellants would amount to a deviation from such order and could create some unbalance between the parties in respect of the sequence in which they expected their respective evidence was to be brought.

However, the Panel allowed the Appellants to address questions on this same issue to Mr Scott, the expert for the Respondent.

In light of this decision of the Panel, the Appellants indeed asked Mr Scott whether he knew about a practice in professional cycling whereby riders wishing to use blood transfusion would use different sorts of bags for the storage/transfusion of red blood cells and plasma. Mr Scott answered that he had heard of the existence of different types of bags, but that he was not an expert in this area. Furthermore, Mr Scott explained that for long-term storage, red blood cells needed to be stored in DEHP bags to prevent the breaking down of the red blood cells, whereas there was no such necessity for the storage of plasma.

Mr Scott also stated that it is possible that plasticisers may be present as a result of plasma transfusion even if the plasma was stored in DEHP-free bags since plasticisers could derive from the "*tubing*" used with the bag for a transfusion.

Although the issue of the use of DEHP-free bags as an explanation for the differences in the values of plasticisers in the 20 and 21 July 2011 tests was not specifically dealt with in the second written submission of WADA, in light of the evidence adduced at the hearing, mainly via the answers of Mr Scott and the article referred to in Dr Geyer's expert opinion, the Panel cannot rule out the possibility that the blood transfusion theory is possible despite the fact that a phthalate peak was only recorded in the sample provided by the athlete on 20 July 2010. Indeed, if Mr Contador had a blood transfusion on 20 July 2010 (which caused the presence of plasticisers) and a plasma transfusion on 21 July 2010 in order to dilute the blood (which caused the presence of clenbuterol, but not the presence of plasticisers), the absence of a spike in the level of plasticisers could be explained if the plasma was stored in a DEHP-free bag.

5.3.3 The Pharmacological and Toxicological possibility

According to Mr Contador, in constructing the blood transfusion theory, the Appellants failed to consider 1) how much clenbuterol the donor, whose plasma the Athlete is alleged to have transfused, would need to have had in his system in order for his plasma to contain a sufficient concentration of clenbuterol to produce a 50 pg/mL reading in the person infusing that plasma; and 2) the toxicological effect that such amount would have had on the donor.

The Athlete's pharmacologist, Dr Tomás Martín-Jiménez, evaluated the plausibility of the blood transfusion theory proposed by the Appellants from a pharmacological and toxicological perspective. Dr Tomás Martín-Jiménez concludes that: *"a typical course of clenbuterol doping treatment would not produce sufficient concentration of the drug in the plasma of the donor to produce a dose in 250 mL of plasma that would account for the 50 pg/mL observed in the urine of Alberto Contador. The dose necessary to achieve that mark would need to be much larger and in fact would be toxic to the donor, even considering the pharmacokinetic model most favourable to Dr Ashenden's theory. In fact, the results of the clenbuterol excretion study performed in Cologne indicate that the donor of the plasma would have needed to receive a highly toxic dose of the drug in order to produce a concentration in plasma that would result in the 50 pg/mL in the urine of the Athlete following infusion of the donor's plasma. […] Based on the results of this study, we consider that the scenario presented by Dr Ashenden in his plasma infusion theory is impossible as a cause of the traces of clenbuterol found in the urine of Alberto Contador during the 2010 Tour de France".*

Dr Martín-Jiménez' opinion is supported by Dr Vivian James who concludes that *"it is my opinion that it would not have been possible for clenbuterol to have been present in a plasma sample in a sufficient amount to produce the positive urine result that was found. It is unlikely that any human donor could have tolerated the amount of clenbuterol required to achieve the plasma concentration necessary to result in a urinary concentration of 50 pg/mL following transfusion of that plasma".*

In its second submission, WADA presented an expert report by Dr Olivier Rabin. This report was reviewed by Boehringer Ingelheim in order to establish whether Dr Rabin's report was compatible with a study made by Boehringer Ingelheim where clenbuterol was administered as an intravenous infusion to six subjects. Boehringer Ingelheim concluded that the calculations contained in the report of Dr Rabin *"are compatible with the scientific information published on clenbuterol's pharmacokinetics by our company as well as with the unpublished data generated by our company as a developer and manufacturer of this substance".*

According to Dr Rabin, an important difference between his study and the study of Prof. Martín-Jiménez is that the latter's study was based on oral administration of clenbuterol and not on intravenous administration. The calculations of the report by Dr Rabin demonstrate that the level of clenbuterol detected in the Athlete's Sample of 21 July 2010 is compatible with not just one, but *"several alternative scenarios of clenbuterol dosing, blood withdrawal and subsequent reinfusion of plasma".* In particular, Dr Rabin considered it perfectly possible that a plasma donor could follow and tolerate a doping regime leading to the concentration of clenbuterol found in Mr Contador's Sample.

This report, nevertheless, also applies the pharmacokinetic model used to simulate the oral administration of clenbuterol to the intravenous administration data for comparison purposes. Even this analysis, when applying the incorrect pharmacokinetic model (as done by Dr Martín-Jiménez in his report), demonstrates that a transfusion of contaminated plasma could perfectly feasibly have caused the clenbuterol levels detected in Mr Contador's urine.

According to Dr Rabin it is important to establish when the suspicious plasma transfusion took place since the blood test performed in the morning of 21 July 2010 detected low levels of clenbuterol in plasma (~1 ug/mL), whereas the urine test performed in the evening of that same day yielded 50 pg/mL of clenbuterol. In principle, such a plasma transfusion could have taken place at any time between the

urine tests performed the evenings of 20 (negative for clenbuterol) and 21 July 2010 (50 pg/mL of clenbuterol). However, if the aim was to affect the results of the blood test, it is reasonable to assume that the plasma transfusion took place before such blood test, *i.e.* at some point between 19.00 (20 July) and 9.00 (21 July), *i.e.* in a period of 14 hours.

Dr Rabin comes to this conclusion based on the following elements:

- according to bodybuilders' blogs, and also the report of the Athlete's defence team, the doses of clenbuterol used for anabolic purposes are 100-300 ng daily;

- Dr Rabin's report posits various timeframes for the withdrawal of the blood, none of which is immediately after the last dose of clenbuterol;

- Bearing in mind the negative urine samples of Mr Contador on the evening of 20 July 2010, one can conclude that the transfusion of plasma must have taken place between the evening of 20 July and the urine test of Mr Contador on the evening of 21 July 2010 (which resulted in a finding of 50 pg/mL clenbuterol); WADA considers, however, that it is much more likely that Mr Contador transfused the plasma before (and most probable shortly before) the blood test on the morning of 21 July. The report therefore runs the calculations for a transfusion occurring both 12 and 24 hours before the urine test of the evening of 21 July 2010;

- the report assumes that Mr Contador transfused a perfectly feasible amount of plasma: 200 mL;

- the report assumes that Mr Contador would have urinated once every three hours between the transfusion and the relevant test which is an extremely fair assumption in favour of the Athlete.

In each of the above examples, more favourable input data could have been used. However, the report from Dr Rabin seeks to demonstrate that the blood transfusion theory is scientifically plausible even if conservative factual assumptions are made.

Prof. Jérome Biollaz reviewed both the expert report of Dr Martín-Jiménez that was attached to Mr Contador's answer and the above-mentioned expert report of Dr Rabin. Prof. Biollaz reports some inconsistencies in both reports. However, he comes to the conclusion that an increased variability will not change the conclusions of Dr Rabin while in Dr Martín-Jiménez's report, the conclusions are likely to change. More importantly, the incorrect adjustment made for the plasma/blood ratio by Prof. Martín-Jiménez invalidates his conclusions.

The final expert report on this matter was prepared by Prof. Martín-Jiménez in connection with the second written submission of Mr Contador, taking into consideration the above remarks from Prof. Biollaz, who confirmed at the hearing that Prof. Martín-Jiménez' second report was more reliable.

Prof. Martín-Jiménez' position remains that the blood transfusion theory is impossible as a matter of pharmacokinetics. These issues will be dealt with separately below and are based on the following arguments:

5.3.3.1 The toxic clenbuterol treatment of the theoretical donor

According to Prof. Martín-Jiménez, WADA's model assumes that the theoretical donor underwent a course of clenbuterol treatment so extreme that it would be likely to cause toxicity.

Dr Martín-Jiménez explains in his second report that *"WADA has provided no justification for using the dose in question, other than the fact it falls within a range of doses (100 to 300 ug) I examined as part of a blood transfusion study I undertook in November 2010. That range of dosage was never intended or proposed as an accurate dosing range and was not based on any user information. On the contrary it was used to provide a widely exaggerated margin of values in the blood transfusion study in order to emphasise the extent to which it was unlikely that clenbuterol came from a blood transfusion. WADA implies that the midpoint of the 100 to 300 ug range (i.e. 200 ug) reflects standard user dosage. In fact, as is developed below, a dose of 200 ug per day is an extreme amount of clenbuterol to ingest, particularly without an escalated dosage protocol"*.

Dr Martín-Jiménez puts forward a report according to which a dose of 60 – 120 ug per day is described to be a dose of clenbuterol typically used by athletes and bodybuilders. By contrast, WADA's model assumed the theoretical donor to have taken 200 ug of clenbuterol for 21 consecutive days. An example is given of a person having administered a dose of clenbuterol of 108.75 ug, but still having suffered *"acute clenbuterol intoxication"*.

During the hearing, such assumptions were rebutted by Dr Rabin as he mentioned that a single dose of clenbuterol is indeed dangerous, but that doses can increase after several days of clenbuterol administration. More specifically, it was mentioned that an ingestion of 200 micrograms of clenbuterol at

once would cause side effects to most people, but if the ingestion of 200 micrograms is part of a course of administration it would have no toxic effect.

Furthermore, it was also clarified and approved by all experts during the hearing that a person being subject to a clenbuterol administration course could reach a 'steady-state' within 5 days, *i.e.* a state where the level of clenbuterol in this person would remain stable even if clenbuterol is still ingested in the context of a clenbuterol administration doping regime. According to Dr Rabin, following multiple oral administrations (as per therapeutic regime), a steady-state concentration of clenbuterol in plasma is reached after ~4 days, with ~500-600 pg/mL in plasma corresponding to a 40 ug/12h administration regimen and 200-300 pg/mL to a 20 ug/12h dosing.

According to Prof. Martín-Jiménez, the scenario of a 21-day course of clenbuterol administration of 200 ug assumes that the donor was exceptionally reckless and underwent the treatment without any fear of detection as such levels of clenbuterol are detectable during a period of 31 to 36 days.

This last argument was rebutted by WADA by stating that Mr Contador possibly transfused into his system the plasma of another person less likely to be submitted to a doping test.

Based on the evidence of the experts' opinions, the Panel notes that a single dose of 200 ug of clenbuterol is likely to cause toxic effects but that, through a planned clenbuterol regime a steady-state can be achieved, meaning that it is possible that a donor, used as an accomplice for the purpose of blood manipulations and not risking any doping tests, could be at the source of the plasma transfusion which the Appellants are alleging took place.

However, the question arises what motive a person that is not likely to submit to doping controls might have to take large amounts of clenbuterol if such person only has the intention of donating plasma to an athlete involved in sports at the highest levels and has no personal ambition to perform in high-level competitive sports. Inversely, if the person did have personal ambitions of that type then why would he be a donor and why would Mr Contador choose this person to be his plasma donor?

To sum up therefore on this point, the Panel finds that such a clenbuterol regime is theoretically possible, whether or not it were followed by the Athlete or by a third party functioning as donor, but that it is, however, rather unlikely that such a scenario actually happened.

5.3.3.2 The donation shortly after the last administration

Dr Martín-Jiménez is of the opinion that WADA's blood transfusion scenario can only work if it is assumed that the donor withdrew his blood within 24 hours after having taken the last in a series of 21 doses of 200 ug of clenbuterol. According to Dr Martín-Jiménez such a scenario is not consistent. In essence, WADA is asking the Panel to accept that the donor is, on the one hand, assumed to be part of a sophisticated doping scheme yet, on the other, is so dim-witted that he donated blood just hours after having taken 200 ug of a drug that is known to have a notorious slow clearance time.

The Panel finds that providing Dr. Martín-Jiménez's foregoing opinion is correct it is indeed curious that Mr. Contador, who is a highly professional athlete, would, on the one hand, act in a sophisticated and planned manner (using blood transfusions in coordination with infusions of plasma and perhaps the services of a third person over a period of time as an accomplice for blood manipulations) and, on the other hand, act in such a negligent manner by receiving plasma from a donor having very recently finished a clenbuterol regime. Of course mistakes and miscalculations can occur; however the Panel finds that such a sequence of events is rather unlikely.

5.3.3.3 The Athlete's urine production

The Athlete contends that WADA, by calculating his daily urine volume on the basis of the amount of urine reportedly provided by him during doping-control tests, vastly underestimated both the daily urine volume produced by an average male human and, more importantly, by himself.

In Dr Rabin's expert report attached to WADA's supplementary brief, it is assumed *"that the First Respondent would have urinated once every three hours between the transfusion and the relevant test which is an extremely fair assumption in favour of the athlete"*. WADA's assumption is based on a mean volume per urination of 140 mL derived from *"data about urine volume delivered by the athlete for several doping tests conducted by the UCI"*.

Prof. Martín-Jiménez also assumed 8 urinations, i.e. one every 3 hours. However, WADA assumed a total daily urine volume of 1.12 L compared to Prof. Martín-Jiménez's 1.5 L.

The Boehringer Ingelheim study that delivered the Intravenous data relied upon by Dr Rabin was derived from six test subjects, one of whom was apparently of a similar weight to the Athlete. The conclusion of

WADA that the calculations regarding this person show a 25% greater concentration of clenbuterol than in Mr. Contador's sample, is misguided according to Prof. Martín-Jiménez, since in pharmacokinetics it is well known that one needs to study a large population of individuals in order to quantitatively describe relationships between demographic or clinical variables and drug exposure parameters.

According to the Athlete, the volumes relied upon by WADA are flawed. One cannot deduct from the data based on a few doping tests the total daily urine volume, since the volume gathered during doping control tests is limited by the size of the urine collection vessel. In addition the Athlete points out that, for reasons of hygiene, he never fills the whole vessel to the brim.

The Athlete therefore conducted a test of his own, to use as evidence in this proceedings, and on such basis filed a report concluding that he produced an average daily volume of urine of 2.115 L.

The Panel accepts the allegation that an athlete for reasons of hygiene would usually not fill the collection vessel to the brim. However, based on all the evidence adduced and in particular the expert testimony at the hearing, including Dr Ashenden's indication that professional athletes usually have a lower urine production than normal persons due to being partially dehydrated, the Panel is reluctant to accept that the Athlete has an average urine production of 2.115 L per day. In reaching this conclusion the Panel took into account that, on the one hand, the sample was taken during the Tour de France and, on the other, that it was not collected during the competition but on a rest day. In this respect the Panel rejects the assertion of Mr Contador in his submissions stating that, since it was a rest day the test should not have been considered an in-competition test. In doing so, the Panel refers to the definitions contained in the UCI ADR, according to which *'In-Competition refers to the period that starts one day before or, in the case of a major tour three days before the day of the start of an Event and finishing at midnight of the day on which the Event finishes'*. In addition, the Panel took into consideration that the Athlete's test was not carried out in a controlled environment, corresponding to the typical conditions required of a scientific experiment.

However, one must also note that the data coming from WADA concerning the Athlete did not come from a scientifically controlled environment either. Hence the data before this Panel must be evaluated and used with caution. Summing up, therefore, the Panel finds that an average urine production of 2.115 L is rather at the high end of the possible range when assessing the blood transfusion as a whole.

5.3.3.4 Fitting to the data

The experts also debated on the topic of "*data fitting*" during the hearing.

According to WADA, the oral model (for the intake of Clenbuterol) used by Prof. Martín-Jiménez is incorrect.

However, Prof. Martín-Jiménez is of the opinion that the model used in this particular case to obtain predictions is less important than the fitting of the data at hand. Furthermore, Prof. Martín-Jiménez is of the opinion that the intravenous data upon which Dr Rabin relied is not well fitted, which skewed the results obtained and reported. By way of illustration, Prof. Martín-Jiménez states that he was able to better fit the intravenous data to his old oral model than Dr Rabin did with his intravenous model. In practical terms, this allegedly would mean that the results obtained and reported by Dr Rabin in relation to urinary concentrations of clenbuterol were biased in favour of WADA's position. In order to obtain more accurate predictions based on the intravenous data, Prof. Martín-Jiménez applied the intravenous data to his own intravenous model.

The panel took note of the differences of opinions between the two experts in relation to this issue of fitting.

However, with respect to the overall assessment and conclusion in respect of the blood transfusion theory, the panel considers that the impact on the findings of the experts' deriving from their different approaches to the fitting of the data is insignificant enough to not require a determination as to which method is better suited.

5.4 The Panel's conclusions regarding the Blood Transfusion Theory

As a preliminary matter, the Panel notes that the primary object of this appeal is the finding of a Prohibited Substance (clenbuterol) in the Athlete's Sample.

Only on a secondary basis is the Panel invited to consider the scenario of a blood transfusion. Indeed, neither the UCI nor WADA initiated nor requested to initiate disciplinary proceedings against Mr Contador in respect of an alleged blood transfusion; the theory of the blood transfusion having only been raised, together with the food supplement's scenario, by the Appellants as an explanation for the adverse

analytical finding, i.e. as alternative explanation for the presence of clenbuterol in the Athlete's system compared to the meat contamination scenario relied on by him.

In other words, the Appellants did not initiate the disciplinary proceedings on the grounds of an alleged blood transfusion.

In his submissions, the Athlete has criticized the foregoing fact – i.e. the lack of direct correlation between the charge brought and the facts invoked to evidence the existence of an anti-doping violation - and has shown obfuscation in that connection, arguing that such approach of the anti-doping authorities is unacceptable.

The Panel is of the opinion that the foregoing criticism is incorrect.

As explained above, the Appellants could not in the case at hand simply contest the contaminated meat scenario, but – due to their obligation to cooperate in elucidating the facts - had to substantiate their contestation, i.e. they were bound to give an explanation as to why they thought the contaminated meat scenario was untrue and why they believed such scenario to be impossible or at least less likely than other alternative scenarios.

In view of this obligation to cooperate in establishing the facts of the case and considering that neither the applicable rules nor principles of fairness dictate otherwise, the Panel finds that – subject to the comments below concerning their procedural approach - the Appellants cannot be criticized for invoking and defending their alternative scenarios, including the blood transfusion theory. However, the Panel notes, in weighing the evidence before it, that neither UCI nor WADA were apparently confident enough to bring a doping charge against the Athlete based directly on their allegation of a blood transfusion.

To sum up, for the above reasons, the Panel finds that although the blood transfusion theory is a possible explanation for the adverse analytical finding, in light of all the evidence adduced and as explained above, it is very unlikely to have occurred.

The Panel has thus concluded that both the meat contamination scenario and the blood transfusion scenario are – in principle - possible explanations for the adverse analytical findings, but are however equally unlikely. In the Panel's opinion there is no need to further investigate the relationship between the two foregoing scenarios since, as will be detailed below, the third scenario (the contaminated supplements scenario) is not only possible, but the more likely of the three.

6. The Supplement scenario

Submissions by the Parties

According to WADA, another plausible scenario is that the adverse analytical finding results from a contamination through a food supplement.

The existence of contaminated food supplements in general is uncontested and there are numerous cases of athletes who have tested positive after having ingested contaminated food supplements.

WADA points out that such food supplement contaminations have also involved clenbuterol and in that connection it invokes as an example the CAS 2009/A/1870 case, which was adjudicated by the CAS.

In the CAS 2009/A/1870 case, the athlete tested positive for clenbuterol, like Mr Contador. After being informed of her positive result, she had the food supplements she was regularly taking tested by a laboratory. The analysis showed that those supplements were tainted with clenbuterol. The contaminated supplement was supplied by AdvoCare, an established health and wellness company, which endorses hundreds of top-level American athletes like Ms CAS 2009/A/1870.

This case illustrates – according to the Appellants - that it is possible for an athlete to test positive for clenbuterol because of a contaminated supplement even if the product is purchased over the counter from an apparently reliable source. Furthermore, this case shows that the substance involved here, *i.e.* clenbuterol, is precisely one that can be found in food supplements.

Mr Contador contested these allegations by submitting that he only used the food supplements of the Astana team. In that connection, Mr Contador provided a list of the food supplements used by the Astana team during the 2010 Tour de France. This list was drawn up by Mr José Marti, assistant coach, and Mr Valentin Dorronsoro, chief masseur, of the Astana team. In a statement dated 9 November 2010, Mr Marti Marti and Mr Dorronsoro confirmed that Mr Contador used these food supplements.

According to WADA, Mr Contador's allegation is not verifiable and no analysis has been provided to show that these supplements could not be contaminated.

One of the reasons for that could be that in this case, Mr Contador knew that he would not escape a sanction as the use of food supplements is rarely considered as a fully exonerating explanation.

WADA submits that it is more likely to test positive for clenbuterol as a consequence of the use of a contaminated food supplement than as a consequence of consumption or ingestion of contaminated meat as alleged by Mr Contador.

The UCI also invokes an investigation conducted by Dr Geyer confirming an important incidence of contaminated food supplements and, in addition to the CAS 2009/A/1870 case, points to a number of other CAS awards where the presence of a prohibited substance in the athletes system was ascribed to the ingestion of a food supplement that was contaminated with a prohibited substance: TAS 2008/A/1675, TAS 2006/A/1120, CAS 2008/A/1489 & CAS 2008/A/1510 and CAS 2002/A/385.

According to Mr Contador, the Appellants' supplement scenario is simply a fall-back position and is not corroborated by any evidence whatsoever and amounts to the following allegations:

a) the Athlete was taking supplements;

b) supplements have in the past been found to be contaminated with prohibited substances; and therefore

c) the clenbuterol in the Athlete's sample could have come from a contaminated supplement.

For the Athlete, the Appellants' unproven assertion is further evidence that they are not seeking the truth in this case but are merely attempting to obtain a conviction against him at all costs, since they have lost all objectivity. That notwithstanding, the Athlete has set out reasons for which he considers the Appellants' supplement scenario carries no credence.

In his witness statement, Mr Contador declares that he did not take any supplements between his anti-doping tests on the 20th July and 21st of July 2010. The supplements which he normally takes were taken during race days alone (either before or during the race) and not on rest days. It is therefore impossible that the clenbuterol detected in his Sample could have originated from a supplement he was taking. The analysis of the Appellants' supplement theory should therefore end here.

However, for the sake of certainty, the Athlete has set out other reasons for which it considers it is beyond question that supplements were not the cause of the positive test.

Mr Contador listed all the supplements that were made available to the Astana riders throughout the 2010 season and the 2010 Tour de France. Each of the nine riders who comprised the 2010 Astana Team have confirmed in their witness statements that: 1) those supplements were indeed the supplements made available to them throughout both the 2010 season and the 2010 Tour de France; and 2) which of those supplements each rider took, and how frequently they took them.

The Athlete affirms that he did not take any other supplements other than those listed: *"I do not, and did not during the 2010 Tour, take any supplements other than those specifically checked by the doctor and made available through the team. I did not during the 2010 Tour take any supplements other than those which I identify in Exhibit AC4. The whole point of taking only what the team doctor has approved is to avoid any inadvertent contamination, and so I am rigorous in following this approach".*

Every rider on the Astana team underwent at least two anti-doping control tests during the 2010 Tour de France and considerably more during the 2010 season. Only one of them failed a doping control test in 2010: the Athlete himself.

Plainly, if any of those supplements had been contaminated with clenbuterol, then there is a very high likelihood that other riders from the Astana team would also have tested positive for clenbuterol during the course of the 2010 season or at least during the course of the 2010 Tour de France.

Three of the nine riders at Astana in 2010 remained for the 2011 season. All three have confirmed that the same supplements than in 2010 were made available by Astana to its riders in 2011. No rider from Astana has tested positive for clenbuterol or any other banned substance in 2011 despite the numerous tests they have undergone throughout the season. Again, if any of those supplements were contaminated with clenbuterol, then there is a very high likelihood that at least one rider from the 2011 Astana team would have tested positive for clenbuterol.

Furthermore, Mr Contador argues that in support of their position, the Appellants have cited the only case ever (to the best of the Athlete's knowledge) in which clenbuterol was found as a contaminant in a supplement (CAS 2009/A/1870), and points out that the manufacturer in that case, AdvoCare, did not supply Astana with any supplements in 2010, nor did Astana provide its riders with any AdvoCare products

in 2011.

The Athlete has approached each of the six manufacturers that produced the products made available to the Astana riders in 2010 and received confirmation that:

a) none of them use or store clenbuterol or any other substance from WADA's Prohibited List in their warehouses;

b) none of them have ever been blamed for an athlete's positive anti-doping test; and

c) all of them carry out external, independent testing of their products, none of which have ever revealed the presence of clenbuterol.

The Panel notes that the Appellants do not contest the three foregoing points.

According to Mr Contador, those declarations by the supplement manufacturers, in themselves, render it virtually impossible that clenbuterol could have been a contaminant in any of the supplements the Athlete was taking.

For Mr Contador, the Appellants therefore argue in a last desperate bid that he may have been taking a supplement that he deliberately did not disclose because he *"knew that he would not escape a sanction as the use of food supplements is never considered as a fully exonerating explanation"*.

Mr Contador submits that the Appellants suggestion here assumes that the Athlete would have known which one of the supplements he was taking was contaminated with clenbuterol and thus deliberately chose not to disclose information about that particular supplement when he provided the RFEC the names of the 27 different supplements that were made available by the Astana team to its riders.

According to Mr Contador, not only is the Appellants' submission in this regard a preposterous speculation, it is also yet more evidence of the repulsive approach taken by the Appellants to the Athlete's case. The Panel need only consider how the unsubstantiated proposition made by the Appellants here would be received if it were made by an athlete who claimed his positive test had been caused by a supplement.

Findings of the Panel

The Panel considers – based on the evidence before it – that the supplement theory is possible. This is true even if one assumes that Mr Contador only took one of the supplements contained in the list.

Quality checks of products and/or regular doping tests on the athletes of the First Respondent's team may render an adverse analytical finding based on contaminated supplements less likely, but do not exclude it. In the same manner as the random controls performed on livestock farming in Spain and Europe cannot guarantee that contaminated meat will not reach the consumer, the above-described precautions cannot exclude that a contaminated batch of supplements reaches an athlete.

In respect to whether or not the First Respondent may have used supplements not mentioned on the list, the Panel is of the opinion that the assertions of the Athlete himself and the statements of his teammates are insufficient in terms of evidence to rule out that possibility.

Having found that it is possible that the adverse analytical finding was caused by the ingestion of contaminated food supplements, it remains to be examined whether the meat contamination theory or the food supplement theory is more likely to have occurred.

7. Is the Meat Contamination Theory more likely to have occurred than the Supplement Theory?

As has been shown above, the Panel has to assess the likelihood of different scenarios that – when looked at individually – are all somewhat remote for different reasons.

However, since it is uncontested that the Athlete did test positive for clenbuterol, and having in mind that both the meat contamination theory and the blood transfusion theory are equally unlikely, the Panel is called upon to determine whether it considers it more likely, in light of the evidence adduced, that the clenbuterol entered the Athlete's system through ingesting a contaminated food supplement. Furthermore, for the reasons already indicated, if the Panel is unable to assess which of the possible alternatives of ingestion is more likely, the Athlete will bear the burden of proof according to the applicable rules.

Considering that the Athlete took supplements in considerable amounts, that it is incontestable that supplements may be contaminated, that athletes have frequently tested positive in the past because of contaminated food supplements, that in the past an athlete has also tested positive for a food supplement contaminated with clenbuterol, and that the Panel considers it very unlikely that the piece of meat

ingested by him was contaminated with clenbuterol, it finds that, in light of all the evidence on record, the Athlete's positive test for clenbuterol is more likely to have been caused by the ingestion of a contaminated food supplement than by a blood transfusion or the ingestion of contaminated meat. This does not mean that the Panel is convinced beyond reasonable doubt that this scenario of ingestion of a contaminated food supplement actually happened. This is not required by the UCI ADR or by the WADC, which refer the Panel only to the balance of probabilities as the applicable standard of the burden of proof. In weighing the evidence on the balance of probabilities and coming to a decision on such basis, the Panel has to take into consideration and weigh all of the evidence admitted on record, irrespective of which party advanced which scenario(s) and what party adduced which parts of the evidence.

That said, the Panel finds it important to clarify that, by considering and weighing the evidence in the foregoing manner and deciding on such basis, the Panel in no manner shifted the burden of proof away from the Athlete as explained above. The burden of proof only allocates the risk if a fact or a scenario cannot be established on a balance of probabilities. However, this is not the case here.

Consequently, the Athlete is found to have committed an anti-doping violation as defined by Article 21 UCI ADR, and it remains to be examined what the applicable sanction is.

D. The Sanctions

It is undisputed that it is the first time the Athlete is found guilty of an anti-doping rule violation.

As already mentioned, Article 293 UCI ADR reads as follows:

"*The period of* Ineligibility *imposed for a first anti-doping rule violation under article 21.1 (Presence* of a Prohibited Substance or *its* Metabolites *or* Markers), *article 21.2* (Use *or* Attempted Use of a Prohibited Substance *or* Prohibited Method) *or article 21.6* (Possession of a Prohibited Substance *or* Prohibited Method) *shall be*

2 (two) years' Ineligibility

unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met".

Pursuant to this provision, the period of ineligibility shall be two years. Accordingly, there is no discretion for the hearing body to reduce the period of ineligibility due to reasons of proportionality.

As none of the conditions for eliminating or reducing the period of ineligibility as provided in Articles 295 to 304 UCI ADR are applicable - in particular because the exact contaminated supplement is unknown and the circumstances surrounding its ingestion are equally unknown - the period of ineligibility shall be two years.

E. The Starting date of the Period of Ineligibility

Article 314 UCI ADR determines that "*Except as provided under articles 315 to 319, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed".*

Furthermore, Article 315 UCI ADR determines that *"Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the License-Holder, the hearing body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation occurred".*

The Panel is of the opinion that such provision is applicable in the present matter.

In that relation, the Panel notes that the Appellants did not respond to the request of the CNCDD of the RFEC to file an additional submission in order to rebut the reports presented by the Athlete in the first instance. Because the Appellants refrained from explaining their positions in more detail despite such request, the CNCDD of the RFEC was unable to make a decision with the benefit of the entire picture of the Appellants' allegations and evidence that was subsequently presented to this Panel; whereas it is possible that with a fuller picture the CNCDD of the RFEC might have decided the case more rapidly and differently, which in turn might have affected the occurrence of an appeal to the CAS.

Furthermore, the proceedings before CAS lasted for over nine months and the hearing was postponed twice, while delays cannot be specifically attributed to the Athlete or to CAS and the Panel agrees with the Athlete's submission that his requests for extension during the present proceeding were a direct consequence of having to address and answer the Appellants' complex submissions on the blood transfusion theory as to the source of the prohibited substance which was not developed in front of the first instance.

According to Article 315 UCI ADR the Panel is entitled to fix the start of the period of ineligibility at an earlier date commencing as early as the date of Sample collection.

Taking into consideration all of the above elements, the Panel deems it fair to order that the period of ineligibility will commence and be counted as of the date on which Mr Contador was proposed by the CNCDD of the RFEC to be suspended for one year, namely 25 January 2011.

According to Article 317 UCI ADR *"if a Provisional Suspension or a provisional measure pursuant to articles 235 to 245 is imposed and respected by the License-Holder, then the License-Holder shall receive a credit for such period of Provisional Suspension or provisional measure against any period of* Ineligibility *which may ultimately be imposed"*.

The Panel notes that Mr Contador was provisionally suspended upon receiving UCI's official notification of the provisional suspension on 26 August 2010 and not on 24 August 2010 as stipulated in Mr Contador's answer. The Athlete remained provisionally suspended until he was acquitted by the CNCDD of the RFEC on 14 February 2011. Thus, the Athlete's provisional suspension lasted 5 months and 19 days. As argued by Mr Contador, Article 317 UCI ADR is a mandatory requirement to which effect must be given, meaning that the foregoing period of provisional suspension must be deducted from the period of ineligibility.

According to Article 288, "*A violation of these Anti-Doping Rules in connection with an In-Competition test automatically leads to Disqualification of the individual result obtained in that Competition"*.

Additionally, Article 289 UCI ADR provides the following:

"Except as provided in articles 290 and 291, an anti-doping rule violation occurring during or in connection with an Event leads to Disqualification of the Rider's individual results obtained in that Event according to the following rules:

[…]

1. *If the violation involves*

a) *the presence, Use or Attempted Use of a Prohibited Substance or a Prohibited Method (articles 21.1 and 21.2), other than a Specified Substance;*

[…]

all of the Rider's results are disqualified, except for the results obtained (i) in Competitions prior to the Competition in connection with which the violation occurred and for which the Rider (or the other Rider in case of complicity) was tested with a negative result, and (ii) in Competitions prior to the Competition(s) under point i".

Appendix 1 to the UCI ADR refers to Article 12.1.022 of the UCI Cycling Regulations to define "Disqualification". According to this Article the meaning of Disqualification includes, inter alia:

"The disqualification of a rider shall incur invalidation of results and his being eliminated from all classifications and losing all prizes, points and medals in the race in question.

[…]"

Article 313 UCI ADR provides that:

"In addition to the automatic Disqualification of the results in the Competition pursuant to article 288 and except as provided in articles 289 to 292, all other competitive results obtained from the date a positive Sample was collected (whether In-Competition or Out-of-Competition) or other anti-doping rule violations occurred, through the commencement of any Provisional Suspension or Ineligibility period, shall, unless fairness requires otherwise, be Disqualified.
Comment:

3. *it may be considered as unfair to disqualify the results which were not likely to have been affected by the Rider's anti-doping rule violation.*
4. *[…]"*.

In his answer, Mr Contador submits that it would be unfair and disproportionate to disqualify any results he has obtained following the decision of the CNCDD to exonerate him given that:

a) it is common ground that the amount of clenbuterol in the Athlete's system on 21 July 2010 was too small to have had any effect whatsoever. Any results subsequently obtained by the Athlete cannot therefore have been affected;

b) the Athlete was suspended for almost 5 months but then exonerated and allowed to compete by the CNCDD;

c) it would be absurd to expect an athlete not to resume competing after having been cleared of any wrong-doing by his/her national federation; and

d) the Athlete has undergone approximately 20 tests since he has resumed competing, all of which he has passed.

The Athlete refers the Panel to the following CAS awards in which various CAS panels held that the athletes had committed anti-doping rule violations but decided not to disturb results achieved by those athletes before the commencement date of their sanction: CAS 2007/A/1396 & 1402, (OG Turin) 06/001 and CAS 2007/A/1283.

The Panel considers that the fairness considerations invoked by the Athlete do not apply in this case because he is in effect requesting that results obtained after the commencement of the ineligibility period be maintained.

That would not only be in contradiction with the sanction of ineligibility itself, but would also be unfair compared to the treatment of the majority of athletes who are provisionally suspended from the outset due to non-contested positive anti-doping test and whose provisional sanction is never lifted, thereby never having the opportunity to enter any competitions and obtain results/prizes pending the final resolution of the anti-doping violations charges. For reasons of fairness, the Panel has decided above to start the Athlete's ineligibility period at a much earlier date than what would in principle apply. The consequence of that cannot be that the results obtained after the beginning of such period would not be affected.

For the above reasons, the Panel decides that the 2010 Tour de France result of Mr Contador shall be disqualified as well as the results obtained in all competitions he participated in after 25 January 2011, which is the date when according to the Panel's decision the ineligibility period is deemed to have begun.

E. Conclusion

In summary, the Panel concludes that:

a) the Athlete's positive test for clenbuterol is more likely to have been caused by the ingestion of a contaminated food supplement than by a blood transfusion or the ingestion of contaminated meat;

b) no evidence has been adduced proving that the Athlete acted with no fault or negligence or no significant fault or negligence;

c) a two year period of ineligibility shall be imposed upon the Athlete, running as of 25 January 2011;

d) the 2010 Tour de France result of Mr Contador shall be disqualified as well as the results obtained in all competitions he participated in after 25 January 2011 when the ineligibility period is decided to have begun.

F. Costs

Given that the parties agreed that the issue of the fine to be imposed on Mr Contador in the event he is sanctioned for an anti-doping rule violation shall be dealt with by way of a separate award, the Panel decides that the costs issue relating to the entire case shall be addressed in that award.

Arbitration CAS 2011/O/2422
United States Olympic Committee (USOC) v. International Olympic Committee (IOC)
4 October 2011

Olympics; doping; validity and enforceability of a rule prohibiting doped athletes from participation in the next Olympic Games; definition of eligibility rules; definition of sanctions; proper characterisation of the rule; consistency with the WADA Code; principle of autonomy of the association; consistency with the Olympic Charter; principle of double jeopardy or *ne bis in idem*

Panel:
Prof. Richard McLaren (Canada), President
Mr. Michele Bernasconi (Switzerland)
Mr. David Rivkin (USA)

Relevant facts

The United States Olympic Committee (USOC; the "*Claimant*") is the National Olympic Committee of the United States of America (USA), responsible for the US Olympic Teams. It has its seat in Colorado Springs, USA.

The International Olympic Committee (IOC; the "*Respondent*") is *"an international non-governmental not for profit organization of unlimited duration, in the form of a Swiss association with the status of a legal person recognized by the Swiss Federal Council"* (see Olympic Charter (OC), Article 15(1)). It has its seat in Lausanne, Switzerland. The IOC is governed by Swiss private law, in articles 60-79 of the Swiss Civil Code (CCS).

The IOC Executive Board, at its meeting in Osaka, Japan on 27 June 2008, enacted the following rule which has come to be known as the "*Osaka Rule*" and is referred to as the "*Decision*" by the USOC and the "*IOC Regulation*" by the IOC. The Panel will refer to it as the "*IOC Regulation*" or the "*Regulation*".

"The IOC Executive Board, in accordance with Rule 19.3.10 OC and pursuant to Rule 45 OC, hereby issues the following rules regarding participation in the Olympic Games:

1. *Any person who has been sanctioned with a suspension of more than six months by any anti-doping organization for any violation of any anti-doping regulations may not participate, in any capacity, in the next edition of the Games of the Olympiad and of the Olympic Winter Games following the date of expiry of such suspension.*

2. *These Regulations apply to violations of any anti-doping regulations that are committed as of 1 July 2008. They are notified to all International Federations, to all National Olympic Committee and to all Organizing Committees for the Olympic Games".*

The IOC Regulation came into effect in July 2008 but does not appear to have impacted any athletes who applied to attend the Vancouver Winter Olympic Games in February 2010. However, the IOC Regulation will impact a number of athletes around the world for the 2012 Summer Olympic Games in London. The IOC Regulation appears to have also affected doping adjudications since it came into effect.

In one of those athletes' situations, the IOC Regulation came under scrutiny before AAA/North American Court of Arbitration for Sport in the case USADA v. LaShawn Merritt (referred to as the "*Merritt Award*"). In the Merritt Award, the AAA Panel was required to determine whether the IOC Regulation could be applied to Mr. Merritt, who had tested positive for the banned substance DHEA in a series of out-of-competition tests. Both the World Anti-Doping Agency (WADA) and the IOC were invited, but declined to submit their respective positions as to whether the IOC Regulation could validly be applied in this situation. In the Merritt Award, the Panel reduced the usual suspension on a finding of exceptional circumstances. It held that: (i) Mr. Merritt had no intention to dope and inadvertently used a banned substance; (ii) following his suspension, which would end on 27 July 2011, Mr. Merritt would be eligible to compete in the competitions of all Signatories to the Code of the World Anti-Doping Agency (the "*WADA Code*"), including the USOC, the IAAF and IOC; and (iii) the IOC Regulation could not be used to prevent Mr. Merritt from competing in the 2012 Olympic Trials or from having his name submitted from entry to the Olympic Games. A preventive appeal was filed by the

athlete but withdrawn once the time period for expiry of appeals by any other interested party had expired.

The enforceability of the IOC Regulation also arose in an arbitration involving another U.S. athlete, Jessica Hardy. Ms. Hardy tested positive for clenbuterol in July of 2008. In light of the positive test, Ms. Hardy withdrew from the 2008 Olympic team. The AAA Panel in the Hardy matter held that Ms. Hardy should be suspended from competition for one year, *i.e.* the minimum period allowed under the governing rules. The Panel further determined that it would be manifestly unfair and a grossly disproportionate penalty for Ms. Hardy to be subject to the application of the IOC Regulation, which had come into effect only three (3) days prior to her positive drug sample. WADA appealed this ruling to the CAS (CAS 2009/A/1870). Ms. Hardy requested unsuccessfully, that the IOC be joined as a party. The CAS Panel ultimately dismissed the appeal, and the one year sanction was maintained. Subsequently, on 21 April 2011, the IOC determined that it would not apply the IOC Regulation to Jessica Hardy.

The IOC Regulation put the USOC in a difficult position: A judicial body in the United States had declared that Mr. Merritt must be allowed to compete at the 2012 Olympic Trials and if he qualified, the USOC must name him to its Olympic Team. However, under the IOC Regulation, the IOC would not accept his nomination to the Team.

Both parties to this proceeding recognized that there was considerable uncertainty facing the world's aspiring Olympic athletes and their national Olympic committees because of the IOC Regulation. In recognition of these concerns and to their credit, in April 2011 the parties voluntarily entered into an Arbitration Agreement (the "*Arbitration Agreement*").

The Arbitration Agreement quoted in full the IOC Regulation and Rule 45.2 OC. The Arbitration Agreement referred to the Merritt Award and also to a CAS Advisory Opinion (TAS 2009/C/1824 IOC) of 11 June 2009 (the "*CAS Advisory Opinion*").

The Arbitration Agreement stated, that a dispute *"has arisen between the parties with respect to the validity and enforceability of the [IOC Regulation]"*. The USOC sought relief so that *"the Decision be cancelled and declared null and void, or alternatively, that a mechanism be allowed for a case by case review of the appropriateness of the applicability of the Decision to each specific athlete"*. The Arbitration Agreement stated that the IOC considered that the Regulation is an eligibility rule as to who may qualify as a competitor in the Olympic Games pursuant to Rule 45.2 OC, rather than an additional sanction, and the IOC *"requests that the CAS find that the Decision is valid in all the circumstances and dismiss the USOC's claim"*. As described further below, the USOC and the IOC submitted this dispute for resolution by this Panel in a CAS Ordinary Arbitration Procedure.

The USOC also sought alternative relief in the Arbitration Agreement that if the Decision was determined by the Panel to be valid, then the Panel *"determine (…) the respective areas of enforceability of the CAS Award* [meaning this Award] *and the AAA Award* [the Merritt Award]*"*.

In the USOC's Statement of Claim, it amended its claim for relief as follows:

"[T]hat the Panel issue an award holding that:

(i) The IOC Executive Board's June 27, 2008 decision prohibiting athletes who have been suspended for more than six months for an anti-doping rule violation from participating in the next Olympic Games following the expiration of their suspension is illegal and unenforceable.

(ii) The costs of the present arbitration will be shared by the parties in equal shares. Each party shall bear its own costs.

The USOC trusts that in the spirit of the Arbitration Agreement the IOC would then take the necessary measures for the Decision not to be enforced against any athlete pending its abrogation by the IOC Executive Board, and thus that there is no need to put forward any particular prayers for relief in this respect".

The IOC, in its Answer Brief, made the following prayers for relief:

"In light of the above, the IOC respectfully requests that the Panel issue an award holding that:

(i) The IOC Regulation is legal, valid and enforceable.

(ii) The costs of the present arbitration will be shared by the Claimant and the Respondent in equal shares with each party bearing its own costs".

The Arbitration Agreement provided for the resolution of the dispute under the CAS rules applicable to the Ordinary Procedure of the CAS Code of Sports-related Arbitration and Mediation Rules (2010 Edition) (the "*CAS Code*").

The Arbitration Agreement provided that the CAS would hear the dispute in an expedited manner as provided for in Article R44 of the CAS Code.

The Arbitration Agreement provided further that *"[t]he Panel shall determine (…) the law applicable to the merits in accordance with article R58 of the Code of Sports-related arbitration"*. Under the heading "*Law Applicable to the merits*", the agreement stated:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

The Arbitration Agreement provided for two written submissions per party. In accordance with the Procedural Order of the Panel dated 3 June 2011, the USOC filed its Statement of Claim on 17 June 2011; the IOC filed its Response (titled "*Answer*") on 15 July 2011; the USOC filed its Reply on 25 July 2011; and the IOC filed its Second Response on 4 August 2011.

The Arbitration Agreement provided in paragraph 3.4 that: *"(…) Each party may submit written witness statements as it deems appropriate. There shall be no live witnesses and experts (…). No third party will be allowed to appear at the hearing. Notwithstanding the foregoing, the Panel may determine otherwise, in accordance with the rule of CAS, should it consider it necessary"*.

The Arbitration Agreement provided for the filing of Amicus Curiae Briefs as attachments to either party's written submissions. This was done to ensure that the Panel would have as comprehensive a view as possible of the potential issues surrounding the IOC Regulation.

The parties also filed numerous exhibits and authorities in support of their positions and arguments. Some additional materials were submitted at the hearing.

In accordance with the Procedural Order issued on 3 June 2011 (the "*Procedural Order*"), the Panel held a hearing at the CAS Headquarters in Lausanne, Switzerland, on 17 August 2011. At that time, the parties were given a full and complete opportunity to make oral argument based upon their written submissions. At the conclusion of the Hearing, counsel for both parties agreed that they had been given a full and complete opportunity to be heard and so advised the Panel.

Extracts from the legal findings

A. Scope and application of the IOC Regulation

The resolution of this dispute ought to begin with an analysis of the scope of the IOC Regulation.

The Regulation has no immediate effect on an athlete who is subject to a suspension under the WADA Code that either prevents him or her from participating in qualifying competitions to become a member of a National Olympic team or coincides with the Olympic Games themselves. Such an athlete would not be able to participate in that particular Olympic Games because of the suspension under the WADA Code. However, that same athlete would be affected by the IOC Regulation at the time of the subsequent Olympic Games, assuming the prior suspension was of more than six months' duration and was served in the four-year period prior to that Olympic Games.

The IOC Regulation applies to all athletes of the Olympic Movement, but only becomes a consequence at the point a decision is made with respect to that athlete's acceptance, nomination, and accreditation to the Olympic Games. In other words, at the point when an NOC has selected an athlete to be a part of its Olympic Team and seeks the IOC's approval for its nomination, the Regulation starts to have a direct effect. The existence of the Regulation might well mean that an NOC will not seek to nominate an athlete who falls within its terms, rather than propose the athlete and have the nomination subsequently rejected by the IOC. Nevertheless, it is at the point that the IOC either accepts or denies the nomination that a decision is made, pursuant to Rule 45.2 of the OC, and that the IOC Regulation has its effect of not permitting participation of an athlete as outlined in the OC.

It is worth noting that the effects of a suspension under the WADA Code that overlaps with an Olympic Games or the qualification for that Games and of the application of the IOC Regulation are identical: in both circumstances, an athlete is denied the possibility to participate in the Olympic Games. A WADA Code suspension, of course, also has a broader effect as it bans participations in other competitions as well.

The IOC Regulation can also affect a team in a team sport, as an athlete subject to the application of the Regulation can be on the national team for all competitions other than the Olympic Games. Thus, there may be a ripple effect to the Regulation that extends beyond the athlete to whom the Regulation is applied.

The USOC argues that the IOC Regulation is invalid and unenforceable because: (i) it is inconsistent with the WADA Code and the OC; (ii) it violates Swiss law and general fundamental principles of law; and (iii) it is an unlawful restriction of competition. In order to assess some of these arguments, it is necessary to determine whether the IOC Regulation is a sanction, as the USOC argues, or is an eligibility rule, as the IOC submits. The USOC argues additionally, however, that even if the Regulation was an eligibility rule, it is still invalid and unenforceable. Because certain branches of the arguments apply only in the event the Regulation is characterized as a sanction, the Panel's characterisation of it will be discussed next.

B. Proper characterisation of the IOC Regulation as an eligibility rule or a sanction

In the CAS Advisory Opinion requested by the IOC, *supra*, the Advisory Panel concluded, in consideration of Rule 45.2 of the OC, that the IOC Regulation was an eligibility rule. However, the manner in which the question for the Advisory Opinion was posed, together with the absence of an adversarial proceeding such as occurred in the proceedings before this Panel, essentially prevented the Panel in the Advisory Opinion from considering all of the issues and arguments put forward in this case. In contrast, this Panel was benefitted by extensive arguments made by both parties and numerous Amicus Curiae Briefs.

Another CAS Panel provided a confidential Advisory Opinion to an International Federation (the "*IF Advisory Opinion*") on its Rule that no athlete who had been declared ineligible to compete for at least two years could take part in the next edition of the Championships following the conclusion of the period of ineligibility (the "*IF Rule*"). For reasons that are found to be inapplicable here, that Panel concluded that the IF Rule was penal in nature and not an eligibility rule. The Panel found an intention to sanction the athlete. Therefore, that case is also distinguished from the current case.

Other CAS jurisprudence has indicated that qualifying or eligibility rules are those that serve to facilitate the organization of an event and to ensure that the athlete meets the performance ability requirement for the type of competition in question. A CAS Panel noted in CAS 2007/O/1381 at paragraph 76, that a common point in qualifying (eligibility) rules is that they do not sanction undesirable behaviour by athletes. Qualifying rules define certain attributes required of athletes desiring to be eligible to compete and certain formalities that must be met in order to compete (see CAS 2007/O/1381 at paragraph 77). This same point is found in the IF Advisory Opinion.

In contrast to qualifying rules are the rules that bar an athlete from participating and taking part in a competition due to prior undesirable behaviour on the part of the athlete. Such a rule, whose objective is to sanction the athlete's prior behaviour by barring participation in the event because of that behaviour, imposes a sanction. A ban on taking part in a competition can be one of the possible disciplinary measures sanctioning the breach of a rule of behaviour. The CAS first addressed the issue of whether the IOC can refuse entry into the Olympic Games to an athlete who has served an anti-doping rule related sanction in CAS OG 02/001. The Panel said that the effect of refusing the athlete entry to the Games was to impose a further sanction on him for the same offense.

In this particular case, what is the appropriate characterisation of the IOC Regulation?

In determining the answer to that question, it is helpful to examine the WADA Code and the OC. As set out in part 6 of this Award, the WADA Code provides that ineligibility means *"the Athlete (…) is barred for a specified period of time from participating in any Competition (…)"*. The IOC Regulation states that an athlete *"may not participate, in any capacity, in the next edition of the Olympic Games"* (in both provisions, the emphasis is that of this Panel.) The essence of both rules is clearly disbarment from participation in an event or a number of events.

As noted above, ineligibility according to the WADA Code is defined in the context of Competition. An *Event* is defined in the WADA Code as *"A series of individual Competitions conducted together under one ruling body"* (emphasis that of the Panel), and sets out as an example, the Olympic Games. Accordingly, the Panel finds that the Olympic Games come within the definition of Competition under the WADA Code.

Ineligibility is a sanction according to the provisions of Article 10 of the WADA Code and its definition. The OC in Rule 44 makes the WADA Code mandatory. Therefore, the Panel finds that a reading of the two documents together makes the IOC Regulation, insofar as it makes an athlete ineligible to participate in a Competition – *i.e.*, the Olympic Games – a sanction.

The IOC submits that the Regulation cannot be disciplinary in nature, because the IOC only has disciplinary jurisdiction and powers over Olympic athletes during the Olympic Games. This argument

is based on Rule 23.2 of the OC, stating that once an athlete has made his Olympic declaration according to the Bye-law 6 to Rule 45 OC, then the declaration, when accepted by the IOC, creates a contractual relationship between the IOC and the single athlete. Based on such relationship, an athlete may be sanctioned pursuant to the "*Measures and Sanctions*" provided for in Rule 23. That provision reflects the bifurcated jurisdiction for discipline between the IOC and an International Federation at the Olympic Games, but it does not answer the characterisation question. As the discussion above demonstrates, the ineligibility caused by the IOC Regulation falls squarely within the nature of sanctions provided in the WADA Code. Once the IOC Regulation is used to bar the participation of an athlete, the effect of the Regulation is disqualification from the Olympics and would be undeniably disciplinary in nature. Furthermore, the athlete would certainly perceive such a disqualification as a sanction, much like a suspension under the WADA Code. Therefore, the Panel is satisfied that the IOC Regulation has the nature and the inherent characteristics of a sanction.

This conclusion holds even though, as the IOC argues, an athlete who is prevented from participating in the Olympic Games by virtue of the IOC Regulation may nevertheless participate in another elite athletic competition in his or her sport at the same time, if one is being run concurrently. The IOC Regulation makes an athlete ineligible for the Competition of the Olympic Games, which as noted above, is a Competition under the WADA CodeThe Panel also notes that the Olympic Games are, for many athletes, the pinnacle of success and the ultimate goal of athletic competition. Being prevented from participating in the Olympic Games, having already served a period of suspension, certainly has the effect of further penalizing the athlete and extending that suspension.

Finally, it is noted that at the Olympic Games, the IOC adopts its own Anti-Doping Rules using the WADA Code as its model, as it is bound to do by Article 20.1.1 of the WADA Code and Rule 44 of the OC. Article 9.4 of the Beijing Olympic Anti-Doping Rules and Article 8.4 of the Vancouver Winter Olympic Anti-Doping rules contained the IOC Regulation within them. Therefore, even if the Regulation is operating as an eligibility rule, the disciplinary sanction in the Olympic Games Anti-Doping Rules would have to be applied if the athlete had been inadvertently accepted as an eligible competitor.

For all of the foregoing reasons, having regard to the objective and purpose of the IOC Regulation and to its scope and application, the Panel is of the view that the IOC Regulation is more properly characterised as a sanction of ineligibility for a major Competition, *i.e.* as a disciplinary measure taken because of a prior behaviour, than as a pure condition of eligibility to compete in the Olympic Games. Even if one accepts that the Regulation has elements of both an eligibility rule and a sanction, it nevertheless operates as, and has the effect of, a disciplinary sanction.

C. Is the IOC Regulation consistent with the WADA Code and the OC?

The USOC submits that the IOC Regulation is a substantive change not permitted by Article 23 of the WADA Code, or alternatively, that it was not enacted in compliance with Article 23.6 of the WADA Code. Similarly, it is submitted by USOC that the Regulation is not consistent with the OC.

1. WADA Code

The WADA Code is neither a law nor an international treaty. It is rather a contractual instrument binding its signatories in accordance with private international law. The IOC is a Signatory of the WADA Code (see Art. 23.1.1).

1.1 Is the IOC Regulation an impermissible substantive change?

As a Signatory of the WADA Code, the IOC is bound by contract to comply with its terms. That contract defines the IOC as an Anti-Doping Organization (ADO). Pursuant to Article 23 WADA Code, such organisations are required to follow all provisions of the WADA Code that are mandatory. The IOC accepts this responsibility by providing in Rule 44 OC that the WADA Code is mandatory for all members of the Olympic Movement, including of course itself.

Article 23.2.2 WADA Code further requires that Signatories accept, *"without substantive changes"*, the mandatory parts of the WADA Code. One of the mandatory provisions of the WADA Code is Article 10 relating to sanctions. Article 20.1.1 requires the IOC *"to adopt and implement anti-doping policies and rules for the Olympic Games which conform with the Code"*. Article 23.2.2 also provides that *"no additional provision may be added to a Signatory's rules which change the effect of (…) the periods of Ineligibility provided for in Article 10 of the WADA Code"*.

The IOC Regulation provides for an additional disciplinary sanction (as characterised by the Panel above) after the ineligibility sanction for an anti-doping rule violation under the WADA Code has been served. The Regulation thus provides for a

period of ineligibility (non-participation) that is not provided for under Article 10 of the WADA Code. In so doing, the IOC Regulation constitutes a substantive change to the WADA Code, which the IOC has contractually committed itself not to do and which is prohibited by Article 23.2.2 WADA Code.

The purpose of Article 23.2.2 WADA Code is to ensure that Signatories do not introduce provisions that negate, contradict, or otherwise change the WADA Code articles that are mandatory, including the sanctions in Article 10. The Regulation is a substantive change to Article 10 because the period of ineligibility now becomes 2 years (or whatever lesser sanction in excess of 6 months is ordered) *plus at least the number of days of the Olympic Games*. The Regulation changes the effect of Article 10, through unilateral action by the IOC, by adding further ineligibility to the anti-doping sanction under the WADA Code after that sanction has been served.

By virtue of imposing an additional consequence that is over and above the consequences that are already provided for in the WADA Code, the IOC Regulation is not in compliance with the WADA Code.

In finding that the IOC Regulation is contrary to the WADA Code, the Panel wishes to make clear that it is not stating that the IOC Regulation could not be incorporated into the WADA Code or that the spirit or the rationale of the IOC regulation is *per se* right or wrong. If the IOC wants to exclude athletes who have been sanctioned for doping from the Olympics Games, it may propose an amendment to the WADA Code, which would allow other Signatories the time and opportunity to consider these issues and whether it should be adopted as provided in the Code. The Panel, of course, declines to comment on whether or how such an amendment should be enacted. It does note, however, that should the WADA Code be revised in this way, any issue of proportionality could be determined by the first instance adjudicatory body and reviewed on appeal, which would likely satisfy any requirement of proportionality. Such an amendment would also likely make moot any issue of double jeopardy, since the sanction including a ban from an Olympic Games would be a single sanction as a result of an anti-doping violation, with the adjudicatory body taking into due consideration the interplay of the two possible sanctioning elements. Similarly, issues regarding equal treatment and due process would also be solved.

1.2 Was the Rule enacted in compliance with the WADA Code Article 23.6?

Given the above finding that the IOC Regulation is not in compliance with the WADA Code as it amounts to a substantive change to the sanctions provisions of the WADA Code, the Panel does not need to address this additional compliance argument in its Award.

2. Olympic Charter

Under Swiss law, private associations such as the IOC must act in compliance with Swiss law and applicable principles of law, as well as the association's own statutes. Indeed, a member of an association may seek redress for acts and decisions of the association that are contrary to the law or to the statutes of the association (see article 75 CCS).

In the present case, even though USOC is not a member of the IOC, the Panel is authorized to consider whether the IOC has acted in accordance with its statutes because the IOC agreed to arbitrate these issues with USOC. Following the desire of the parties to finally resolve the matters regarding to the validity and enforceability of the IOC Regulation, the Arbitration Agreement gives extensive powers to the Panel to resolve this dispute, including declaratory powers making it unnecessary for others to seek redress.

Recognized by the Swiss federal Constitution and anchored in the Swiss law of private associations is the principle of autonomy, which provides an association with a very wide degree of self-sufficiency and independence. The right to regulate and to determine its own affairs is considered essential for an association and is at the heart of the principle of autonomy. One of the expressions of private autonomy of associations is the competence to issue rules relating to their own governance, their membership and their own competitions. However, this autonomy is not absolute.

The OC constitutes the IOC's "*Statutes*" within the meaning of the law on Swiss associations, pursuant to Article 60 of the CCS. That provision prescribes that the statutes must contain the necessary provisions as to the goal, the resources and the organisation of an association. The OC is the codification of the Fundamental Principles of Olympism and, amongst other matters, governs the action and operation of the Olympic Movement.

By Rule 44 of the OC, the IOC has incorporated the WADA Code into the IOC's own Statutes. The IOC further provides in Rule 41 of the OC that a competitor must respect and comply with all aspects with the WADA Code. Accordingly, the IOC has by virtue of its own statutes and in particular, Rule 44,

accepted the binding nature of the WADA Code.

Because the Panel has found that the IOC Regulation is not in compliance with the WADA Code, and because the WADA Code has been incorporated into the OC, the IOC Regulation is not in compliance with the IOC's Statutes, *i.e.* the OC, and is therefore invalid and unenforceable.

D. Other arguments raised by the USOC

The USOC also based its claim on Swiss law and fundamental principles of law, as well as competition rules. The parties provided extensive briefing and oral submissions on these issues. However, the conclusions above that the IOC Regulation violates the WADA Code and the OC make it unnecessary to deal with any of those arguments. If the Panel adopted or denied any of these additional bases for the USOC's claim, the conclusion would still be the same: that the IOC Regulation is invalid and unenforceable.

Nevertheless, the Panel finds it appropriate to make the following comments with respect to one set of these issues. CAS case law has consistently held that the principle of *ne bis in idem* can apply to sanctions under sport law, and academic authorities on the subject have come to the same conclusion. The Panel considers that, if the *ne bis in idem* principle is indeed applicable to sanctions imposed under anti-doping regulations, the IOC Regulation would contravene this principle. The effective purpose of the sanction is the same (even if the underlying motivations are different); the sanction is attributable to the same behaviour, and the sanction results in the same consequence, ineligibility from Competition. As mentioned above, no *ne bis in idem* issue would be raised if the IOC Regulation were implemented in the WADA Code, so that one adjudicatory body would be in position to assess the proper sanction for a certain behaviour, taking into due consideration the overall effect of the sanction to be attributed.

E. Conclusion

In summary, the Panel concludes for the reasons set out in this Award and taking in due consideration all arguments submitted by the parties as well as the amicus curiae briefs filed by third parties, that the IOC Regulation is not in compliance with the WADA Code and violates the IOC's own Statutes. The Arbitration Agreement provides for this dispute to *"be submitted exclusively to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland, and settled definitively in accordance with the Code of Sports-related arbitration, under the rules applicable to the Ordinary Arbitration Procedure"*. In the exercise of this power conferred upon the Panel by the Arbitration Agreement and in light of these findings, the IOC Regulation is found to be invalid and unenforceable. It is so declared by this Panel.

The Panel notes that in the spirit of the Arbitration Agreement, the IOC should take the necessary measures for the Regulation not to be enforced against any athlete pending its formal abrogation by the IOC Executive Board. Thus, there is no need to order other particulars of relief in this Award.

Arbitrage TAS 2011/A/2433
Amadou Diakite c. Fédération Internationale de Football Association (FIFA)
8 mars 2012

Football; faits de corruption dans le processus d'attribution de l'organisation de la Coupe du monde de la FIFA; admissibilité d'enregistrements de conversations téléphoniques à l'insu de la personne visée comme moyen de preuve; pouvoir d'examen du TAS; admissibilité des preuves (principes); caractère licite de la preuve; réglementation applicable en matière de preuve; degré de la preuve; atteinte au droit de la personnalité; corruption au sens de l'art. II al.1 du Code d'Ethique de la FIFA (CEF); violation de l'obligation de déclaration et de rapport; violation de l'obligation de loyauté et de confidentialité; sanctions

Panel:
Prof. Massimo Coccia (Italie), Président
Me François Klein (France)
Me Michel Bernasconi (Suisse)

Faits pertinents

La présente affaire se distingue par le fait que l'Appelant a été enregistré à son insu au cours de conversations téléphoniques qu'il a eues avec des journalistes du *Sunday Times* se faisant passer pour des lobbyistes cherchant à favoriser la candidature de la Fédération de football des Etats-Unis d'Amérique à l'organisation des Coupes du Monde de la FIFA 2018 et 2022. Lors de ces entretiens, les journalistes ont sollicité de l'Appelant qu'il les aide à entrer en contact avec un ou plusieurs membres du Comité Exécutif de la FIFA, afin de les convaincre de voter en faveur de la candidature américaine. Les divers enregistrements en cause, qui ont été remis par le *Sunday Times* à la FIFA, sont à l'origine des charges retenues par la FIFA à l'encontre de l'Appelant.

L'Appelant est de nationalité Malienne. Au moment des faits de la présente cause, il était membre du Comité Exécutif de la Confédération Africaine de Football (CAF), de la Commission des Arbitres de la CAF et de la Commission des Arbitres de la FIFA. Il a précédemment occupé la fonction de conseiller aux sports à la Présidence de la République du Mali ainsi que de membre du Comité Exécutif de la FIFA pendant près de neuf ans.

La FIFA est une association au sens des articles 60 ss du Code civil suisse ("*CC*"), inscrite au Registre du commerce. Son siège est à Zurich et son but statutaire consiste notamment à assurer la promotion du football à travers le monde, à réglementer et contrôler le football dans le monde et à organiser la Coupe du Monde et autres compétitions internationales de football.

La Coupe du Monde de la FIFA est une compétition internationale de football, qui se tient tous les quatre ans. Elle est connue pour être l'un des événements sportifs les plus suivis dans le monde et implique d'énormes intérêts économiques, notamment en termes d'infrastructures régionales et locales, d'exploitation de droits d'image et audiovisuels, de billetterie, de sponsoring et de merchandising.

Les candidats à l'organisation de la Coupe du Monde de la FIFA 2018 étaient la Russie, l'Angleterre, les Pays-Bas conjointement avec la Belgique ainsi que l'Espagne conjointement avec le Portugal. L'Australie, le Japon, la République de Corée, les Etats-Unis d'Amérique et le Qatar étaient en compétition pour accueillir la Coupe du Monde de la FIFA 2022, étant précisé que la fédération des Etats-Unis avait initialement déposé sa candidature pour les deux éditions avant de décider, en octobre 2010, de renoncer à maintenir sa candidature pour l'édition de 2018 et se consacrer exclusivement à celle de 2022.

En date du 2 décembre 2010, le Comité Exécutif de la FIFA a attribué l'organisation de la Coupe du Monde de 2018 à la Russie et celle de 2022 au Qatar.

Le 17 octobre 2010, l'hebdomadaire britannique Sunday Times a publié un article intitulé en français: *"Le jeu déloyal menace la candidature anglaise pour la Coupe; les Nations dépensent des sommes énormes dans l'espoir d'être nommées hôte de la Coupe du Monde mais, comme une enquête le démontre, 800.000 $ offerts à un officiel de la FIFA peuvent être beaucoup plus efficaces"*. L'article suggérait non seulement que la corruption était généralisée au sein de la FIFA mais arrivait à la conclusion qu'en l'état actuel des choses, il était moins aléatoire et moins onéreux d'obtenir l'attribution de l'organisation de la Coupe du Monde en versant des pots-de-vin plutôt

qu'en présentant un dossier complet et bien monté. En guise d'épilogue, l'article relevait ce qui suit:

en français:
"Le football a déjà suffisamment *de mal à maintenir le fair-play sur le terrain. La FIFA doit veiller à ce que le fair-play* soit également respecté en dehors du terrain*, en éradiquant la corruption et* en assainissant *le processus de candidature* lié à l'attribution de la *Coupe du Monde. La FIFA* doit impérativement se montrer plus transparente et *placer ses décideurs sous une surveillance plus stricte.* En d'autres termes, elle doit mettre un terme aux *paiements sur des comptes bancaires privés ou en faveur de projets personnels et s'assurer que chaque membre du Comité* évalue la candidature sur ses mérites et non en fonction *des pots-de-vin versés. Les Jeux Olympiques ont* fait le ménage à la suite *d'une série de scandales de corruption,* dont le point culminant fut atteint lors des Jeux *à Salt Lake City en 2002. Nous avons le droit d'en attendre tout autant de la Coupe du Monde".*

L'enquête a été menée par des journalistes du *Sunday Times*. Ces derniers avaient approché plusieurs cadres et anciens cadres de la FIFA en se faisant passer pour des lobbyistes travaillant pour le compte d'une entreprise privée fictive, dénommée *Franklin Jones*, supposée chargée de représenter des entrepreneurs américains désireux de soutenir la candidature de la Fédération de football des Etats-Unis d'Amérique à l'organisation des Coupes du Monde de la FIFA de 2018 et de 2022.

Au cours du mois d'octobre 2010, l'Appelant a été contacté téléphoniquement au moins à six reprises par deux journalistes – un homme et une femme – qui n'ont pas révélé leur véritable identité ou profession mais qui se sont présentés en tant que "*David Brewster*" et "*Sylvie Goldberg*", collaborateurs auprès de *Franklin Jones*. Chacune des conversations a été enregistrée à l'insu de l'Appelant.

A l'appui de sa réponse déposée dans le cadre de la présente procédure, la FIFA a produit une copie des enregistrements en question. Par souci de clarté, la Formation arbitrale a choisi d'en retranscrire les extraits les plus pertinents ci-dessous:

a) 1ère conversation: durée environ 37 minutes (Participent à l'entretien une femme qui se fait appeler Sylvie Goldberg (la "*journaliste*"), un homme dénommé "*David Brewster*" et l'Appelant)

(…)

39. Journaliste: Et est-ce que vous voulez déjà que nous, on fasse un contrat avec, avec les conditions du contrat et éventuellement on vous l'envoie la semaine prochaine aussi, comme ça vous jeter un coup d'œil?

40. Amadou Diakite: Oui, oui, tout à fait, pas de problème, oui, pas de problème.

41. Journaliste*:* Ok, et alors je vous l'enverrai. Vous pouvez le signer et regarder un peu et comme ça, nous on assure après le montant. Donc, est-ce que donc 100.000 pounds pour l'année à venir, est-ce que, est ce que c'est un montant qui vous convient.

42. Amadou Diakite: Euh, ça fait combien (*inintelligible*)?

43. Journaliste: En Euro? Ça fait, le pounds est plus fort, donc ça fait un peu près 120, 120.000 euros.

44. Amadou Diakite: Ok, ok, non, ça me va.

45. Journaliste: Pour un peu près un jour ou maximum deux jours de consultance par mois.

46. Amadou Diakite: Ok, non, non, c'est bon.

47. Journaliste: Plus, plus éventuellement si vous vous devez vous déplacer pour aller rencontrer certaines des personnes et alors on prend évidemment tous les frais en charge et alors évidemment si ça fonctionne très bien alors on pourrait vraiment faire ça à plus long terme et éventuellement il y a aussi des bonus. Donc si ces conditions-là vous conviennent, nous on peut faire un contrat et vous l'envoyer alors la semaine prochaine, comme ça vous jeter un coup d'œil déjà.

48. Amadou Diakite: (*inintelligible*)

49. Journaliste: Pardon, je, je …

50. Amadou Diakite: Lundi ou mardi, je vous envoie ces informations et vous m'envoyez le projet de contrat.

(Suit une discussion sur une rencontre éventuelle en personne au Mali)

b) 2ème conversation: durée environ 5 minutes

(…)

(La journaliste interpelle M. Diakite sur le Qatar qui est le principal rival des Etats-Unis et demande des

précisions sur les offres que le Qatar aurait faites aux Pays Africains pour le vote)

c) 3ème conversation: durée environ 1 minute

(…)

(La journaliste répète que le paiement se fera en dollars, directement aux membres du Comité exécutif de la FIFA. M. Diakite approuve)

d) 4ème conversation: durée environ 1.30 minutes

(…)

(La journaliste fait état d'une rumeur selon laquelle les Etats-Unis n'ont aucune chance pour l'édition 2018 de la Coupe du Monde de la FIFA, qui devrait être attribuée à un candidat européen. M. Diakite explique les raisons pour lesquelles il pense que l'Angleterre sera sélectionnée. Selon lui, l'Angleterre n'a pas fait de propositions aux membres du Comité et ne va gagner que sur la base de son dossier de candidature)

e) 5ème conversation: durée environ 33 minutes

(…)

(M. Diakite a bien reçu le contrat. Il le fait traduire en français et redonnera des nouvelles)

(…)

(Les parties spéculent sur les modalités de paiement par le Qatar)

90. Journaliste: Quand on parle de projet, est-ce qu'un projet, est-ce qu'on doit, est-ce que c'est vraiment nécessaire d'avoir un projet ou bien est-ce qu'on l'appelle un projet ou bien est-ce que, pour vous, les membres exécutifs peuvent juste avec l'argent qui leur serait versé puisque c'est quand même pour leur vote, est-ce que on peut les laisser libres d'utiliser l'argent comme ils le veulent?

91. Amadou Diakite: Je pense que, ce que vous devez leur dire, vous devez leur dire, ce montant est à leur disposition pour un projet ou l'utilisation qu'ils souhaiteraient faire. C'est à eux de demander comment ça se fera bien. L'essentiel est que vous ne dépassez pas le montant que vous avez proposé.

92. Journaliste: Est-ce que vous pensez que on doit vraiment avoir des projets ou est-ce qu'on peut juste les payer pour le vote? Est-ce que c'est nécessaire d'avoir des projets? Ou est-ce que c'est juste une manière d'appeler un paiement, un projet?

93 . Amadou Diakite: Ouais, je crois, je crois que laisser le membre décider de ce qu'il va faire du montant, c'est la manière la plus sûre d'avoir son vote.

(Journaliste traduit les propos de M. Diakite à M. Brewster. Suit une conversation sur a) l'identité et la fonction des quatre membres africains, b) du fait de savoir si le Qatar leur a versé de l'argent – ce que M. Diakite ignore – , c) si M. Diakite estime que l'offre devrait être augmentée – ce que ne pense pas ce dernier, d) si M. Diakite est sûr que l'offre du Qatar se monte à 1.000.000/1.200.000 dollars. En ce qui concerne ce dernier point, M. Diakite confirme qu'il va se renseigner et informer les journalistes à ce propose le mardi ou mercredi prochains. Il confirme d'ailleurs avoir entendu parler de ce montant par le biais des Membres africains)

94. Journaliste: […] Est-ce que vous pensez que ce serait mieux que nous, nous leur fassions l'offre de paiement ou est-ce que vous pensez que ce serait plus sûr pour eux, qu'ils se sentiraient plus en confiance, si c'était vous qui leur faisiez l'offre? Est-ce que vous seriez à l'aise de faire cela?

95. Amadou Diakite: Non, non, non, c'est mieux que vous le fassiez.

96. Journaliste: Ok. Donc, si vous, vous nous mettez en contact avec eux, ça assure déjà la relation de confiance.

97. Amadou Diakite: Tout à fait, tout à fait. Je suis, moi je ferais comme si je suis censé ne pas savoir que l'offre leur a été faite, quoi.

(*Journaliste traduit les propos de M. Diakite à M. Brewster*)

98. Journaliste: D'accord. Et juste alors, une dernière question afin de. Donc pour vraiment optimiser l'influence sur les membres exécutifs, ce serait mieux tout de même de les payer directement sur leur compte en banque personnel et de les laisser libres de faire ce qu'ils veulent avec les investissements, de leur donner toute liberté?

99. Amadou Diakite: Je crois aussi, ouais, je crois aussi.

100. Journaliste: D'accord, donc ce serait mieux de faire directement cet accord et cette négociation avec eux et de ne pas impliquer les fédérations?

101. Amadou Diakite: Ouais, ouais, tout à fait. Non, c'est mieux.

(Suit une discussion sur le fait de savoir s'il serait plus avantageux d'accompagner l'offre en espèce par d'autres avantages, en nature et si M. Diakite a déjà fait mention de Franklin Jones aux personnes qu'il aurait contactées.)

102. Amadou Diakite: Moi, je vais simplement leur dire que vous voulez les rencontrer et organiser les rendez-vous à Zurich. Voilà. Mais moi, je leur dis pas, vous voulez faire ça, vous voulez faire ça. C'est à vous-même de voir ça avec eux, directement. […] Ouais, c'est mieux comme ça, en Afrique c'est mieux comme ça, qu'ils sachent, qu'ils ne sachent pas que moi je sais aussi qu'on leur offre.

(La connexion est interrompue. La journaliste le recontacte et se propose de le rappeler mardi ou mercredi prochains, tout en lui demandant a) de découvrir la véritable offre du Qatar et b) de ne pas mentionner le nom de Franklin Jones avant les négociations directes)

f) 6ème conversation: durée environ 20 minutes

103. Journaliste: […] Vous avez reçu mon e-mail hier ?

104. Amadou Diakite: Oui, oui, je l'ai reçu, oui.

105. Journaliste: Oui, je ne sais pas si vous avez eu le temps de discuter avec certaines de vos interlocuteurs.

106. Amadou Diakite: Oui […], oui j'ai essayé de reprendre vos questions que vous avez posées.

107. Journaliste: Oui, comme ça, ce pourrait vraiment nous aider à clore tous, tous ces documents cette après-midi.

108. Amadou Diakite: Voilà, donc, bon, pour la décision jusqu'à preuve du contraire c'est le 2 décembre.

109. Journaliste: D'accord, donc ils prendront la décision le 2 décembre.

110. Amadou Diakite: Ouais, il y a la réunion du Comité exécutif le 2 décembre pour décider.

111. Journaliste: D'accord, mais ça c'est la ... Donc, bon, je vais essayer de couvrir les questions telles qu'elles étaient inscrites dans l'email, comme ça je suis sûre de tout couvrir. Donc, au niveau du montant de l'offre qui a été faite par le Qatar aux membres exécutifs, vous aviez dit entre 1 million et 1 million deux cent mille, c'est bien ça?

112. Amadou Diakite: Oui, oui. En vérité, ils n'ont pas fait une offre fixe à tous les membres. Donc, ils ont rencontré chaque membre et ils ont fait des offres spécifiques et personnelles à chaque membre. Donc le montant n'est pas fixe.

113. Journaliste: D'accord, mais c'est un maximum de 1.200.000, alors?

114. Amadou Diakite: Voilà, tout à fait, tout à fait.

115. Journaliste: Et donc, c'est en fonction de …, est-ce qu'il y a des projets ou est-ce que, c'est un montant qui n'est pas, qui ne dépend d'aucun projet?

116. Amadou Diakite: Non, sous forme de, sous forme de projet, mais à l'initiative de l'intéressé.

117. Journaliste: D'accord, et vous pouvez me confirmer que c'est en dollars?

118. Amadou Diakite: Oui, en dollars.

119. Journaliste: (*répète ce qui vient d'être dit*) […] Donc au niveau de l'offre, vous savez s'il y a d'autres pays qui ont été contactés mis à part les. Vous me confirmez d'abord que les quatre pays africains ont été contactés, tous les quatre, et ensuite est-ce que vous savez s'il y a d'autres pays qui ont été contactés?

120. Amadou Diakite: Non, ce qui est sûr, c'est qu'ils ont contacté tous les membres de l'exécutif. Par la règle, c'est ça la règle, et c'est que par l'intermédiaire du comité de candidature. Donc il n'y a pas une société privée comme la vôtre.

121. Journaliste: Donc c'est le comité officiel de candidature du Qatar qui a …

122. Amadou Diakite: … qui a fait, qui a fait les contacts. Et puis, ils les ont invités au Qatar, ils sont allés chez eux, ouais.

123. Journaliste: Parce que normalement, il y a des

restrictions, non, entre les comités officiels et les membres exécutifs. Je pense que normalement, ils n'ont, c'est pour ça que nous on a été entrepr…

124. Amadou Diakite: Tout à fait.

125. Journaliste: Normalement ce n'est pas autorisé, n'est-ce pas, de faire les contacts directement entre le...

126. Amadou Diakite: Oui, ils peuvent faire des contacts, mais des contacts officiels. Ils peuvent aller les voir, ils peuvent les visiter dans le pays, mais officiellement, aucun cadeau n'est permis, quoi, jusqu'à un montant dérisoire.

127. Journaliste: (*répète que les montants offerts à des membres exécutifs ne doivent pas pouvoir influencer leur vote*) […] Est-ce que vous pourriez me dire éventuellement quels sont les membres exécutifs qui vous l'ont confirmé, qui vous ont confirmé cette offre du Qatar?

128. Amadou Diakite: Non, c'est-à-dire, moi je connais ce que les membres de la Russie, africains, ont été contactés mais je sais que tous les membres ont été contactés. Ils contactent tous les membres […] pour leur présenter le projet comme le comité de candidature américain a fait. Tous les comités de candidature l'ont fait.

(Une discussion floue tourne autour a) de l'offre de 1.200.000, qui est officieuse et b) des chances qu'elle a d'influencer les électeurs. M. Diakite ne répond pas à la question de savoir qui aurait reçu une telle offre. La discussion se poursuit en lien avec une offre officielle de l'Australie aux pays africains)

129. Amadou Diakite: […] Les membres ont un peu peur de rencontrer des initiatives privées, quoi. Donc, eux, ils souhaitent, y a des propositions, moi je peux les leur faire et en fonction de ça, ils prendront leur décision, quoi. Dans tous les cas, ils disent qu'ils ont rencontré tous les comités de candidature, ils ont vu tous leur projet. Bon maintenant s'il y a des projets qui ne sont pas dans le cadre officiel, ils craignent, quoi, que, s'ils rencontrent des gens, parce que, moi, je leur ai dit, moi, je vous connais, on a déjà fait des choses ensemble, ce qui n'est pas vrai, mais pour les rassurer. Donc, en fait, c'est un seul qui n'est pas du tout partant mais les trois autres veulent avoir des propositions, même à l'égyptien j'ai, s'il y a des propositions, je les lui ferai.

130. Journaliste: Ouais, d'accord.

131. Amadou Diakite: Ils ne veulent pas de papiers écrits, de papiers signés, ouais.

132. Journaliste: Oui, d'ailleurs, vous m'aviez dit aussi que, par exemple, au niveau des montants qui étaient payés, on pouvait, par exemple, enfin que nous, nous fassions un contrat pour eux mais que eux ne doivent rien signer du tout, comme ça il n'y a aucune trace et on pourrait aussi payer un tiers du montant avant le vote et deux tiers ensuite, c'est ça que vous m'aviez dit?

133. Amadou Diakite: Ouais, ce que j'avais, moi, vous voyez quoi, mais eux, ils veulent seulement des engagements de votre, enfin, ce que vous voulez sert en cas de victoire, c'est-à-dire s'il y a leur vote, et ensuite moi je leur confirme ça et ils feront ce qu'ils doivent faire au moment opportun. Ils craignent des contacts, quoi, ils craignent des contacts, parce qu'on sait jamais quoi, voilà.

134. Journaliste: Oui, bien sûr. Donc, donc, est-ce qu'ils sont toujours intéressés quand même de se faire éventuellement rémunérer pour des projets et ce avant le vote?

135. Amadou Diakite: Pas avant.

136. Journaliste: Pas avant? Donc, même pas, même pas, mais après éventuellement, oui?

137. Amadou Diakite: Après, bien sûr. Après, si le projet passe avec leur vote, après certainement.

(La journaliste souligne que les montants doivent être versés directement aux membres, qui doivent être libres d'en disposer comme ils l'entendent. M. Diakité croit savoir que les mêmes modalités s'appliquent à l'offre du Qatar et de l'Australie)

138. Journaliste: (…) Est-ce que vous avez éventuellement encore des suggestions quant à ce que nous, nous pourrions proposer aux pays pour essayer que notre offre soit vraiment compétitive? Au-delà du, du montant?

139. Amadou Diakite: Je crois que c'est ce qui est, actuellement, c'est ce qui peut être fait. Proposez un montant, leur disant que c'est pour un projet qu'ils veulent financer à telle hauteur. Voilà. Contre ça, c'est amplement suffisant, quoi. Comme ils ne souhaitent pas rencontrer une commission en dehors des

comités officiels, maintenant vous, vous verrez et vous m'indiquerez les propositions concrètes de votre offre et je leur ferai.

140 . Journaliste: Donc, ce ne sera pas possible, par exemple, de les rencontrer quand ils viendront à Zurich, mais on pourrait éventuellement, vous vous pourriez éventuellement être en charge de leur, de nous représenter, alors?

141. Amadou Diakite: Voilà, parce qu'ils ne veulent pas, ils craignent les, comment dirai-je, voilà, ils craignent que ça s'ébruite et que ça porte ombrage à leur image et leur façon donc de voter (*inintelligible*)

142. Journaliste: (*répète que l'offre doit être faite par le bais de M. Diakite, directement aux membres du comité exécutif, qui doivent rester libres d'investir les sommes dans le projet de leur choix*)

143. Amadou Diakite: En effet, quoi. Ce que vous allez offrir, c'est un rapport avec un projet de football mais que eux-mêmes ont proposé. Maintenant, maintenant, comment le financer, tout ça, eux, ils le feront, ils s'occuperont de ça

144. Journaliste: Parce que nous, en fait, ce qui nous intéresse, au-delà de tout, c'est d'essayer d'influencer le vote, donc, nous le montant …

145. Amadou Diakite: Non, c'est sûr, c'est sûr.

146. Journaliste: …le montant, en fait, ce qu'ils en font, ça, nous, ils ne doivent pas vraiment, nous rapporter …

147. Amadou Diakite: Ce n'est pas important pour vous.

148. Journaliste: Donc on peut appeler ça, des projets, mais en fait…

148. Amadou Diakite: Je comprends. Non, c'est-à-dire, ou dire simplement pour un projet à leur initiative. C'est tout. Maintenant, à eux de voir comment ils font et comment, quel projet c'est.

(Suit une discussion liée au Qatar)

149. Amadou Diakite: […] Maintenant, la balle est dans votre camp. Quand vous prendrez votre décision, vous m'informez, moi je me charge de régler ça, voilà.

150. Journaliste: D'accord parfait, et alors on vous tient au courant, nous nous avons notre meeting cet après-midi et je vous tiendrai au courant d'ici un jour ou deux de la suite des événements.

151. Amadou Diakite: Ok, très très bien. N'hésitez pas, même si en réunion vous pensez que vous avez besoin d'informations très précises, vous pouvez m'appeler, il y a pas de problème.

Le 17 octobre 2010, le *Sunday Times* a publié sur format papier ainsi que sur son site Internet, l'article intitulé "*Foul play threatens England's Cup bid* […]". En particulier, l'article fait état des contacts entre les journalistes et l'Appelant. Etaient notamment énoncés les propos tenus aux chiffres 91 et suivants de la retranscription ci-dessus, le chiffre 93 ayant été intégralement traduit et cité.

Immédiatement après la publication de l'article précité, la FIFA a demandé au *Sunday Times* de lui remettre une copie des enregistrements des conversations téléphoniques avec l'Appelant. L'hebdomadaire lui a remis un exemplaire des 6 bandes sonores.

Le 18 octobre 2010 et se fondant sur l'article 16 du Code d'Ethique de la FIFA (CEF), le Secrétaire Général de la FIFA a déposé plainte auprès du Président de la Commission d'Ethique de la FIFA, à qui il a demandé d'ouvrir une procédure disciplinaire contre l'Appelant.

Le 20 octobre 2010, la Commission d'Ethique de la FIFA a décidé de suspendre provisoirement l'Appelant de toute activité relative au football, au niveau national comme international et au plan administratif, sportif ou autre, conformément aux articles 22 et 129 du Code disciplinaire de la FIFA (CDF).

Le 16 novembre 2010, la Commission d'Ethique de la FIFA a tenu une audience en présence de l'Appelant, assisté de ses avocats. Par décision du même jour, elle a déclaré l'Appelant coupable d'avoir enfreint les articles 3 (Règles générales), 9 (loyauté et confidentialité), 11 (corruption) et 14 (obligation de déclaration et de rapport) du CEF. L'Appelant a été interdit d'exercer toute activité relative au football, au niveau national comme international et au plan administratif, sportif ou autre, pour une période de trois ans à partir du 20 octobre 2010, conformément à l'article 22 CDF. En outre, l'Appelant a été condamné au paiement d'une amende de CHF 10,000, conformément à l'article 10.c) CDF.

Le 4 janvier 2011, la motivation de la décision de la Commission d'Ethique de la FIFA a été notifiée à l'Appelant, lequel a formé recours le 6 janvier 2011.

En date du 3 février 2011, la Commission de Recours de la FIFA a entendu l'Appelant, assisté de ses conseils, au cours d'une audience qui s'est tenue au siège de la FIFA. Par décision du même jour, elle a notamment considéré a) que la procédure menée à l'encontre de l'Appelant avait été conduite de manière régulière, b) que les enregistrements des conversations fournis par le *Sunday Times* (dont l'authenticité n'est pas contestée) sont des moyens de preuves admissibles et leur validité ne peut pas être remise en cause du fait qu'il existerait d'autres enregistrements ou que les propos tenus par l'Appelant lors des conversations en question ont été provoqués par des journalistes, c) que lesdits enregistrements n'ont pas été réalisés en violation de l'article 6 de la Convention Européenne des Droits de l'Homme (CEDH) ou du droit suisse, d) qu'il est valablement établi que l'Appelant a violé l'article 11 al. 1, l'article 9 al. 1, l'article 3 al. 1, 2 et 3 ainsi que l'article 14 al. 1 CEF. La Commission de Recours de la FIFA a estimé que la violation par l'Appelant de l'article 11 al. 1 CEF, justifiait une interdiction d'exercer toute activité relative au football pour une durée de 16 mois, laquelle devait être augmentée de 8 mois supplémentaires en raison des infractions à l'article 9 al. 1, article 3 al. 1, 2 et 3 et article 14 al. 1 CEF. De même, la Commission de Recours de la FIFA a infligé à l'Appelant une amende de CHF 5.000 pour avoir violé l'article 11 al. 1 CEF et de CHF 2.500 pour les infractions à l'article 9 al. 1, article 3 al. 1, 2 et 3 et article 14 al. 1 CEF.

C'est ainsi que le recours formé par l'Appelant devant la Commission de Recours de la FIFA a été partiellement admis, puisque les infractions stipulées dans la décision de la Commission d'Éthique de la FIFA ont été confirmées mais la sanction a été réduite à deux années d'interdiction d'exercer toute activité liée au football (au lieu de trois années) et à une amende de CHF 7.500 (au lieu de CHF 10.000).

La motivation de la décision rendue par la Commission de Recours de la FIFA a été notifiée à l'Appelant en date du 18 avril 2011.

Par déclaration d'appel du 6 mai 2011, l'Appelant a saisi le Tribunal Arbitral du Sport ("TAS"). Dans son mémoire d'appel daté du 9 juin 2011, il a formulé les conclusions suivantes:

"En conséquence de ce qui précède, M. Diakite demande respectueusement à votre Tribunal:

- *à titre principal, d'infirmer la décision rendue par la Commission de recours de la FIFA le 3 février 2011 et, statuant à nouveau, de ne prononcer aucune sanction à l'encontre de M. Diakite;*
- *à titre subsidiaire, d'infirmer la décision rendue par la Commission de recours de la FIFA le 3 février 2011 et, statuant à nouveau, de ramener les sanctions prononcées contre M. Diakite à de plus justes proportions".*

Au cours de l'audience qui s'est tenue devant le TAS en date du 19 octobre 2011, l'Appelant a précisé ses conclusions de manière à ce qu'à titre encore plus subsidiaire, une peine avec sursis soit prononcée et qu'un sursis lui soit accordé pour le temps restant de la sanction.

Par courrier daté du 2 août 2011, la FIFA a adressé sa réponse, laquelle contient les conclusions suivantes:

"Au vu de ce qui précède, il n'y a aucune raison pour annuler ou réformer la Décision attaquée, de sorte que la FIFA conclut respectueusement à ce que la Formation:

- *Rejette l'appel interjeté par M. Diakite et le déboute de toutes ses conclusions.*
- *Ce faisant confirme la Décision attaquée.*
- *Ordonne à M. Diakite de rembourser les frais encourus par la FIFA dans le cadre de cet arbitrage ou, du moins, ordonne à M. Diakite de payer un montant de CHF 40'000.- à titre de contribution à ces frais".*

En date du 19 octobre 2011, une audience a été tenue à Lausanne, au siège du TAS, en présence de tous les membres de la Formation arbitrale. A l'ouverture de l'audience, les parties ont expressément confirmé qu'elles n'avaient pas d'objection à formuler quant à la constitution et composition de la Formation arbitrale.

Extrait des considérants

A. Pouvoir d'examen du TAS

En vertu de l'article R57 du Code TAS, le TAS jouit d'un plein pouvoir d'examen en fait et en droit. Ce pouvoir lui permet d'entendre à nouveau les parties sur l'ensemble des circonstances de faits ainsi que sur les arguments juridiques que les parties souhaitent soulever et de statuer définitivement sur l'affaire en cause (TAS 99/A/252 p. 22; TAS 98/211, p. 19; TAS 2004/A/549, p. 8; TAS 2005/A/983&984, para. 59). Selon la jurisprudence constante du TAS:

"[I]t is the duty of a CAS panel in an appeals arbitration procedure to make its independent determination of whether the Appellant's and Respondent's contentions are correct on the merits, not limiting itself to assessing the correctness of the previous procedure and decision" (CAS 2009/A/1880-1881, para. 146);

en français:

"Dans une procédure d'appel, il est du devoir de la Formation arbitrale de se prononcer en toute indépendance sur le bien-fondé des allégations de l'Appelant et de l'Intimé au fond, et de ne pas se borner à examiner la légitimité de la procédure et de la décision des instances antérieures".

La Formation arbitrale a également pris bonne note des arguments de l'Appelant quant aux violations des droits de la défense qui auraient entaché la procédure devant la FIFA. Or, en raison du plein pouvoir d'examen conféré aux formations arbitrales du TAS, l'appel au TAS permet de "*considérer comme purgés les vices de procédure ayant éventuellement affecté les instances précédentes*" (TAS 2004/A/549, para. 31; voir également CAS 2003/O/486, para. 50, CAS 2006/A/1153, para. 53, CAS 2008/A/1594 para. 109, TAS 2008/A/1582, para. 54, TAS 2009/A/1879, para. 71).

La Formation arbitrale est d'avis que, dans la présente procédure devant le TAS, l'Appelant a eu tout loisir de défendre sa cause et d'exercer son droit d'être entendu, comme confirmé par l'Appelant à la fin de l'audience. Les éventuels vices de procédure ou violations ayant pu affecter les procédures disciplinaires de la FIFA sont donc purgés et il n'y a dès lors pas lieu de s'arrêter sur les reproches formulés par l'Appelant à l'encontre des procédures engagées à son encontre par la FIFA devant les instances associatives.

B. Droit applicable

L'article R58 du Code TAS prévoit ce qui suit:

"La Formation statue selon les règlements applicables et selon les règles de droit choisies par les parties, ou à défaut de choix, selon le droit du pays dans lequel la fédération, association ou autre organisme sportif ayant rendu la décision attaquée a son domicile ou selon les règles de droit dont la Formation estime l'application appropriée. Dans ce dernier cas, la décision de la Formation doit être motivée".

Comme relevé plus haut, la compétence du TAS n'est pas contestée. Sa qualité de véritable tribunal arbitral a d'ailleurs été reconnue par le Tribunal fédéral suisse à maintes reprises (Tribunal fédéral, arrêt du 27 mai 2003, 4P.267/2002, 4P.268/2002, 4P.269/2002, 4P.270/2002/ech; ATF 119 II 271; arrêt du 23 mars 2005, 4P.26/2005; arrêt du 21 février 2006, 4P.149/2003).

Le siège du TAS se trouvant en Suisse et l'Appelant n'ayant, au moment de la conclusion de la convention d'arbitrage, ni son domicile ni sa résidence habituelle en Suisse, les dispositions du chapitre 12 relatif à l'arbitrage international de la Loi fédérale sur le droit international privé ("*LDIP*") sont applicables en vertu de son article 176 al. 1 (Arrêt du Tribunal fédéral du 31 octobre 2003, 4P.149/2003). Pour que le chapitre 12 de la LDIP s'applique, il suffit que le "*siège du tribunal arbitral se trouve en Suisse*", d'une part et que, d'autre part, "*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*" (Arrêt du Tribunal fédéral du 20 janvier 2010, 4A_548/2009, consid. 2.1; ATF 129 III 727, B. Dutoit, *Droit international privé suisse, commentaire de la loi fédérale du 18 décembre 1987*, Bâle 2005, N. 2 ad. art. 176 LDIP, p. 615).

Au chapitre 12 de la LDIP, le droit applicable au fond est régi par l'article 187 al. 1 LDIP qui prévoit que le "*tribunal arbitral statue selon les règles de droit choisies par les parties ou, à défaut de choix, selon les règles de droit avec lesquelles la cause présente les liens les plus étroits*".

Une élection de droit tacite et indirecte par renvoi au règlement d'une institution d'arbitrage est admise (P. Karrer, *Basler Kommentar zum Internationalen Privatrecht*, 1996, N. 92 et 96, ad. art. 187 LDIP; J.-F. Poudret et S. Besson, *Droit comparé de l'arbitrage international*, 2002, N. 683, p. 613 et références citées; B. Dutoit, op. cit., N. 4 ad. art. 187 LDIP, p. 657; CAS 2004/A/574).

En outre, au sens de l'article 187 al. 1 LDIP, peuvent être choisies par les parties non seulement une loi nationale, mais encore des "règles de droit" affranchies de toute loi étatique (P. Lalive, J.-F. Poudret, C. Reymond, *Le droit de l'arbitrage interne et international en Suisse*, Lausanne, 1989, pp. 399-400), comme les règles et règlements des fédérations internationales sportives. L'application à titre principal des règles de droit non étatiques se produit souvent dans les procédures au TAS. Par exemple, dans l'affaire TAS 92/80 Beeuswaert c. FIBA (Recueil TAS I, p. 287) la conclusion suivante a été formulée par la formation arbitrale:

"Si le parties n'ont pas déterminé un droit national applicable, elles sont, en revanche, soumises aux statuts et règlements de la FIBA (…). Le droit fédératif adopté par la FIBA constitue une réglementation de droit privé, ayant une vocation internationale, voire mondiale, à s'appliquer dans le domaine des règles de sport régissant le basketball. Pour résoudre le présent litige, le tribunal arbitral appliquera donc ce droit fédératif, sans recourir à l'application de telle ou telle loi nationale au fond" (p. 292).

En l'espèce et au moment des faits litigieux, l'Appelant était membre du Comité Exécutif de la CAF, membre de la Commission des Arbitres de la CAF et membre de la Commission des Arbitres de la FIFA. En cette qualité, il était (et est) soumis aux Statuts et aux règlements de la FIFA (ATF 119

II 271; H.M. Riemer, Berner Kommentar ad Art. 60- 79 du Code Civil suisse, N 511 et 515; CAS 2004/A/574). En acceptant ces diverses fonctions, l'Appelant a expressément consenti à se soumettre à la réglementation de la FIFA, dont il n'a d'ailleurs jamais contesté l'application.

L'article 62 al. 2 des Statuts de la FIFA prévoit que la "*procédure arbitrale est régie par les dispositions du Code de l'arbitrage en matière de sport du TAS. Le TAS applique en premier lieu les divers règlements de la FIFA ainsi que le droit suisse à titre supplétif*".

Dès lors et en l'absence de convention spécifique entre les parties, la Formation arbitrale jugera la présente affaire à la lumière des divers règlements de la FIFA, lesquels doivent être appliqués en premier lieu, le droit suisse étant applicable à titre supplétif.

Tous les faits reprochés à l'Appelant se sont déroulés après le 1er janvier 2009, après le 1er septembre 2009 et après le 10 août 2010, dates d'entrée en vigueur respectives du CDF (Edition 2009), du CEF (Edition 2009) et des Statuts de la FIFA (Edition août 2010). En vertu du principe de non-rétroactivité, la présente affaire doit donc être examinée en vertu des règles de la FIFA contenues dans ces éditions (voir articles 4 et 146 CDF, 17 al. 2 CEF et 83 des Statuts de la FIFA).

C. Admissibilité des preuves

1. La position de l'Appelant

Selon l'Appelant, les enregistrements sonores effectués par les journalistes du *Sunday Times* à son insu sont illicites, immoraux et constituent des preuves inadmissibles, qui doivent être écartées des débats. Ces enregistrements ont été effectués en violation des droits fondamentaux de l'Appelant, du droit pénal et du droit civil suisses, de la loi fédérale contre la concurrence déloyale ainsi que de la loi fédérale sur la protection des données.

2. D'une manière générale

A titre préliminaire, la Formation arbitrale observe que, selon le droit suisse, de même que selon la plupart des systèmes juridiques, les associations et en particulier les associations sportives ont le pouvoir (i) d'adopter des règles de conduite qui s'imposent à leurs membres directs et indirects et (ii) d'appliquer des sanctions disciplinaires aux membres qui ne respectent pas ces règles, pour autant que certains principes généraux du droit – tels que le droit d'être entendu et le principe de proportionnalité – soient respectés (cf. M. Baddeley, L'association sportive face au droit, Bâle, 1994, pp. 107 et suivantes, 218 et suivantes; M. Beloff, T. Kerr, M. Demetriou, Sports Law, Oxford, 1999, pp. 171 et suivantes).

A cet égard, la Formation arbitrale relève que la compétence de l'association sportive de fixer ses propres règles et d'exercer son pouvoir disciplinaire sur ses membres directs ou indirects, ne repose pas sur le droit public ou pénal, mais sur le droit civil. Le Tribunal fédéral suisse a clairement affirmé que les sanctions disciplinaires décidées par des organisations sportives ressortent du droit privé et non du droit pénal:

"Il est généralement admis que la peine statutaire représente l'une des formes de la peine conventionnelle, qu'elle repose donc sur l'autonomie des parties et peut ainsi être l'objet d'une sentence arbitrale […]. En d'autres termes, la peine statutaire n'a rien à voir avec le pouvoir de punir réservé aux tribunaux pénaux […], et ce même si elle réprime un comportement qui est aussi sanctionné par l'Etat" (Arrêt du Tribunal fédéral du 15 mars 1993, Gundel c. FEI, consid. 5a; Recueil TAS I, p. 545; partiellement publié aux ATF 119 II 271).

Selon la jurisprudence constante du Tribunal fédéral suisse, la procédure régissant l'adoption des sanctions disciplinaires sportives n'est pas subordonnée au respect des garanties de procédure existant en droit pénal. Notamment, le Tribunal fédéral a souligné que l'appréciation des preuves ne saurait suivre les principes propres à la procédure pénale, en affirmant que les questions ayant trait

"à la charge de la preuve et à l'appréciation des preuves, [sont des] problèmes qui ne peuvent pas être réglés, en matière de droit privé, à la lumière de notions propres au droit pénal, telles que la présomption d'innocence ou le principe "in dubio pro reo", et des garanties correspondantes figurant dans la Convention européenne des droits de l'homme" (Arrêt du Tribunal fédéral du 31 mars 1999, N., J. Y. W. c. FINA, consid. 3d, 15 mars 1993, reproduit dans Recueil TAS II, p. 767; Arrêt du Tribunal fédéral du 15 mars 1993, Gundel c. FEI, consid. 8b, *ibidem).*

En ce qui concerne la Convention Européenne des Droits de l'Homme (CEDH), dont se prévaut expressément l'Appelant, la Formation arbitrale souligne également que, par principe, les droits fondamentaux et les garanties de procédure accordés par les traités internationaux de protection des droits de l'homme ne sont pas censés s'appliquer directement dans les rapports privés entre particuliers et donc ne sont pas applicables dans les affaires disciplinaires jugées par des associations privées. Cette façon de voir est en harmonie avec la jurisprudence du Tribunal fédéral suisse, qui, dans le cadre d'un recours formé contre une décision du TAS, a précisé

que "*le recourant invoque les art. 27 Cst. et 8 CEDH. Il n'a cependant pas fait l'objet d'une mesure étatique, de sorte que ces dispositions ne sont en principe pas applicables*" (Arrêt du Tribunal fédéral du 11 juin 2001, Abel Xavier c. UEFA, consid. 2d, reproduit dans *Bull. ASA*, 2001, p. 566; partiellement publié aux ATF 127 III 429).

Toutefois, la Formation arbitrale est consciente du fait que certaines garanties procédurales découlant de l'article 6.1 de la CEDH, dans les litiges portant sur des droits et obligations de caractère civil, sont indirectement applicables même devant un tribunal arbitral – d'autant plus en matière disciplinaire. Cela est dû au fait que la Confédération suisse, en tant que partie contractante à la CEDH, doit veiller à ce que, au moment de la mise en en œuvre des sentences arbitrales (au stade de l'exécution de la sentence ou à l'occasion d'un appel tendant à son annulation), les juges s'assurent que les parties à l'arbitrage aient pu bénéficier d'une procédure équitable, menée dans un délai raisonnable par un tribunal indépendant et impartial.

Les formations du TAS ont d'ailleurs toujours cherché à garantir aux parties le respect des principes fondamentaux de procédure, conformes à la notion d'ordre public procédural telle que définie par la jurisprudence du Tribunal fédéral Suisse:

"L'ordre public procédural garantit aux parties le droit à un jugement indépendant sur les conclusions et l'état de fait soumis au tribunal d'une manière conforme au droit de procédure applicable; il y a violation de l'ordre public procédural lorsque des principes fondamentaux et généralement reconnus ont été violés, ce qui conduit à une contradiction insupportable avec le sentiment de la justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit" (Arrêt du Tribunal fédéral du 11 juin 2001, Abel Xavier c. UEFA, consid. 2d, ibidem).

Compte tenu de ce qui précède, la Formation arbitrale ne tiendra pas compte des normes de droit pénal ou de procédure pénale pour évaluer l'admissibilité des enregistrements en tant que preuve dans le présent arbitrage. Toutefois, elle s'efforcera de se conformer aux diverses prescriptions de l'ordre public procédural suisse.

Dans ce contexte, au vu du fait que la présente procédure arbitrale n'a pas pour objet une accusation en matière pénale, il n'y a pas lieu pour la Formation arbitrale de s'étendre sur les analogies que l'Appelant tente de faire entre la présente affaire et l'arrêt Teixeira de Castro c. Portugal du 9 juin 1998 (n° 44/1997/828/1034), par lequel la Cour Européenne des Droits de l'Homme a reconnu le Portugal coupable d'une violation de l'article 6 CEDH. En effet, la Cour Européenne des Droits de l'Homme s'est toujours gardée d'établir une règle générale sur l'admission ou le rejet des moyens de preuves obtenus par des procédés illicites. Son souci est que le droit à un procès équitable soit respecté. A cet égard et dans le contexte d'affaires pénales, elle a eu l'occasion de souligner que si l'article 6 garantit le droit à un procès équitable, il ne réglemente pas pour autant l'admissibilité des preuves en tant que telle, qui relève, dès lors, au premier chef, du droit interne (J.-M. Grossen, Les Moyens de preuve obtenus par des procédés contraires au droit, dans Pour un droit équitable, engagé et chaleureux, Mélanges en l'honneur de Pierre Wessner, Bâle 2011, p. 613 et références citées). Par ailleurs, l'Appelant ne prend pas en compte deux distinctions fondamentales entre sa situation et celles évoquées dans le cadre de l'arrêt Texeira de Castro précité. D'une part, dans l'affaire Texeira de Castro, les preuves illicites avaient été réunies par des policiers, détenteurs de l'autorité publique. Or, la FIFA est une association de droit privé, régie par le Code civil, qui a toujours été soucieuse de préserver l'indépendance de son activité vis-à-vis des instances publiques et d'empêcher toute ingérence étatique dans ses affaires comme dans celles de ses membres. Partant, en l'espèce, il n'est pas question de "*provocation policière*". D'autre part, et c'est essentiel, ce n'est pas la FIFA qui a demandé la mise sur écoute de l'Appelant ou qui a provoqué ce dernier à commettre une infraction. L'Appelant a été enregistré par des journalistes du Sunday Times sur leur propre initiative ou sur instructions de leur employeur ou éventuellement d'un tiers mais aucunement de la FIFA. D'ailleurs, ni les journalistes, ni le Sunday Times n'ont de rapport de quelque nature que ce soit avec la FIFA. Ce n'est qu'à la publication de l'article du 17 octobre 2010 que la FIFA a eu connaissance des reproches formulés à l'encontre de l'Appelant et de l'existence des enregistrements secrets. En d'autres termes, la FIFA a été placée devant le fait accompli. Il résulte de ce qui précède que l'Appelant ne peut se prévaloir de l'arrêt européen précité ainsi que de tout argument fondé sur le droit pénal.

3. Caractère illicite ou non de la preuve

A titre préliminaire, et en ce qui concerne la prétendue illicéité de la preuve, la Formation arbitrale note que les règles générales en matière de bonne foi et de respect de la procédure arbitrale interdisent à une partie à un arbitrage de tromper l'autre partie ou d'obtenir illégalement certains éléments de preuve. Le cas échéant, les éléments de preuves ainsi recueillis pourraient être considérés comme irrecevables par le tribunal arbitral (cf. B. Berger, F. Kellerhals, International Arbitration in Switzerland, 2nd Ed., London, 2010, p. 343). C'est ainsi, par exemple, qu'une violation des règles générales en matière de

bonne foi et de respect de la procédure arbitrale a été reconnue dans les cas suivants:

- Un tribunal arbitral international a précisé que toutes les parties ont une obligation générale envers les autres ainsi qu'envers le tribunal de se comporter avec bonne foi au cours de la procédure d'arbitrage. Il a relevé qu'il n'était pas acceptable pour une partie de recueillir des preuves par l'intermédiaire de détectives privés, qui se seraient secrètement introduits dans les locaux de l'autre partie (CNUDCI, Methanex Corp c. États-Unis, sentence finale, 3 Août 2005, pt. II, ch. A, ad 13);

- Dans une affaire où un État qui était partie à un arbitrage du CIRDI a utilisé ses pouvoirs de police et ses services de renseignement pour espionner les conversations téléphoniques de l'autre partie, le tribunal arbitral international a déclaré que

  en français:

  "les parties ont l'obligation d'arbitrer équitablement et de bonne foi et [...] un tribunal arbitral doit veiller à ce que cette obligation soit respectée; ce principe s'applique dans tout arbitrage" (Affaire CIRDI n° ARB/06/8, Libananco Holdings Co. C. Turquie, sentence du 23 Juin 2008, ad 78).

Sur la base des éléments à sa disposition, la Formation arbitrale constate que la présente affaire ne partage aucun point commun avec les exemples cités ci-dessus. Non seulement la FIFA n'a pas eu recours à des procédés illicites ni n'a trompé l'Appelant en vue d'obtenir les enregistrements mais rien ne laisse supposer que l'enquête menée par le *Sunday Times* ait été diligentée ou soutenue par la FIFA ou des proches de la FIFA. De manière parfaitement transparente, et immédiatement après la publication de l'article du 17 Octobre 2010, la FIFA a demandé et reçu les enregistrements du *Sunday Times*. La Formation arbitrale est d'avis que la FIFA n'a pas violé les règles générales en matière de bonne foi et de respect de la procédure arbitrale, qui s'imposent à tout participant à un arbitrage international. Par voie de conséquence, ces principes procéduraux ne peuvent pas constituer une base juridique permettant d'écarter la preuve litigieuse de la présente instance.

Toutefois, l'Appelant fait valoir que les journalistes du *Sunday Times* ont violé la loi ainsi que sa sphère intime en l'enregistrant à son insu. Il est d'avis que, dans de telles circonstances, les enregistrements constituent une preuve "immorale" et en contradiction insupportable avec le sentiment de justice, qui ne peut être utilisé dans la présente procédure d'arbitrage, même si la FIFA n'est, en tant que telle, pas responsable du comportement des journalistes.

Selon l'Appelant, la licéité de la conduite des journalistes doit être évaluée sous l'angle du droit suisse alors que la FIFA soutient que la question est régie par le droit anglais. La Formation arbitrale observe que, au regard de la législation anglaise comme de la législation suisse, deux droits distincts devraient être mis en balance, à savoir le droit au respect de la vie privée et le droit à la liberté d'expression. Ces deux droits sont protégés dans toute société démocratique mais ni l'un ni l'autre n'est absolu, puisqu'ils sont tous deux soumis à un certain nombre d'exceptions et de restrictions (voir les articles 8.2 et 10.2 de la CEDH). Selon la jurisprudence actuelle de la Cour Européenne des Droits de l'Homme, aucun des deux droits fondamentaux ne l'emporte automatiquement sur l'autre et, en principe, chacun d'entre eux mérite un égal respect (Cour Européenne des Droits de l'Homme, arrêt du 23 Juillet 2009, Affaire Hachette Filipacchi Associés "*Ici Paris*" c. France, requête n° 12268/03, chiffre 41).

En ce qui concerne les ingérences des médias dans la vie privée de particuliers, la Cour Européenne des Droits de l'Homme a récemment souligné le rôle vital de la presse qui doit assurer l'accès du public à l'information et assumer la fonction de "chien de garde public" ("*public watchdog*"), insistant sur le fait que non seulement la presse a pour mission de diffuser des informations et des idées sur des questions d'intérêt public, mais que le public a également le droit de les recevoir (Cour Européenne des Droits de l'Homme, jugement du 10 mai 2011, Mosley c. Royaume-Uni, requête n° 48009/08, chiffre 112). La Cour de Strasbourg a notamment retenu ce qui suit (*ibidem*, chiffre 114):

en français:

"dans une démocratie, le rôle essentiel de la presse et son devoir d'agir comme un "chien de garde public" plaident en faveur d'une interprétation restrictive de toute limitation à la liberté d'expression. Cependant, il en va différemment des articles de presse qui se concentrent sur des informations sensationnalistes et, parfois, scabreuses, destinées à provoquer et à divertir et qui visent à satisfaire la curiosité d'un lectorat particulier sur des aspects de la vie strictement privée d'une personne. [...] la Cour souligne que, lorsqu'il y a lieu d'évaluer si une publication spécifique présente un intérêt public justifiant une ingérence dans le droit au respect de la vie privée, il convient de déterminer si la publication relève de l'intérêt public et non pas de savoir si le public pourrait être intéressé à la lire".

La Formation arbitrale relève que les journalistes du Sunday Times n'ont pas recherché à exposer des détails "*sensationnalistes*" ou scabreux de la vie

strictement privée de l'Appelant aux fins de susciter la curiosité du public. Ces journalistes ont plutôt tenté de dénoncer des éventuels cas de corruption dans le processus d'attribution de l'organisation de la Coupe du Monde de la FIFA, agissant ainsi en tant que "chiens de garde publics" (pour reprendre la terminologie de la Cour Européenne). Pour la Formation arbitrale, il paraît difficile de soutenir que le fait d'exposer au grand jour des pratiques illégales liées à des manifestations sportives importantes – que ce soit la corruption, le dopage ou des matches truqués – ne relève pas de l'intérêt public. Tenant compte de la jurisprudence précitée de la Cour Européenne des Droits de l'Homme, il n'est pas évident de considérer que la conduite des journalistes – quand bien même sournoise – serait illégale. Si tel avait été le cas l'Appelant aurait pu obtenir justice en déposant une plainte pénale et/ou en engageant une action civile à l'encontre du Sunday Times ou de ses journalistes. Le fait que, jusqu'à la date de l'audience, l'Appelant n'ait intenté d'action en justice affaiblit certainement son affirmation selon laquelle la preuve a été obtenue de manière illégale.

Dans tous les cas, la Formation ne voit pas l'utilité de s'étendre sur la question de savoir si les enregistrements secrets ont été ou non obtenus par les journalistes au moyen de procédés contraires au droit et si la preuve doit être considérée comme illégale au moment où elle est arrivée en mains de la FIFA. Dans l'intérêt de l'Appelant, la Formation serait même disposée à partir du postulat que la preuve a été obtenue de manière illicite, en violation du droit pénal et civil suisses, de la loi suisse contre la concurrence déloyale et de la loi suisse sur la protection des données. Or, le simple fait pour une preuve d'avoir été obtenue de manière illégale n'empêche pas nécessairement sa prise en compte par un tribunal arbitral international ayant son siège en Suisse (B. Berger, F. Kellerhals, op. cit., p. 343). En effet, un tribunal arbitral international siégeant en Suisse n'est pas tenu de suivre les règles de procédure et donc les règles en matière de preuve applicables devant les tribunaux civils suisses, ou d'autant moins devant les juridictions pénales suisses. Selon la doctrine suisse sur l'arbitrage international: "*La procédure arbitrale n'est pas soumise aux règles applicables devant les tribunaux étatiques. C'est d'ailleurs là un avantage souvent cité de l'arbitrage*" (G. Kaufmann-Kohler, A. Rigozzi, Arbitrage international. Droit et pratique à la lumière de la LDIP, 2ème Ed., Berne, 2010, ad 294).

Ainsi et en ce qui concerne le caractère admissible des preuves, la Formation arbitrale fait siennes les considérations formulées dans un arrêt récent du TAS (TAS 2009/A/1879 Valverde Belmonte c. CONI, paragraphes 134-135, "*l'affaire Valverde*"):

"L'ordre juridique interne suisse n'établit pas de principe général selon lequel des preuves illicites seraient généralement inadmissibles dans une procédure devant les cours civiles étatiques. Au contraire, le Tribunal Fédéral, dans une jurisprudence constante, est d'avis que l'admissibilité ou la non-admissibilité d'une preuve illicite est le résultat d'une mise en balance de différents aspects et intérêts juridiques. Sont pertinents, par exemple, la nature de la violation, l'intérêt à la manifestation de la vérité, la difficulté de preuve pour la partie concernée, le comportement de la victime, les intérêts légitimes des parties et la possibilité d'acquérir les (mêmes) preuves de façon légitime. La doctrine suisse prédominante suit cette jurisprudence du Tribunal Fédéral. L'approche adoptée par le Tribunal Fédéral et la doctrine dominante a, par ailleurs, été codifiée dans le nouveau CPC suisse (Article 152 alinéa 2), qui entrera en vigueur le 1er janvier 2011 […].

Les principes qui viennent d'être décrits ne constituent qu'une faible source d'inspiration pour la pratique des tribunaux arbitraux. […] En particulier, l'interdiction de se fonder sur une preuve illicite dans une procédure étatique ne lie pas en soi un tribunal arbitral. Selon le droit de l'arbitrage international un tribunal arbitral n'est pas lié par les règles applicables à l'administration de la preuve devant les tribunaux civils étatiques du siège du tribunal arbitral. Comme l'on a vu supra, le pouvoir discrétionnaire de l'arbitre de décider sur l'admissibilité de la preuve n'est limité que par l'ordre public procédural. L'utilisation de preuves illicites ne relève par ailleurs pas automatiquement de l'ordre public suisse, car ce dernier est seulement atteint en présence d'une contradiction insupportable avec le sentiment de justice, de telle sorte que la décision apparaît incompatible avec les valeurs reconnues dans un Etat de droit".

A la lumière de ces principes et des circonstances particulières du cas d'espèce, la formation arbitrale appelée à statuer dans l'affaire Valverde a considéré comme recevable une preuve (en l'occurrence un échantillon sanguin) qu'un juge espagnol de première instance a non seulement qualifiée d'illicite mais en a expressément interdit l'usage dans une procédure judiciaire ou disciplinaire. De surcroit, il est à noter que l'ordonnance de ce juge a été confirmée par une décision subséquente de la Cour d'Appel de Madrid. En dépit de cela, la formation, dans l'affaire Valverde, s'est notamment fondée sur cette preuve illicite pour parvenir à la conclusion que l'athlète avait à tout le moins essayé de se livrer à des pratiques de dopage interdites. Elle l'a alors suspendu pour une durée de deux ans. L'affaire Valverde a fait l'objet d'un recours porté devant le Tribunal fédéral, qui a rejeté ce dernier (arrêt du 29 octobre 2010, 4A_234/2010, ATF 136 III 605).

La Formation arbitrale relève que, dans la présente affaire, non seulement il n'y a pas une ordonnance d'un juge déclarant la preuve illicite et interdisant

son exploitation mais, comme observé plus haut, la question de savoir si les journalistes du Sunday Times ont agi de manière illégale, peut demeurer ouverte. A la lumière des considérations qui précèdent et même en partant du principe favorable à l'Appelant que les enregistrements ont été obtenus de manière illégale (en violation du droit pénal et du droit civil suisses, de la loi suisse contre la concurrence déloyale et de la loi suisse sur la protection des données), cela n'exclut pas leur utilisation comme preuve dans les procédures disciplinaires instruites au sein d'une association de droit privé.

4. La réglementation applicable en matière de preuve

4.1 Autonomie privée et réglementation suisse en matière de preuve

En matière d'arbitrage international, le Chapitre 12 de la LDIP instaure une large place à l'autonomie privée puisque les parties sont libres de déterminer leurs propres règles procédurales, notamment en matière de preuve. En particulier, l'article 182 al. 1 LDIP prévoit que "*Les parties peuvent, directement ou par référence à un règlement d'arbitrage, régler la procédure arbitrale; elles peuvent aussi soumettre celle-ci à la loi de procédure de leur choix".*

Cet article entérine la déclaration de la formation arbitrale dans l'Affaire Valverde, selon laquelle "*un tribunal arbitral n'est pas lié par les règles applicables à l'administration de la preuve devant les tribunaux civils étatiques du siège du tribunal arbitral*". Cela est particulièrement vrai lorsque les parties font usage de leur autonomie privée pour mettre en place des règles en matière de preuve.

En l'espèce, les parties ont fait usage de leur autonomie privée, la FIFA en adoptant sa réglementation et l'Appelant en se soumettant à cette dernière lorsqu'il est devenu membre indirect et officiel de la FIFA. Elles ont donc accepté que les règles de la FIFA en matière de preuve soient applicables dans les procédures disciplinaires les concernant. Ainsi, la Formation arbitrale estime que les questions de preuve doivent être analysées sur la base de ces règles privées, acceptées par les parties et non sur la base des règles applicables devant les tribunaux civils ou correctionnels suisses.

Par conséquent, la Formation arbitrale n'est pas liée par les conditions d'admissibilité des preuves retenues par le droit procédural civil et pénal suisse.

Les règles applicables de la FIFA en matière de preuve se trouvent dans le CDF, qui prévoit des dispositions en matière (i) de fardeau de la preuve, (ii) de degré et d'appréciation de la preuve ainsi que (iii) d'admissibilité des preuves.

4.2 Les règles de la FIFA en matière de fardeau de la preuve

En ce qui concerne le fardeau de la preuve, l'article 99 al. 1 CDF prévoit ce qui suit:

"Article 99 Fardeau de la preuve
1. Le fardeau de la preuve des fautes disciplinaires commises incombe à la FIFA".

Cette disposition est conforme au principe général en matière de procédure disciplinaire selon lequel le fardeau de la preuve incombe à l'accusateur. Ainsi, indépendamment du fait que la FIFA a la qualité d'intimée dans le présent arbitrage, il lui appartient de faire la preuve des accusations portées à l'encontre de l'Appelant.

4.3 Les règles de la FIFA en matière de degré et d'appréciation de la preuve

Le siège de la matière se trouve à l'article 97 CDF qui dispose de ce qui suit:

"Article 97 Libre appréciation des preuves

1. Les autorités apprécient librement les preuves.

2. Elles peuvent notamment tenir compte de l'attitude des parties au cours de la procédure, notamment de la manière dont elles collaborent avec les autorités juridictionnelles et le secrétariat (art. 110).

3. Elles décident sur la base de leur intime conviction".

Cette disposition laisse une importante marge d'appréciation à la Formation arbitrale, laquelle peut librement se forger une opinion après avoir examiné toutes les preuves disponibles. La Formation arbitrale doit décider sur la base de son "*intime conviction*", étant précisé que la version anglaise de l'article 97 al. 3 CDF (qui prévaut en vertu de l'article 143 al. 2 CDF) parle de "*convictions personnelles*" ("*They decide on the basis of their personal convictions*").

La Formation arbitrale est d'avis que la notion de "*intime conviction*" coïncide avec le degré de preuve usuellement appliqué dans les affaires disciplinaires par les formations arbitrales du TAS, en vertu duquel il appartient à l'accusateur d'établir l'existence d'une violation des règles disciplinaires à la satisfaction de l'instance de jugement, qui appréciera la gravité des accusations. Il en découle que le degré de preuve

doit être plus important que le standard civil de simple prépondérance des probabilités, mais moins important que le standard pénal de preuve allant au-delà d'un doute raisonnable (CAS 2010/A/2172, para. 53; CAS 2009/A/1920, para. 85). C'est dans ce sens que la Formation arbitrale interprète la notion d'intime conviction prévue par l'alinéa 3 de l'article 97 CDF.

4.4 Les règles de la FIFA en matière d'admissibilité des preuves

En ce qui concerne l'admissibilité des preuves – qui est l'une des principales questions litigieuses – l'article 96 CDF prévoit ce qui suit:

"Article 96 Divers moyens de preuve

1. *Tous les moyens de preuve peuvent être produits.*

2. *Doivent être refusés ceux qui sont contraires à la dignité humaine ou ne permettent manifestement pas d'établir des faits pertinents.*

3. *Sont notamment admis: les rapports de l'arbitre, des arbitres assistants, du commissaire de match, de l'inspecteur d'arbitre; les déclarations des parties, celles des témoins, la production de preuves matérielles, les expertises, les enregistrements audio ou vidéo".*

Au vu de l'article 96 al. 1 CDF, tous les moyens de preuves sont admissibles, sans aucune limitation. L'alinéa 3 de cette disposition inclut expressément les "*enregistrements audio et vidéo*". Il apparaît que le CDF accepte quasiment tous les moyens de preuves, à l'exception de ceux "*qui sont contraires à la dignité humaine*" ou qui sont manifestement sans pertinence (voir article 96 al. 2 CDF). La Formation arbitrale observe qu'une telle politique libérale en matière d'admissibilité de preuves n'est pas étonnante, sachant que les procédures disciplinaires mises en œuvres au sein d'associations sportives sont, par définition, moins formalistes et avec moins de garanties procédurales que les procédures pénales.

Selon le Tribunal fédéral suisse, la teneur normative de la dignité humaine ne peut pas être déterminée explicitement et exhaustivement. Toutefois, il souligne à ce sujet qu'il s'agit de la spécificité intangible de l'homme et des êtres humains (ATF 132 I 49 cons. 5.1). A la lumière de ce qui précède, il apparaît que le CDF a ouvert un spectre très large, dans lequel seraient admissibles quasiment toutes les preuves, à l'exception de celles obtenues notamment par la torture ou la violence, ensuite de traitements inhumains ou dégradants et/ou au moyen de procédés scientifiques forçant la volonté de l'individu, ainsi privé de sa liberté. En l'espèce, la Formation arbitrale est d'avis que les enregistrements effectués à l'insu de l'Appelant n'ont pas porté atteinte à sa dignité humaine: l'Appelant n'a pas fait l'objet de menaces ou de violence, ses entretiens téléphoniques avec les journalistes ont été librement consentis et leur contenu n'apparaît pas comme étant dégradant. En bref, les enregistrements constituent une preuve admissible au sens de l'article 96 du CDF.

Toutefois, la FIFA ne peut pas se borner à respecter sa seule réglementation. En effet, s'il est vrai que le législateur suisse a souhaité laisser une large autonomie aux associations quant à leur fonctionnement et à leur organisation, aucune disposition réglementaire ne doit porter atteinte aux droits de la personnalité de ses membres (V. Jeanneret et O. Hari, in Pichonnaz / Foëx, Commentaire romand, Bâle, 2010, ad. art. 63, para. 2 et ss, p. 474; J.-F. Perrin; C. Chappuis, Droit de l'association, 3ème édition, Genève, Zurich, Bâle, 2008, ad. art. 63, p. 41).

Par voie de conséquence, les preuves telles que prévues à l'article 96 al. 2 CDF ne peuvent en aucun cas léser les droits de la personnalité, protégés par l'article 28 CC.

4.5. La protection des droits de la personnalité de l'Appelant

Le siège de la matière se trouve aux articles 27 et 28 CC. Alors que l'article 27 CC vise à protéger la personne contre elle-même et contre ses engagements excessifs, l'article 28 CC interdit les atteintes à la personnalité émanant de la part de tiers. Seule cette dernière disposition est pertinente dans la présente affaire.

L'article 28 CC a la teneur suivante:

"1 Celui qui subit une atteinte illicite à sa personnalité peut agir en justice pour sa protection contre toute personne qui y participe.
2 Une atteinte est illicite, à moins qu'elle ne soit justifiée par le consentement de la victime, par un intérêt prépondérant privé ou public, ou par la loi".

La garantie de l'article 28 CC s'étend à l'ensemble des valeurs essentielles de la personne qui lui sont propres par sa seule existence et peuvent faire l'objet d'une atteinte (ATF 134 III 193, consid. 4.5, p. 200). Selon l'article 28 al. 2 CC, une atteinte à la personnalité est illicite, à moins qu'elle ne soit justifiée (i) par le consentement de la victime, (ii) par un intérêt prépondérant privé ou public, ou (iii) par la loi. Il résulte de cette disposition que l'atteinte est en principe illicite, ce qui découle du caractère absolu

des droits de la personnalité. L'illicéité est une notion objective de sorte qu'il n'est pas décisif que l'auteur soit de bonne foi ou ignore qu'il participe à une atteinte à la personnalité (ATF 132 III 193, consid. 4.6.2, p. 201). C'est en fonction du bien de la personnalité touché et des circonstances du cas concret que la Formation arbitrale retiendra l'existence ou non d'une atteinte. Cette démarche doit être opérée sur la base d'une échelle de valeurs objectives et non eu égard au ressenti ou à la sensibilité de la victime (N. Jeandin; in Pichonnaz/Foëx, Commentaire romand, Bâle, 2010, ad. art. 28, para. 67 et ss, p. 261).

De manière générale, il ne fait aucun doute que le respect de la vie privée fait partie des droits protégés par l'article 28 CC. La Formation arbitrale estime que, par leurs procédés, les journalistes n'ont pas respecté la sphère privée de l'Appelant, lequel n'était pas averti que les conversations téléphoniques étaient enregistrées. Toutefois, la question litigieuse n'est pas tant de déterminer si les journalistes ont porté atteinte aux droits de la personnalité de l'Appelant mais plutôt si ces droits sont violés par l'utilisation des enregistrements en question dans la présente procédure.

Comme exposé ci-dessus, l'atteinte à la personnalité est licite lorsqu'elle est justifiée par l'un des trois motifs prévu à l'article 28 al. 2 CC, à savoir le consentement de la victime, un intérêt prépondérant privé ou public et/ou la loi. En l'espèce, l'Appelant n'a pas donné son consentement et il n'y a pas de base légale qui justifierait expressément l'atteinte à sa personnalité. Il y a donc lieu de déterminer s'il existe un intérêt prépondérant privé ou public pouvant justifier l'utilisation des enregistrements en tant que moyens de preuve dans la présente procédure. La Formation estime à cet égard que la notion d'intérêt public – contrairement à l'opinion exprimée par l'Appelant – ne coïncide pas avec la notion d'intérêt étatique et doit être interprétée au sens large d'intérêt général (comprenant soit l'intérêt étatique soit l'intérêt des collectivités concernées).

4.6 La pesée des intérêts en présence

La Formation arbitrale doit procéder à une pondération des intérêts en présence. L'intérêt prépondérant est privé lorsque le sacrifice qui est imposé à la victime est jugé supérieur à l'avantage que peut en retirer une autre personne physique ou morale. L'intérêt prépondérant est public lorsqu'il profite à une pluralité d'autres personnes ou à la collectivité (N. Jeandin, op. cit., p. 263). En l'espèce, il y a lieu de mettre en balance l'intérêt de l'Appelant à ce que les enregistrements demeurent confidentiels et l'intérêt de la FIFA et d'autres personnes ou entités à ce qu'ils soient utilisés dans le cadre de la présente procédure.

En ce qui concerne le bien protégé de l'Appelant (protection de la vie privée, notamment protection des conversations privées), la Formation relève qu'au moment de l'ouverture de la procédure disciplinaire, de nombreux détails compris dans les conversations enregistrées – dont les passages les plus révélateurs et les plus sensibles – sont entrés dans le domaine public lors de la diffusion de l'article du *Sunday Times* par voie de presse ou par le biais d'Internet (diffusion que l'Appelant n'a pas cherché à contester par voie judiciaire). Cet hebdomadaire a non seulement fait état de l'existence des enregistrements litigieux et du contexte dans lequel ils ont été captés mais en a divulgué une partie du contenu. De ce fait, il résulte que la valeur du bien à protéger, ou plutôt ce qu'il en reste, a été amoindrie. L'Appelant ne peut donc pas raisonnablement exiger la complète protection de ses conversations privées, dont une partie significative a déjà été portée à la connaissance de centaines de milliers de personnes. Malgré tout, la Formation arbitrale est d'avis qu'il existe encore une part résiduelle de la sphère privée de l'Appelant qui mérite d'être protégée, dans la mesure où (i) une partie importante des conversations n'a pas été divulguée et (ii) la publication de la présente sentence qui contient une retranscription des propos tenus par l'Appelant lors desdites conversations va à nouveau attirer l'attention sur ce dernier. L'Appelant a donc un intérêt certain à ce que l'intégralité de ses conversations avec les journalistes ne soit pas diffusée et ainsi à contester l'utilisation des enregistrements dans la présente procédure.

Néanmoins, l'intérêt de l'Appelant à ce que les enregistrements ne soient pas exploitables est contrebalancé par celui de la FIFA ainsi que par celui d'autres personnes ou entités tant du secteur privé que public:

- Il y a assurément un intérêt public général à ce que soit exposé au grand jour tout comportement illégal ou contraire à l'éthique, tel que la corruption ou toute autre forme de fraude en relation avec l'attribution de l'organisation d'un événement sportif majeur.

- La FIFA a un intérêt privé à vérifier la véracité du contenu de l'article du *Sunday Times* et, le cas échéant, rétablir la vérité ainsi que son image. En effet, l'hebdomadaire présente la FIFA comme étant gangrénée par la corruption et lui reproche son manque de transparence et d'impartialité dans le processus d'attribution de l'organisation de la Coupe du Monde.

- La FIFA, tout comme n'importe quelle association privée, a un intérêt certain à pouvoir identifier les dysfonctionnements organisationnels et ceux qui en sont à l'origine, afin de pouvoir prendre les dispositions nécessaires, en particulier pour éviter que des situations similaires ne se reproduisent.

- Toute les fédérations nationales qui sont ou seront candidates à l'organisation de la Coupe du Monde de la FIFA, ont un intérêt à être informées exhaustivement et, si possible, rassurées au sujet de l'efficacité, la transparence et la régularité du processus de sélection.

- Compte tenu de la quantité d'argent public notoirement investi par les gouvernements et autres organismes publics en vue de soutenir la candidature de leur fédération de football et de l'impact bien connu de la Coupe du Monde de la FIFA sur l'économie d'un pays, il y a indubitablement un intérêt de chaque gouvernement (ainsi que des contribuables concernés) de savoir si l'attribution de la Coupe du monde de la FIFA est affectée par la corruption de responsables de la FIFA.

- Enfin, les amateurs de football comme le public, et en particulier celui du pays candidat malheureux, doivent avoir la conviction que l'attribution de la Coupe du Monde s'est faite de manière équitable, en toute impartialité et selon des critères objectifs.

Ainsi, au vu de ce qui précède, la Formation arbitrale n'a aucune difficulté à admettre que la balance des intérêts penche en faveur de la divulgation et de l'utilisation dans la présente procédure des preuves réunies par le *Sunday Times* et remises à la FIFA. Dès lors que l'atteinte aux droits de la personnalité de l'Appelant est justifiée par des intérêts publics et privés prépondérants, les enregistrements sonores (qui sont des moyens de preuves prévus par l'article 96 CDF) doivent être admis dans la présente procédure.

De plus, la Formation arbitrale doit évaluer si l'usage des enregistrements entre en conflit avec l'ordre public procédural suisse. A cette fin, les éléments suivants doivent être pris en compte:

- la nature du comportement en question et la gravité des accusations;

- la nécessité morale et éthique de faire toute la lumière sur ce qui s'est passé et de sanctionner les fraudes et la corruption;

- le fait que, dans un contexte démocratique, les personnes qui occupent des postes-clés (que ce soit dans une organisation privée ou publique) doivent être responsables;

- le consensus général au sein des institutions sportives et gouvernementales, selon lequel la corruption est un sujet d'inquiétude croissant dans tous les sports majeurs qui nuit considérablement à ces derniers ainsi qu'à leur crédibilité et qui doit être combattu avec la plus grande détermination (voir Transparency International - Czech Republic, *Why sport is not immune to corruption*, Conseil de l'Europe – EPAS, 1er décembre 2008); et

- les moyens d'instruction limités des organisations sportives en comparaison avec ceux des autorités publiques.

Sur la base de ces considérations, la Formation arbitrale est d'avis, en l'espèce, que l'utilisation dans une procédure disciplinaire pour corruption des enregistrements secrets de conversations privées n'est pas immorale et ne conduit pas à une contradiction insupportable avec le sentiment de justice, ni qu'une décision fondée sur de tels moyens de preuve paraîtrait incompatible avec les valeurs reconnues dans un Etat de droit.

La Formation arbitrale conclut donc que le fait d'admettre les enregistrements comme moyen de preuve dans la présente procédure ne constitue pas une violation de l'ordre public procédural suisse.

En relation avec ce qui précède, l'Appelant tente de soutenir que la valeur probatoire des enregistrements sonores est remise en cause au motif que ces derniers ne sont pas datés et qu'ils sont incomplets. Selon lui, d'autres conversations ont eu lieu entre les mêmes protagonistes, lesquels auraient également échangé des courriers. L'Appelant estime que le fait que ces éléments ne soient pas au dossier vicie l'ensemble de la procédure.

La Formation relève qu'en vertu de l'article 97 CDF, "*Les autorités apprécient librement les preuves*" (al. 1) et "*décident sur la base de leur intime conviction*" (al. 3). Il appartiendra à la Formation de se faire librement une opinion sur la base de l'ensemble des éléments dont elle dispose. Font partie de ces éléments (mais pas exclusivement) les enregistrements litigieux dont l'Appelant n'a jamais soutenu qu'ils avaient fait l'objet de manipulations ou qu'ils n'étaient pas originaux.

Quant au fait que les enregistrements ne sont pas datés, la Formation relève que le contenu des conversations démontre aisément que les entretiens téléphoniques ont eu lieu au cours du mois d'octobre 2010. Quant au caractère incomplet des preuves, la Formation arbitrale

ne peut que prendre note de remarques de l'Appelant, tout en relevant qu'elle ne dispose d'aucune indication permettant d'affirmer avec un degré suffisant de probabilité que les éventuelles autres conversations ont été enregistrées. La Formation arbitrale relève encore que, s'il devait y avoir des courriers échangés entre l'Appelant et les journalistes, l'Appelant même était le mieux placé pour établir leur existence. Il est à souligner que ni la FIFA ni le TAS ne dispose de la force publique permettant d'exiger de tiers la production d'éléments de preuve. La FIFA a déclaré avoir tenu à la disposition de l'Appelant l'intégralité des pièces dont elle disposait et rien ne permet à la Formation d'en douter.

En conclusion, la Formation arbitrale est d'avis que les enregistrements sont des preuves fiables et peuvent être admises dans la présente procédure. L'Appelant n'a avancé aucun élément convaincant suggérant que la FIFA n'a pas agi de manière convenable lorsqu'elle s'est fondée sur les enregistrements pour engager une procédure disciplinaire à son encontre.

Cette constatation ne signifie cependant pas que la Formation arbitrale estime que la FIFA peut demeurer passive et se borner à lutter contre les problèmes de corruption uniquement lorsque ceux-ci surgissent de manière fortuite. Bien au contraire, afin de favoriser la transparence en matière de gouvernance interne et la mise en œuvre de ses règles éthiques, la FIFA serait bienvenue de continuer à se montrer proactive dans la lutte contre la corruption de ses officiels et, en présence d'activités suspicieuses, d'entreprendre toute mesure d'instruction utile, en s'appuyant sur tous les moyens légaux à sa disposition et éventuellement en sollicitant l'assistance des autorités judiciaires.

D. Au fond

La Commission de Recours de la FIFA a déclaré l'Appelant coupable d'avoir enfreint les articles 3. al. 1, 3 al. 2, 3 al. 3 (Règles générales), l'article 9 al. 1 (Loyauté et confidentialité), l'article 11 al. 1 (Corruption) et l'article 14 al. 1 (Obligation de déclaration et de rapport) CEF.

Les dispositions qui précèdent ne s'appliquent que si l'auteur des infractions en remplit la condition subjective, à savoir s'il revêt la qualité de "*officiel*". Ce dernier aspect doit dès lors être examiné en premier.

1. L'Appelant est-il un officiel au sens du CEF?

L'article 1 al. 1 CEF prévoit ce qui suit:

"Le présent code s'applique à tous les officiels. On entend par officiel tout membre de la direction, d'une commission, tout arbitre, arbitre assistant, entraîneur, préparateur physique et toute autre personne chargée des questions techniques, médicales, administratives à la FIFA, dans une confédération, une association, une ligue ou un club".

Au vu des fonctions qu'il occupait au moment des faits litigieux, notamment au sein de la FIFA et de la CAF, il ne fait aucun doute que l'Appelant est un "*officiel*" au sens du CEF, ce qu'il n'a jamais contesté.

Dès lors que la condition subjective liée à la qualité d'officiel est remplie, les dispositions des articles 3, 9 et 11 sont toutes applicables à l'Appelant. Il y a lieu de reprendre chacune de ces dispositions, en commençant par celles qui sont les plus spécifiques, à savoir les articles 11 et 14 CEF.

2. Article 11 CEF (Corruption)

En substance, l'Appelant allègue qu'il ne peut être sanctionné du chef de corruption, qui est une infraction que seuls des agents publics peuvent commettre. Il appuie cette argumentation sur la lettre du titre 19 du Code pénal suisse. Il peut également être déduit de ses autres allégations, que l'Appelant estime ne pas remplir les conditions de cette disposition, ses paroles n'ayant jamais été suivies d'action de sa part, ni d'effet. En particulier, il relève qu'il n'a jamais rencontré les journalistes ni entrepris quelques démarches que ce soit auprès de membres du Comité Exécutif de la FIFA, ni conclu de contrat, ni reçu d'argent. Selon ses déclarations, il n'avait d'ailleurs jamais l'intention de donner une suite concrète aux sollicitations de *Franklin Jones*.

L'article 11 al. 1 CEF, qui a pour note marginale "*Corruption*", prévoit ce qui suit:

"Les officiels ne doivent en aucun cas accepter les pots-de-vin. Ils sont tenus de refuser tout cadeau et autre avantage qui leur serait offert, promis ou envoyé pour les inciter à manquer à leur devoir ou à adopter un comportement malhonnête au profit d'une tierce personne".

La Formation arbitrale est d'avis que le fait que l'Appelant ne soit pas un employé d'une administration publique au sens du droit pénal suisse est sans pertinence, l'article 11 CEF ne visant pas de telles personnes. L'argumentation de l'Appelant n'est d'ailleurs pas acceptable, dans la mesure où l'infraction visée par le CEF et celle visée par le titre 19 du code pénal suisse ont pour seul point commun leur qualification (corruption). La comparaison s'arrête là, puisque les deux textes ne cherchent pas à protéger le même bien ni ne visent les mêmes personnes. Il y a lieu de rejeter l'argument de l'Appelant sans autre considération.

L'article 11 al. 1 CEF est composé de deux phrases. La première énonce le principe de base en vertu duquel les officiels ne doivent jamais accepter des pots-de-vin. La deuxième phrase précise la notion de corruption, en prévoyant l'obligation pour ces officiels de refuser activement toute offre d'une transaction qui pourrait impliquer un pot-de-vin. Il résulte de cette deuxième phrase que, pour que la corruption soit avérée, les éléments exhaustifs suivants doivent être réunis:

(a) un cadeau ou autre avantage doit être offert, promis ou envoyé;

(b) l'officiel doit être incité à manquer à son devoir ou adopter un comportement malhonnête, au profit d'une tierce personne;

(c) l'officiel n'a pas refusé le cadeau ou l'autre avantage.

Ces trois éléments peuvent être repris ci-dessous:

2.1 Cadeau ou autre avantage offert, promis ou envoyé

La Formation observe que la formulation de l'article 11 al. 1 CEF est volontairement large. L'avantage peut revêtir toute forme et ne doit pas être concrètement accordé, puisque, selon le texte même de cette disposition, il suffit qu'il soit offert ou promis. En d'autres termes, il ne résulte pas de l'article 11 al. 1 CEF que le cadeau ou tout autre avantage doit effectivement être reçu par l'officiel.

De même, et en vertu de l'article 11 al. 1 CEF, les officiels sont tenus de refuser "*tout*" cadeau et autre avantage, ce qui implique que la forme ou le genre d'avantage est sans importance. Il peut s'agir d'argent ou d'autre chose, qui pourrait même être difficile à évaluer économiquement (par exemple, une carrière, une promotion).

En outre, et contrairement à l'opinion exprimée par l'Appelant, rien n'indique que le cadeau ou l'avantage doit être offert, promis ou envoyé à l'officiel en personne ou servir ses intérêts exclusifs. En vertu de l'article 11 al. 1 CEF, l'avantage peut très bien être octroyé à un tiers ou à une organisation désignée par l'officiel ou proche de ce dernier. Si on devait suivre la thèse qu'un cas de corruption n'est réalisé qu'en présence d'avantages concédés directement à l'officiel, il serait facile pour l'officiel de se soustraire à toute responsabilité en faisant transiter le cadeau ou l'avantage par le biais d'une autre personne ou organisation.

En l'espèce, il est indéniable qu'un avantage a été promis à l'Appelant, sous forme de rémunération à hauteur de GBP 100.000 par an pour une activité exercée à raison d'un à deux jours par mois. En outre, l'Appelant tente de soutenir que les propos qu'il a tenus au cours des conversations enregistrées étaient influencés par la promesse faite par les journalistes de le mandater en qualité de consultant, pour des investissements liés à des infrastructures au Mali. Quand bien même l'existence d'une telle promesse n'a jamais été démontrée et pour les motifs déjà évoqués ci-dessus, la nature précise du cadeau ou de l'avantage (de l'argent, des infrastructures au Mali, etc.) ainsi que l'identité du bénéficiaire (l'Appelant, des organisations d'intérêt public ou sportif maliennes) est sans importance au regard de l'article 11 al. 1 CEF. Ainsi, le fait que le comportement de l'Appelant ait été motivé par l'intention de soutenir le football malien est sans pertinence. Il est évident qu'un officiel ne peut pas être empêché d'agir dans l'intérêt du football de son pays mais il doit le faire de manière transparente et intègre. La collaboration que le consortium représenté par *Franklin Jones* aurait proposée à l'Appelant ne peut pas être comparée aux engagements pris par certains comités de candidature – en particulier ceux de l'Angleterre, de la Corée et de l'Australie – qui ont annoncé publiquement dans le cadre de leur campagne leur intention de lever et reverser des fonds en faveur du développement du football et de l'aide sociale de pays les moins favorisés. Cette situation n'est pas comparable avec celle de l'Appelant, où les entretiens avec les prétendus lobbyistes de *Franklin Jones* ont un caractère confidentiel et un objectif critiquable.

En bref, il a été établi à la satisfaction de la Formation arbitrale qu'un cadeau ou un autre avantage a été offert à l'Appelant et que la première des trois conditions de l'article 11 al. 1 CEF est remplie.

2.2 Incitation à manquer à son devoir ou adopter un comportement malhonnête, au profit d'un tiers

Ce deuxième élément constitutif de l'infraction visée à l'article 11 al. 1 CEF a trait au but que cherche à atteindre celui qui tente de corrompre l'officiel. L'instigateur doit chercher à inciter l'officiel à manquer à ses devoirs ou à adopter un comportement malhonnête, au profit d'une tierce personne. Il ressort de la lettre de cette disposition que l'instigateur ne doit pas forcément être le bénéficiaire de l'infraction et qu'une incitation suffit. Il n'est donc pas nécessaire que le manquement de l'officiel soit effectivement concrétisé par des actes. Dès lors qu'il est en présence d'une "*incitation*" à manquer à ses devoirs au profit d'un tiers, l'officiel doit s'y opposer et refuser l'avantage proposé.

En l'espèce, celui qui cherchait à corrompre l'Appelant était *Franklin Jones*, une prétendue compagnie de relations publiques mandatée par des investisseurs privés souhaitant favoriser la candidature officielle américaine mais à l'insu de cette dernière. Il ressort de l'intégralité des retranscriptions que cela avait bien été compris par l'Appelant. Cet aspect a d'ailleurs été directement abordé par les protagonistes à plusieurs reprises.

Il ne fait pas de doute aux yeux de la Formation arbitrale que l'Appelant était disposé à manquer à ses devoirs et à adopter un comportement malhonnête. C'est ainsi qu'il s'est proposé de mettre son réseau de connaissances et son expérience à la disposition de *Franklin Jones* pour créer des contacts avec les membres du Comité Exécutif de la FIFA (chiffre 12), afin d'acheter leurs votes. Il a conseillé ses interlocuteurs sur les procédés à mettre en œuvre pour de tels achats et sur les montants à payer, tout en sachant que son comportement était contraire à la réglementation applicable. Il s'est même proposé de présenter les représentants de *Franklin Jones* auprès des personnes susceptibles d'être achetées, de faire à ces dernières des offres directes et de communiquer à *Franklin Jones* tous les éléments leur permettant de maximiser leur offre.

Compte tenu de ce qui précède, il est manifeste que l'Appelant avait bien compris que ses interlocuteurs cherchaient à l'inciter à se comporter malhonnêtement en faveur des prétendus clients de *Franklin Jones* et de la candidature des États-Unis pour l'organisation de la Coupe du Monde. En conséquence, il a été établi à la satisfaction de la Formation arbitrale que la deuxième condition de l'article 11, al. 1 CEF est remplie.

2.3 L'avantage doit être refuse

Le troisième élément constitutif de l'infraction visée à l'article 11 al. 1 CEF est l'obligation faite à l'officiel de refuser l'avantage offert ou promis. Il ne suffit donc pas que l'officiel demeure sans réaction devant une incitation à agir malhonnêtement; il se doit de la refuser expressément. Il ne peut pas se borner à rester impassible ou inactif devant une tentative de corruption. Si une telle obligation de refuser activement n'existait pas, les tentatives de corruption ne seraient pas décourageées. En outre, cela aurait pour conséquence qu'une corruption ne serait vérifiée qu'une fois la transaction frauduleuse effectivement effectuée, ce qui serait, dans la majorité des cas, indémontrable pour une entité privée, sans pouvoirs d'investigation comparables à ceux des autorités étatiques.

Il n'y a pas de place pour l'ambiguïté ou l'incertitude dans la lutte contre la corruption dans le sport (voir CAS 2009/A/1920, para. 85). De la même manière, il ne doit pas y avoir d'ambigüité ou d'incertitude de la part des officiels en présence d'une offre déplacée. En particulier, des officiels de l'importance de l'Appelant doivent présenter toutes les garanties possibles d'honnêteté et de fiabilité, en l'absence desquelles les acteurs du monde de football et le public seraient naturellement amenés à avoir de sérieux doutes quant à la probité et l'intégrité de l'ensemble des organisations liées au football. Cette méfiance du public prendrait rapidement de telles proportion que la crédibilité des résultats serait rapidement remise en cause, détruisant ainsi tout ce qui fait l'essence même du sport. A cet égard, la Formation arbitrale peut reprendre à son compte les considérations formulées dans un précédent arrêt rendu par le TAS:

en français:

"La Formation arbitrale observe que, bien évidemment, l'honnêteté et la rectitude constituent des valeurs morales fondamentales, qui s'imposent dans tous les domaines de la vie et des pratiques commerciales. Il n'y a pas de raison qu'il en aille différemment pour le football. Plus précisément, toutefois, la Formation arbitrale est d'avis que la notion d'intégrité telle qu'appliquée au football va au-delà de la notion d'honnêteté et de rectitude, tant sur le plan sportif que sur le plan commercial. Selon la Formation arbitrale, l'intégrité dans le football est étroitement liée à la crédibilité des résultats, qui doivent traduire, aux yeux du public, le fait que la meilleure performance athlétique, technique, d'encadrement et managériale se vérifie sur le terrain, à l'occasion d'un match comme d'un championnat".

En effet, de l'avis de la Formation arbitrale, les officiels du monde du football doivent refuser haut et fort tout pot-de-vin ou autre forme de corruption, afin que le public perçoive les organisations de football comme étant dignes de confiance, faute de quoi l'attrait sportif et économique du football serait rapidement appelé à décliner. Il est crucial, non seulement que les hauts responsables du monde du football soient honnêtes mais aussi qu'ils soient perçus comme tels. Les exigences de probité sont d'autant plus élevées que l'officiel concerné occupe une fonction importante dont l'exercice ne doit pas apparaître comme pouvant être influencé de quelque manière.

Il en découle que la question n'est pas de savoir si, au cours de ses entretiens avec les journalistes, l'Appelant a tenu des propos ambigus ou fantaisistes quant au soutien qu'il était prêt à apporter aux lobbyistes en échange d'avantages mais plutôt s'il sautait aux yeux des instigateurs (ou de tout autre personne) que la tentative de corruption échouerait au vu de son refus sans appel de tout pot-de-vin.

En l'espèce, loin de refuser l'offre, l'Appelant a été jusqu'à demander à ce que le contrat de collaboration lui soit envoyé pour l'étudier. De même, il a accepté de parler aux représentants de *Franklin Jones* au moins à 6 reprises et, au cours de la dernière conversation, a pris congé de ses interlocuteurs en se tenant à leur entière disposition, eussent-ils besoin "*d'informations très précises*".

En conclusion, tenant compte de la gravité des accusations et au vu des éléments à disposition, il a été établi à la satisfaction de la Formation arbitrale que l'Appelant n'a pas activement et catégoriquement refusé l'offre inappropriée des prétendus lobbyistes. La troisième condition de l'article 11, al. 1 CEF est donc remplie.

2.4 Conclusion en ce qui concerne l'article 11 al. 1 CEF

Au vu de ce qui précède, la Formation est d'avis que l'Appelant s'est rendu coupable de corruption au sens de l'article 11 al. 1 CEF, dont les conditions sont indubitablement réunies en l'espèce. Pour les raisons déjà évoquées, le fait qu'il n'ait concrètement entrepris aucune démarche et rien reçu n'est pas déterminant.

3. Article 14 CEF (Obligation de déclaration et de rapport)

L'Appelant n'a pas soumis d'allégations spécifiques en relation avec cette disposition.

L'article 14 al. 1 CEF prévoit ce qui suit:

"Les officiels sont tenus de signaler toute preuve de violation des règles de conduite au Secrétaire Général de la FIFA qui est lui-même tenu de la signaler aux organes compétents".

Il est indéniable que l'Appelant n'ignorait pas que les démarches de la prétendue compagnie *Franklin Jones* étaient contraires "*aux règles de conduite*". Très rapidement, au cours du premier entretien enregistré et en relation avec l'initiative indirecte de *Franklin Jones*, l'Appelant a souligné que cette dernière est interdite "*par les textes*". Cet aspect a également été abordé au cours du dernier entretien.

Bien plus, au cours de l'audience du 19 octobre 2011 devant le TAS, l'Appelant a admis qu'il aurait dû informer la FIFA mais que, au moment des faits litigieux, il ignorait l'existence de cette obligation.

Cette défense ne convainc pas venant d'un officiel tel que l'Appelant, alors membre du Comité Exécutif de la CAF et des commissions des arbitres de la CAF et de la FIFA, et surtout ancien membre du Comité Exécutif de la FIFA. Aux yeux de la Formation arbitrale, il ne fait aucun doute que les membres de tels organes doivent nécessairement être sensibles à la problématique liée au non respect des règles en vigueur et en particulier à la corruption.

Enfin et devant l'insistance des représentants de *Franklin Jones* (six entretiens téléphoniques totalisant plus d'une heure et demi de conversations), prêts à acheter des votes pour des montants allant jusqu'à USD 1.200.000, le bon sens et surtout les obligations découlant de son devoir de loyauté à l'égard des institutions sportives, auraient voulu que l'Appelant signale la situation spontanément, de sa propre initiative et non parce qu'une réglementation le lui imposait.

Au vu de ce qui précède, la Formation arrive à la conclusion que l'Appelant s'est rendu coupable d'une violation de son obligation de déclaration et de rapport au sens de l'article 14 al.1 CEF.

4. Article 3 (Règles générales) et Article 9 CEF (Loyauté et confidentialité)

Pour sa défense, l'Appelant soutient qu'il s'est limité à prononcer des paroles fantaisistes qui n'ont jamais été suivies d'effet. Il est d'avis qu'en l'absence d'une quelconque action de sa part, il n'a pas pu abuser de ses fonctions.

L'article 3 CEF a le contenu suivant:

"1. Les officiels doivent avoir conscience de l'importance de leur fonction et des obligations et responsabilités qui en découlent. Leur conduite doit refléter en tous points leur fidélité et leur soutien aux principes et objectifs de la FIFA, des confédérations, des associations, des ligues et des clubs, et ne contrevenir en aucune façon à ces objectifs. Ils doivent mesurer toute la portée de leur allégeance à la FIFA, aux confédérations, aux associations, aux ligues et aux clubs et les représenter avec honnêteté, dignité, respectabilité et intégrité.

2. Les officiels doivent accomplir leurs tâches dans un grand souci d'éthique. Ils doivent s'engager à être irréprochables, notamment en termes de crédibilité et d'intégrité.

3. Les officiels ne doivent en aucun cas abuser de leur fonction, notamment à des fins privées ou pour en tirer un quelconque avantage pécuniaire".

En insistant sur "*l'importance de leur fonction et des obligations et responsabilités qui en découlent*", l'article 3 al. 1 CEF attire l'attention des officiels sur les obligations élevées qui se rattachent à leurs activités. Bien plus, cette disposition met explicitement en

évidence le fait que leur "*conduite doit refléter en tous points leur fidélité et leur soutien aux principes et objectifs de la FIFA*". Font notamment partie des objectifs de la FIFA, l'organisation de ses propres compétitions internationales (article 2.b des statuts de la FIFA) et l'empêchement que des méthodes et pratiques ne mettent en danger l'intégrité du jeu et des compétitions ou ne donnent lieu à des abus dans le football association (article 2.e des Statuts de la FIFA). L'article 3 al. 2 CEF attend de l'officiel qu'il s'engage "*à être irréprochable, notamment en termes de crédibilité et d'intégrité* ".

Enfin, l'article 3 al. 3 CEF ne semble pouvoir être violé que si l'officiel abuse de sa fonction "*à des fins privées ou pour en tirer un quelconque avantage pécuniaire*". En l'occurrence, il résulte clairement des enregistrements que l'Appelant a été contacté en tant qu'ancien membre du Comité Exécutif de la FIFA et en raison des contacts que cette position lui assure. L'Appelant va même préciser qu'il "*pense être bien placé pour jouer le rôle*" proposé par Franklin Jones. En outre, il s'est spontanément proposé d'organiser des rencontres entre ses interlocuteurs et les personnes susceptibles d'être achetées lors de son passage à Zurich, dans le cadre de séances organisées sous l'égide de la FIFA.

L'article 9 al. 1 CEF prévoit ce qui suit:

"Dans l'exercice de leurs fonctions, les officiels doivent faire preuve d'une loyauté absolue notamment envers la FIFA, les confédérations, les associations, les ligues et les clubs".

L'article 9 CEF exige de l'officiel qu'il fasse "*preuve d'une loyauté absolue*". Cela signifie clairement qu'il doit mettre les intérêts de la FIFA au premier plan, avant même ses propres intérêts.

Par ses actions mises en évidence en relation avec les articles 11 al. 1 et 14 al. 1 CEF, l'Appelant a porté atteinte à l'image et à la crédibilité de la FIFA ce qu'il a admis en audience. Bien plus, il n'a pas agi avec honnêteté, respectabilité, intégrité et encore moins avec une loyauté absolue, lesquelles auraient exigé non seulement qu'il refuse immédiatement les offres qui lui ont été faites mais aussi qu'il les dénonce afin d'empêcher Franklin Jones de poursuivre son action malveillante auprès de tiers. En l'occurrence, il s'est bien gardé de reporter à la FIFA ses contacts avec cette société mais a été jusqu'à lui offrir ses services et une assistance active, au détriment des intérêts de la FIFA et de tous ceux qui, de près ou de loin, ont présenté des dossiers de candidature en vue d'obtenir l'organisation de la Coupe du Monde de la FIFA.

Il découle de ce qui précède qu'il a été établi à la satisfaction de la Formation arbitrale que l'Appelant a violé les articles 3 al. 1, 3 al. 2, 3 al. 3 ainsi que 9 al. 1 CEF.

E. Les sanctions

L'article 17 CEF, conjointement avec les articles 59 des Statuts de la FIFA et 10 ss CDF, énonce quelles sont les sanctions applicables.

Pour les motifs évoqués ci-dessus, l'Appelant est coupable d'avoir enfreint les articles 3 al. 1, 3 al. 2, 3 al. 3 (Règles générales), l'article 9 al. 1 (Loyauté et confidentialité), l'article 11 al. 1 (Corruption) et l'article 14 al. 1 (Obligation de déclaration et de rapport).

Les matchs truqués, le blanchiment d'argent, les pots-de-vin, l'extorsion, la corruption et autres fraudes analogues sont une source de préoccupation croissante dans de nombreux sports majeurs. La conduite des activités économiques et commerciales liées à des événements sportifs exige le respect de certaines "*règles du jeu*" afin d'en assurer la mise en œuvre la plus appropriée et ordonnée possible. L'essence même du sport est que la compétition soit équitable. Cela est également vrai pour l'organisation d'un événement de l'importance de la Coupe du Monde de la FIFA où la fraude ne devrait pas avoir de place. De l'avis de la Formation arbitrale, il est donc essentiel que les autorités sportives ne montrent aucune tolérance face à la corruption sous toutes ses formes et la sanctionnent avec des peines suffisamment lourdes pour prévenir les velléités d'actes frauduleux que pourraient avoir certaines personnes égoïstes et peu scrupuleuses, motivées à satisfaire leurs intérêts personnels ou politiques. Au vu de ses fonctions au sein de la FIFA et de la CAF, l'Appelant était une cible évidente pour ceux qui cherchent à approcher et influencer des membres du Comité Exécutif de la FIFA, appelés à désigner le pays organisateur de la Coupe du Monde.

Lorsqu'elle évalue le degré de culpabilité de l'Appelant, la Formation arbitrale doit prendre en considération les éléments objectifs et subjectifs constitutifs de l'infraction, la gravité des faits ainsi que les dommages que le comportement de l'Appelant a causé à ceux qui sont directement et indirectement impliqués dans le processus d'attribution de la Coupe du Monde de la FIFA, à l'image de la FIFA et, plus généralement, au football.

En l'espèce, les diverses violations du CEF par l'Appelant doivent être considérées comme graves, au vu de la position qu'il occupait au moment des faits litigieux (membre du Comité Exécutif de la CAF, de la Commission des Arbitres de la CAF et de la

Commission des Arbitres de la FIFA), de la portée de son comportement fautif et des conséquences qui en ont découlé.

Pour résumer, il a été établi que l'Appelant a été impliqué dans un scandale de corruption, lié à la désignation du pays organisateur de la Coupe du Monde de la FIFA et qui a fait l'objet d'une importante couverture médiatique. Non seulement l'Appelant a agi de façon imprudente et négligente mais il a délibérément violé plusieurs dispositions du CEF. A au moins six reprises, il a accepté d'entrer en contact avec des personnes qui lui ont immédiatement fait part de leur intention de manipuler le résultat du processus d'attribution de la Coupe du Monde et qui ont cherché son soutien actif pour ce faire. Pour les raisons déjà exposées, le fait que l'Appelant n'ait concrètement jamais entrepris quelque démarche que ce soit ni reçu quelque avantage est dénué de pertinence. Est en revanche significatif le fait que l'Appelant était prêt à s'investir dans une activité illicite et que sa conduite était évidemment motivée par la poursuite d'un gain. Le fait qu'il était disposé à accepter les avantages du consortium pour la promotion du football au Mali plutôt que pour son usage personnel est sans importance, puisque dans les deux cas le même résultat était recherché: influencer de manière frauduleuse le processus d'attribution de la Coupe du Monde d'une façon susceptible de lui procurer des avantages personnels directs ou indirects. En outre, l'Appelant n'a pas signalé spontanément et immédiatement les tentatives de corruption des journalistes qui lui ont fait savoir sans ambiguïté leur intention d'acheter des votes de membres du Comité Exécutif de la FIFA. En audience devant le TAS, l'Appelant a cherché à se disculper en plaidant qu'il ignorait cette obligation de signaler, ce qui est hautement improbable au vu de sa longue expérience au sein de la FIFA et de la CAF. Pour les raisons déjà évoquées et au vu de l'ampleur de la fraude sportive envisagée par les prétendus représentants de *Franklin Jones*, le bon sens et son devoir de loyauté envers la FIFA imposaient à l'Appelant de couper immédiatement les contacts avec eux et de contrer une telle initiative frauduleuse.

Le comportement de l'Appelant est particulièrement répréhensible eu égard à sa position d'ancien membre du Comité Exécutif de la FIFA (fonction qu'il a occupée pendant neuf ans), d'ancien conseiller aux sports à la Présidence de la République du Mali, de membre du Comité Exécutif de la CAF, de la Commission des Arbitres de la CAF et de la Commission des Arbitres de la FIFA. A ce titre, l'Appelant ne pouvait pas ignorer la nature contraire à l'éthique et illégale des démarches des journalistes. En outre et en raison de sa position élevée au sein de la FIFA et de la CAF, il se devait de respecter scrupuleusement les règles éthiques et de servir de modèle de probité et de respectabilité, tant auprès de la CAF qu'auprès de la FIFA.

Compte tenu de l'importance de la Coupe du Monde de la FIFA, du niveau de cette compétition, des intérêts sportifs et financiers en jeu, les critères en matière de comportement, d'honnêteté, de compétence, d'objectivité, de loyauté et d'impartialité doivent être d'autant plus élevés que les personnes impliquées occupent des fonctions importantes. Le scandale de corruption dans lequel a été impliqué l'Appelant et, en particulier, les allégations relatives à la manipulation du processus d'attribution de la Coupe du Monde, ont indubitablement éclaboussé la réputation de la FIFA.

Pour fixer la peine, il convient notamment de prendre en considération les divers types de sanctions applicables, qui en l'occurrence sont la mise en garde, le blâme; l'amende (laquelle ne doit pas être inférieure à CHF 200 ou CHF 300 et ne peut dépasser CHF 1,000,000), l'interdiction de vestiaires et/ou de banc de touche, l'interdiction de stade et l'interdiction d'exercer toute activité relative au football. Ces sanctions peuvent frapper chacune des infractions condamnées par le CFE (soit ses articles 3, 9 al. 1 et 11 al. 1).

Comme source d'inspiration, il est intéressant d'observer que l'article 62 CDF (qui n'est pas applicable en vertu du principe de la *lex specialis*) prévoit ce qui suit en matière de corruption:

"1. Celui qui offre, promet ou octroie un avantage indu à un organe de la FIFA, à un officiel de match, à un joueur ou à un officiel, pour lui ou un tiers, afin d'amener cette personne à violer la réglementation de la FIFA sera puni:

a) d'une amende d'au moins CHF 10 000,

b) d'une interdiction d'exercer toute activité relative au football, et

c) d'une interdiction de stade.

2. La corruption passive (solliciter, se faire promettre ou accepter un avantage indu) est sanctionnée de la même manière.

3. Dans les cas graves et en cas de récidive, la sanction de l'al. 1b pourra être prononcée à vie".

En l'espèce, la Commission de Recours de la FIFA a confirmé les infractions stipulées dans la décision de la Commission d'Éthique de la FIFA mais a réduit la sanction à deux années d'interdiction d'exercer

toute activité liée au football à partir du 20 octobre 2010 (au lieu de trois années) et a ramené l'amende à CHF 7.500 (au lieu de CHF 10.000).

La Formation arbitrale ne trouve aucune circonstance atténuante dans le cas de l'Appelant, si ce n'est qu'il a exprimé des regrets pour l'atteinte portée à l'image de la FIFA, ensuite du battage médiatique notamment provoqué par ses rencontres téléphoniques avec les journalistes. En tout état de cause, l'Appelant a constamment nié toute malversation et systématiquement contesté une quelconque violation du CEF. L'Appelant soutient que compte tenu de ses antécédents irréprochables, la sanction prononcée à son encontre est disproportionnée. La Formation arbitrale ne met pas en doute que, avant les faits de la présente cause, la réputation de l'Appelant était intacte.

Dans son examen de la proportionnalité de la sanction, la Formation arbitrale a pris en compte un précédent du TAS où une suspension à vie a été prononcée à l'encontre d'un arbitre qui avait omis d'informer l'UEFA des contacts répétés qu'il avait eus avec une organisation criminelle, lesquelles lui avaient offert EUR 50,000 pour truquer un match de l'UEFA Europa League en novembre 2009 (CAS 2010/A/2172). Par ailleurs, la Formation relève que les décisions disciplinaires relatives aux protagonistes de l'affaire dite "*Concacaf/Jack Warner*" (voire *supra*) n'ont pas d'utilité dans le cas présent puisque la Formation a pu seulement prendre connaissance des dispositifs et méconnaît le faits pertinents. En outre, il s'agit de décisions rendues par une instance associative qui ne peuvent avoir la valeur jurisprudentielle qu'ont les sentences du TAS.

En application des articles 10 c) et 22 CDF, conjointement avec l'article 17 CEF, la Formation arbitrale estime que ne sont pas disproportionnées l'interdiction faite à l'Appelant d'exercer toute activité relative au football, au niveau national comme international et au plan administratif, sportif ou autre, pour une période de deux ans à partir du 20 octobre 2010, ainsi que l'amende de CHF 7,500. Au contraire, la Formation arbitrale considère ces sanctions comme étant relativement légères compte tenu de la gravité des infractions dont s'est rendu coupable l'Appelant. Par conséquent, la Formation arbitrale, statuant à l'unanimité, estime que la sanction attaquée doit être maintenue dans son intégralité, sans aucune modification.

Dès lors que la durée d'interdiction d'exercer toute activité relative au football excède six mois, la peine prononcée à l'encontre de l'Appelant n'est pas compatible avec le sursis requis par ce dernier (voir article 33 al. 2 CDF).

Au vu de ce qui précède, toutes requêtes et plus amples conclusions des parties doivent être rejetées.

Arbitration CAS 2011/A/2499
Albert Subirats v. Fédération Internationale de Natation (FINA)
24 August 2011

Swimming; doping (whereabouts filing failure); responsibility of the athlete for making accurate and complete whereabouts filings; responsibility of the anti-doping organization in the notification of the filing failures

Panel:
Mr. Michele Bernasconi (Switzerland), Sole Arbitrator

Relevant facts

Mr Albert Subirats (the "*Appellant*"), born on 25 September 1986, is a professional swimmer from Venezuela. He has been part of the Venezuelan national swimming team since 1999. He is a two times Olympic swimmer and won, inter alia, medals on 100 m butterfly at the 2006 Shanghai World Championships, 100 m butterfly at the 2007 World Aquatic Championships, Melbourne Australia, and 50 m and 100 m butterfly at the 2010 Dubai World Championships.

The Fédération Internationale de Natation (FINA; the "*Respondent*") is the international federation which promotes the development of five disciplines of aquatic sports throughout the world. Founded in 1908, FINA has today more than 200 members and is located in Lausanne, Switzerland. FINA has established and is carrying out, inter alia, a doping control program, both for in-competition as well as out-of-competition testing.

According to the rules regulating the doping control program of the FINA, i.e. the Doping Control Rules (the "*DC*"), FINA shall establish a FINA Registered Testing Pool of Competitors (the "*FINA RTP*"). Each swimmer in the FINA RTP has the obligation to keep FINA informed about where he or she can be met for unannounced testing.

The Appellant belongs to the FINA RTP and, since 2006, he has always submitted his whereabouts forms to the Venezuelan Swimming Federation (VSF), i.e. the Appellant's national federation, which is a member of the FINA. Until 2010, the VSF has always forwarded the Appellant's whereabouts forms to FINA on time. However, VSF did not forward the Appellant's whereabouts information to FINA for the first quarter of 2010, the fourth quarter of 2010 and the first quarter of 2011, so committing 3 filing failures.

FINA notified the Appellant's filing failures to VSF by letters of 25 February 2010, 11 November 2010 and 2 February 2011, requesting VSF to inform the Appellant about the failures. However, VSF failed to forward the three FINA communications to the Appellant on time. In fact, all three letters were forwarded from VSF to the Appellant for the first time on 2 February 2011, i.e. only after the third violation had already occurred. No failure notification was ever sent directly by FINA to the Appellant.

Thereinafter, FINA initiated a proceeding against the Appellant for the violation of the DC. On 7 May 2011, the FINA Doping Panel held a hearing in Lausanne and on 21 June 2011 the FINA Doping Panel issued a decision (the "*FINA Decision*") whereby it was determined that the Appellant had committed an anti-doping rule violation and it was ordered a one year period of ineligibility commencing on 7 May 2011 and ending on 6 May 2012. In addition, all results obtained by the Appellant after 3 January 2011 have been disqualified and any medals, points and prizes achieved during that period have been forfeited.

On 9 July 2011, the Appellant filed with the Court of Arbitration for Sport (CAS) his Statement of Appeal against the FINA Decision. The Appeal Brief was filed on 24 July 2011, i.e. within the deadline as extended by the CAS with letter dated 14 July 2011.

On 9 August 2011, the Respondent filed its Appeal Answer within the deadline fixed by the CAS with letter dated 26 July 2011.

Upon the Parties request, no hearing was held on this matter and the present decision was taken on the basis of the written submissions, following the expedited proceedings.

Extracts from the legal findings

A. Applicable law and applicable regulations

The DC in their version of January 2009 apply to the present proceedings in accordance with § 1 DC.

According to § 5.4.3 DC, FINA shall establish a FINA Registered Testing Pool of Competitors. It shall be the obligation of each swimmer, i.e. each "Competitor" in the Registered Testing Pool as well as that Competitor's Member Federation, to keep FINA informed about where the Competitor can be met for unannounced Testing. It is the responsibility of each Competitor in the Registered Testing Pool to report the required whereabouts information to the FINA office no later than the first Monday of the months of January, April, July and October, respectively (§ 5.4.4 DC). According to § 2.4 DC, the athlete has to comply with the requirements regarding Competitor availability for Out-of-Competition Testing, including the filing of the required whereabouts information as well as the participation to the tests. Any combination of three missed tests and/or filing failures within an eighteen-month period as determined by Anti-Doping Organizations with jurisdiction over the Competitor shall constitute an anti-doping rule violation. For violations of § 2.4 DC (*i.e.* Whereabouts Filing Failures and/or Missed Tests), the period of Ineligibility shall be at a minimum one (1) year and at a maximum two (2) years, based on the Competitor's degree of fault (§ 10.3.3 DC).

The World Anti-Doping Code International Standard for Testing (the "*ISF*") is a mandatory International Standard developed as part of the World Anti-Doping Program. The ISF January 2009 are applicable in accordance with Clause 1 ISF.

According to Clause 11.3.5 ISF, an athlete may only be declared to have committed a filing failure where the responsible anti-doping organization can establish each of the following:

a) that the athlete was duly notified (i) that he/she was designated for inclusion in a Registered Testing Pool, (ii) of the consequent requirement to make whereabouts filings; and (iii) of the consequences of any failure to comply with that requirement;

b) that the athlete failed to comply with that requirement by the applicable deadline;

c) (in the case of a second or third filing failure in the same quarter) that he/she was given notice of the previous filing failure in accordance with Clause 11.6.2(a) and failed to rectify that filing failure by the deadline specified in that notice; and

d) that the athlete's failure to comply was at least negligent. For these purposes, the athlete will be presumed to have committed the failure negligently upon proof that he/she was notified of the requirement yet failed to comply with it. That presumption may only be rebutted by the athlete establishing that no negligent behavior on his/her part caused or contributed to the failure.

An athlete in a Registered Testing Pool may choose to delegate the making of some or all of his/her whereabouts filings required under Clauses 11.3.1 and 11.3.2 (and/or any updates to his/her whereabouts filings required under Clause 11.4.3) to a third party, such as (for example, and depending on the rules of the responsible anti-doping organization) a coach, a manager or a national federation, provided that the third party agrees to such delegation (Clause 11.3.6 ISF). In all cases, however, each athlete in a Registered Testing Pool remains ultimately responsible at all times for making accurate and complete whereabouts filings as required by Clause 11.3, whether he/she makes each filing personally or delegates this to a third party (or a mixture of the two). It shall not be a defense to an allegation of a filing failure under Clause 2.4 that the athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirements (Clause 11.3.7(a) ISF).

B. Discussion

Uncontested is the fact that the Appellant always sent the whereabouts information on time to VSF, but that VSF did not forward such information to the Respondent, neither for the first quarter of 2010, nor for the fourth quarter of 2010, nor for the first quarter of 2011. In addition, uncontested and supported by the documents in the file is the fact that the Respondent notified all three filing failures by letters of 25 February 2010, 11 November 2010 and 2 February 2011 to VSF, only. No failure notices were ever sent by Respondent to the Appellant directly. Also uncontested is the fact that VSF forwarded these communications to the Appellant for the first time on 2 February 2011, *i.e.* after the third violation had already occurred.

It is correct that it is the responsibility of each swimmer registered in the FINA RTP to report the required whereabouts information to the FINA office (§ 5.4.4 and § 2.4 DC). Even when the athlete chooses to delegate whereabouts filings to a third party, he

or she remains ultimately responsible at all times for making accurate and complete whereabouts filings (Clause 11.3.6 and Clause 11.3.7(a) ISF). In particular, it is important that the athlete that delegates such assignments to a third party makes sure that such third party effectively forward the whereabouts information to the anti-doping organization on time. The rationale of such rule is quite obvious: no athlete shall be in position to somehow "*hide*" behind a third party, chosen by the athlete himself as a kind of personal "*courier*". As the rule itself states: it shall not be a defense to an allegation of a filing failure under Clause 2.4 that the athlete delegated such responsibility to a third party and that third party failed to comply with the applicable requirements (Clause 11.3.7(a) ISF).

It is also correct that an athlete may only be declared to have committed a filing failure when the responsible anti-doping organization duly notified to the athlete that he or she failed to comply with that requirement by the applicable deadline and, in the case of a second or third filing failure in the same quarter, that he/she was given notice of the previous filing failure and failed to rectify that filing failure by the deadline specified in that notice (Clause 11.3.5 ISF). In particular, the anti-doping organization is responsible for making an accurate notification to the athlete. If it decides to notify the filing failure communication to the athlete's national federation instead of directly to the athlete, it has to make sure that the athlete receives such communication from the national federation. If the athlete does not receive the filing failure communication from the national federation, he or she may not be declared to have committed any filing failure. Again, the rationale of this is also quite obvious: the athlete must be informed adequately so that he or she has a true opportunity to correct the filing deficiencies that have emerged.

In the case under consideration, the Appellant chose to delegate whereabouts filings to VSF. Despite this choice, he remained ultimately responsible at all times for making accurate and complete whereabouts filings to the FINA. For this reason, as mentioned above, the Appellant should have ensured that the VSF was acting correctly, for example by asking the VSF to confirm the fact that the whereabouts information was filed on time.

On the other side, FINA never notified a filing failure communication to the Appellant. In particular, FINA did not send the letters concerning the filing failures directly to the Appellant, but only to the VSF, and the Appellant did not receive any such communications from the VSF before his third failure. As a consequence, the Appellant was unaware of all filing failures until the third filing failure occurred and was not in a position to repair on that.

In accordance with the ISF rules, a similar restriction shall apply when the anti doping organization chooses as recipient of the failure notices a third party, even if such third party is the one chosen by the athlete to make his or her filing. In other words, it shall not be a defense to an allegation of non-receipt of one or more failure notices that the anti- doping organization delegated such responsibility to a third party and that third party failed to comply with the applicable requirements.

Thus, since it is undisputed that Appellant did not receive any failure notice before the third whereabouts filing failure, the existence of a second and a third violation cannot be reproached to the Appellant.

For these reasons, no anti-doping rule violation in the sense of § 2.4 DC (Whereabouts Filing Failures and/or Missed Tests) exists and, as a consequence, the Appeal is upheld, the FINA Decision overturned, the second and third filing failure for the fourth quarter of 2010 and the first quarter of 2011 are cancelled and the Appellant's results reinstated.

The above conclusion, finally, makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the parties. Accordingly, all other prayers for relief are rejected.

Arbitration CAS 2011/O/2574
Union of European Football Association (UEFA) v. FC Sion/Olympique des Alpes SA
31 January 2012

Football; eligibility of players for a UEFA competition; arbitration agreement by reference; legal interest to obtain declaratory relief; competence of the UEFA to review the qualification of players for participation in UEFA competitions; restraint of competition justified by legitimate business reasons; abuse of dominant market position; proportionality of the declaration of forfeit; proportionality of assessing the eligibility of players only once a protest is filed; competence to lift provisional measures and necessity of a formal lifting

Panel:
Mr. Hans Nater (Switzerland), President
Mr. Patrick Lafranchi (Switzerland)
Mr. Jean Gay (Switzerland)

Relevant facts

A. The Parties

1. The Main Parties

UEFA is an association incorporated under Swiss law with its headquarters in Nyon, Switzerland. UEFA is the governing body of European football, dealing with all questions relating to European football and exercising regulatory, supervisory and disciplinary functions over national associations, clubs, officials and players of the European continent.

UEFA is one of the six continental confederations of the Fédération Internationale de Football Association (FIFA), which is the governing body of football on worldwide level and has its registered office in Zurich, Switzerland.

One of UEFA's tasks is to organise and conduct international football competitions and tournaments at European level. In this context, UEFA organises each year the UEFA Europa League (UEL), which is a competition gathering professional football teams from all over the continent of Europe.

OLA is a professional football club competing, under the sportive name "*FC Sion", in the Swiss "Super League*" and constituted as a limited company (société anonyme) under Article 620 of the Swiss Code of Obligations (CO) with the corporate name Olympique des Alpes SA, having its registered office in Martigny-Combe, Switzerland. It is affiliated with the Swiss Football Association (SFA) as member club no. 8700.

It is to be noted that the Football Club Sion Association is an amateur football club with registered office in Sion, Switzerland, constituted as an association in the sense of Article 60 *et seq.* of the Swiss Civil Code (CC). FC Sion Association is affiliated with the SFA as member club no. 8040 and its first team takes part in an amateur championship, which is the sixth tier national division in Switzerland.

2. The Third Parties

Atlético is a professional football club competing in the top Spanish championship. In the current season 2011/2012, Atlético takes part in Group I of the UEL together with three other European clubs.

Udinese is a professional football club competing in the top Italian championship. In the current season 2011/2012, Udinese takes part in Group I of the UEL together with three other European clubs.

Celtic is a professional football club competing in the top Scottish championship. In the current season 2011/2012, Celtic takes part in Group I of the UEL together with three other European clubs.

Stade Rennais is a professional football club competing in the top French championship. In the current season 2011/2012, Stade Rennais takes part in Group I of the UEL together with three other European clubs.

B. Factual Background

The present dispute finds its origins in February 2008, when Respondent hired the goalkeeper E. of the Egyptian Football Club Al-Ahly Sporting Club for a duration expiring at the end of 2011.

On 12 June 2008, Al-Ahly Sporting Club summoned E. and "*FC Sion*" to the FIFA Dispute Resolution Chamber (the "*FIFA DRC*") asking for their condemnation for breach of contract and inducement of breach of contract respectively.

On 16 April 2009, the FIFA DRC ordered E. and "*FC Sion*" jointly to pay a compensation fee in a considerable amount and banned "*FC Sion*" from registering any new players for a period of two entire consecutive registration periods.

On 18 June 2009, FC Sion Association appealed against the FIFA DRC decision of 16 April 2009 to the Court of Arbitration for Sports (CAS).

On 7 July 2009, the Deputy President of the Appeals Arbitration Division of CAS granted an interim stay of the FIFA DRC's decision dated 16 April 2009. As the summer registration period lasted from 10 June to 31 August, OLA was allowed to transfer players during that period in 2009, which it actually did.

On 1 June 2010, CAS declared the appeal of FC Sion Association against the FIFA DRC decision inadmissible, considering that FC Sion Association lacked legal interest and standing to appeal, as OLA was affected by the decision of the FIFA DRC of 16 April 2009 and not FC Sion Association.

On 1 July 2010, FC Sion Association appealed to the Swiss Federal Tribunal (the "*Federal Tribunal*") and asked for the annulment of the CAS Award dated 1 June 2010. Together with its appeal, FC Sion Association filed a request for stay of the execution of the FIFA DRC decision dated 16 April 2009.

On 14 July 2010, the Qualification Commission of the SFL issued two decisions, whereby FC Sion/ Olympique des Alpes SA was permitted to register players during the then on-going summer registration period. In this respect, the Qualification Commission reasoned that the CAS Award was notified on 14 June 2010, *i.e.* at a point in time when the summer registration period had already started.

On 14 July and 11 October 2010, the President of the 1st Civil Court of the Federal Tribunal dismissed the request of FC Sion Association to stay the execution of the FIFA DRC decision of 16 April 2009.

On 12 January 2011, the Federal Tribunal dismissed the appeal.

OLA did not register any new players during the winter registration period of the season 2010/2011.

On 7 April 2011, FIFA reminded OLA as well as the SFA that the sporting sanction imposed on OLA would also be applicable during the following summer registration period, lasting from 10 June 2011 until 31 August 2011, and requested them to act accordingly.

On 9 May 2011, Mr Christian Constantin, President of OLA, signed the Entry Form UEL 2011/2012 on behalf of OLA. On 10 May 2011, a representative of SFA signed the Entry Form.

On 17 May 2011, OLA asked FIFA DRC to render a formal decision regarding the registration periods for which the ban on registration of new players was to be applied.

In its decision of 25 May 2011, the FIFA DRC stated that its decision of 16 April 2009 must be *"interpreted in the sense that OLA was banned from registering any new players also for the entire registration period, either nationally or internationally, following the notification of this decision"*.

On 17 June 2011, OLA filed an appeal against the FIFA DRC decision of 25 May 2011 to CAS, which was later withdrawn.

On 5 and 6 July 2011, OLA requested from the SFL the registration of the following new players: Messrs S., P., J., B., M. and G. ("*the Players*").

On 13 July 2011, the Deputy President of the CAS Appeals Arbitration Division dismissed OLA's request for suspension of the FIFA DRC decision of 25 May 2011.

On 15 July 2011, the SFL rejected OLA's request for registration of the Players, relying on the decision of the FIFA DRC dated 16 April 2009.

On 18 July 2011, OLA and the Players appealed against the SFL decision of 15 July 2011 to the SFL Appeals Tribunal.

On 29 July 2011, the SFL Appeals Tribunal notified the operative part of its decision whereby it dismissed the appeal of OLA and the Players and confirmed the SFL decision dated 15 July 2011.

On 2 August 2011, OLA appealed to CAS against the decision of the SFL Appeals Tribunal dated 29 July 2011, and filed a request for provisional measures.

On 3 August 2011, the Players filed a request for provisional and *ex-parte* provisional measures to the District Court of Martigny and St-Maurice, Switzerland, on the grounds that the decision of the

SFL Appeals Tribunal of 29 July 2011 violated their personality rights.

Also on 3 August 2011, the District Court of Martigny and St-Maurice ordered *ex-parte* provisional measures, according to which the Players shall not be barred from participating in official matches of OLA. Such measures were directed against FIFA and SFL, but not against UEFA, which was not a party to the proceedings.

On 4 August 2011, the SFL Appeal Tribunal notified its full written decision dated 29 July 2011 to the Parties.

On 5 August 2011, the SFL, referring to the order by the District Court of Martigny and St-Maurice of 3 August 2011, advised OLA that it can *"valablement, au regard de la SFL et/ou de la FIFA, faire jouer dans les matchs de football les corequérants S., P., J., B., M. and G., ce jusqu'à droit connu sur le sort de la requête de mesures provisionnelles"*. By letter of 25 August 2011, FIFA informed the Players that it also abided with this order.

On 5 August 2011, OLA withdrew its request for provisional measures, filed with its appeal to CAS of 2 August 2011.

On 8 August 2011, OLA withdrew its appeal to CAS against the FIFA DRC decision dated 25 May 2011.

On the same day, OLA submitted its UEL Player List A to UEFA, which included the Players, except S. This list was then confirmed by the SFA and approved by the UEFA Administration.

On 15 August 2011, OLA appealed to CAS against the decision of the SFL Appeals Tribunal dated 29 July 2011, notified on 4 August 2011.

On 17 August 2011, Claimant addressed a letter to Celtic and to the Scottish Football Association that stated the following: *"UEFA has been informed of the current situation, both by [SFA] and FIFA. The [SFA] has announced the players for FC Sion, including the players whose status was subject to discussions. It has confirmed to us that the players are qualified under their regulations. Therefore, UEFA has to consider that these players are eligible to participate in the UEFA Europa League 2011-12. Would it appear that players have been deemed as eligible, while their situation was in fact irregular, UEFA would certainly take appropriate steps against them and their club"*. In answer to their queries, UEFA referred Celtic and the Scottish Football Association to Articles 23 and 24 of the UEL Regulations *"which provide that a club may protest based on a player's eligibility to play, and that the case would then be heard by the UEFA Control and Disciplinary Body"*.

On 18 August 2011, OLA played a play-off match of the UEL 2011/2012 against Celtic. The match was played under protest filed by Celtic, on the grounds that OLA did not have the right to field some of the players who played the match, *i.e.* Messrs P., J., B., M. and G. ("*the litigious Players*"). The score of such match was 0-0.

On 25 August 2011, OLA played the second play-off match of the UEL 2011/2012 against Celtic. Such match was also played under protest, for the same reason as the first match. The score of such match was 3-1 for OLA.

On 1 September 2011, FIFA informed UEFA that five of the players fielded by OLA during the match against Celtic were not properly registered in accordance with the FIFA Regulations on the Status and Transfer of Players and had been qualified only further to the order issued by the District Court of Martigny and St-Maurice on 3 August 2011.

On 1 September 2011, the Players filed a request for *ex-parte* provisional measures to the District Court of Martigny and St-Maurice, again for breach of their personality rights, but this time directed against UEFA.

On 2 September 2011, the UEFA Control and Disciplinary Body (the "*UEFA CDB*"), considering that OLA fielded players who were not qualified in accordance with SFL's and FIFA's regulations, sanctioned OLA with two forfeit defeats for the matches played against Celtic in the UEL.

Also on 2 September 2011, the District Court of Martigny and St-Maurice dismissed the Players' request for *ex-parte* provisional measures against UEFA, considering that they had not proven a violation of their personality rights.

On 5 September 2011, the Players filed a new request to the District Court of Martigny and St-Maurice for *ex-parte* provisional measures against UEFA. In addition to their request of 2 September 2011, the Players asked for the reintegration of OLA in the UEL 2011/2012.

On 6 September 2011, OLA filed a request for provisional measures against UEFA before the State Court of the Canton of Valais submitting that UEFA violated Swiss competition law.

On 7 September 2011, the State Court of the Canton of Valais declared OLA's request for provisional measures against UEFA inadmissible, considering that it had no jurisdiction *ratione loci*.

On the same day, the District Court of Martigny and St-Maurice dismissed the Players' new request for *ex-parte* provisional measures against UEFA, on the ground that an illegal violation of their personality rights was not likely.

On 8 September 2011, OLA appealed to the UEFA Appeals Body against the decision of the UEFA CDB dated 2 September 2011 declaring the matches against Celtic in the UEL forfeit.

On 9 September 2011, OLA filed a request for *ex-parte* provisional measures against UEFA before the State Court of the Canton of Vaud submitting that UEFA violated Swiss competition law.

On 13 September 2011, the State Court of the Canton of Vaud granted OLA's request against UEFA, and ordered *ex-parte* provisional measures according to which UEFA was ordered to reintegrate OLA and the litigious Players in the UEL 2011/2012.

On the same day, the UEFA Appeals Body dismissed the appeal filed by OLA and confirmed the decision of the UEFA Control and Disciplinary Body dated 2 September 2011.

On 16 September 2011, Claimant requested the State Court of the Canton of Vaud to revoke its Order of 13 September 2011.

On 16 September 2011, OLA filed a request for conservatory and enforcement measures against UEFA before the State Court of the Canton of Vaud.

On the same day, the State Court of the Canton of Vaud issued an order forbidding UEFA to validate the results of Group I of the UEL 2011/2012.

By order of 20 September 2011, the State Court of the Canton of Vaud dismissed the Claimant's request for a revocation of its order of 13 September 2011.

On 26 September 2011, the UEFA Appeals Body notified its written decision dated 13 September 2011.

C. Summary of the Proceedings before the CAS

On 26 September 2011, UEFA filed a Request for Arbitration with CAS. As to the procedure, it requested CAS to order the consolidation of the proceedings should OLA appeal against any decision of UEFA. As to the merits it mainly requested CAS to declare that the UEFA Regulations and the disciplinary measures taken by UEFA against OLA did not violate Swiss Law. It appointed Professor Massimo Coccia as arbitrator.

On 27 September 2011, the CAS Court office forwarded the Request for Arbitration filed by UEFA to OLA and *inter alia* informed the Parties that the matter was assigned to the CAS Ordinary Arbitration Division.

In its letter of 3 October 2011, OLA informed CAS that it did not accept the jurisdiction of CAS and denied the admissibility of UEFA's Request for Arbitration. It requested an extension of the deadlines set forth by CAS in its letter of 27 September 2011. Further, it appointed Mr Jean Gay as arbitrator in case the requested time extensions were not granted. Finally, it requested that the language of the Arbitration be French allowing the Parties to file their submissions in French or English.

On 4 October 2011, OLA requested from CAS to be informed on the number of times Mr Coccia had previously been appointed as arbitrator by either UEFA or FIFA.

On 6 October 2011, the Parties were informed by the CAS Secretariat that (i) the language of the arbitration would be determined by the President of the Panel and the Parties were allowed to file, at least pending the constitution of the Panel, documents in French as well, (ii) the Panel, once constituted, would decide on the status of the procedure (expedited or not), (iii) the nomination by OLA of Mr Gay as a CAS arbitrator was noted and (iv) the request for an extension of the deadlines insofar as it concerned the Answer was granted to OLA.

On 7 October 2011, OLA informed CAS that it had filed, on 9 September 2011, a request for *ex-parte* and provisional measures before the State Court of the Canton of Vaud. It submitted that the Prayers for Relief in the proceedings were broadly connected (*connexes*) to those requested by UEFA in the present proceedings before CAS. As a consequence, OLA requested the suspension of the proceedings before CAS on the grounds that the proceedings before the State Court of the Canton of Vaud were initiated before those before CAS (*lis pendens*). It also underlined that its nomination of Mr Gay was conditional.

On 10 October 2011, OLA filed a copy of the order issued by the State Court of the Canton of Vaud of 27 September 2011, ordering Claimant to take any appropriate measures to integrate OLA in the UEL 2011/2012, to admit the Players and to forbid to pronounce a forfeit against Respondent for letting the Players participate.

On 10 October 2011, CAS informed the Parties that UEFA was given a short deadline to express

its position on OLA's request for a stay of the proceedings and invited Respondent either to confirm the designation of Mr Gay or appoint another CAS arbitrator. The Parties were informed that Mr Coccia declined to serve as an arbitrator for lack of availability, and Claimant was invited to appoint another CAS arbitrator.

On 11 October 2011, UEFA appointed Mr Luigi Fumagalli as arbitrator. In its letter of even date, UEFA objected to OLA's request for a stay of the proceedings before CAS.

On 14 October 2011, OLA requested the suspension of the proceedings before CAS and, if the request were dismissed, to rule on its competence to adjudicate the dispute. OLA submitted that CAS is neither an independent nor an impartial arbitral tribunal in cases involving UEFA or FIFA and requested the issuance of an interim decision on this issue. OLA requested a financial expertise on how football contributes to the financing of CAS and statistics in this regard. OLA also informed CAS that it would call several witnesses in this respect. OLA criticised the closed list of CAS arbitrators and, in this regard, appointed Mr Niels Sörensen, judge at the State Court of the Canton of Neuchatel, in replacement of Mr Jean Gay, previously appointed by OLA, and, on a subsidiary basis, requested to be provided with some statistics. Finally, OLA confirmed that it did not agree to take part in an expedited procedure.

On 14 October 2011, the Parties were informed by the Deputy President of the CAS Ordinary Arbitration Division that Mr Jean Gay was appointed as arbitrator for OLA.

On 14 October 2011, the Deputy President of the CAS Ordinary Arbitration Division issued an order dealing with OLA's request to suspend the CAS proceedings. It rejected OLA's request.

On 14, 17 and 18 October 2011, Atlético, Udinese, Celtic and Stade Rennais filed separate requests for intervention in the CAS proceedings, based on Article R41.3 of the CAS Code.

On 18 and 19 October 2011, UEFA submitted that the requests for intervention filed by the four clubs should be accepted based on Articles R41.3 and R41.4 of the CAS Code and the signed entry form to participate in the UEL 2011/2012.

On 20 October 2011, a *"Notice of formation of the Panel"* was sent to the Parties. The following arbitrators were appointed, in application of Articles R33 and R40 of the CAS Code:

President: Dr Hans Nater, Attorney-at-law in Zurich, Switzerland

Arbitrators: Professor Luigi Fumagalli, Attorney-at-law in Milan, Italy

Mr Jean Gay, Attorney-at-law in Geneva, Switzerland

On the same date at 7:38 pm, OLA requested an extension of the time limit, expiring that day, to submit its position on the requests for intervention. OLA requested a new time limit be fixed ending 28 October 2011.

On 21 October 2011, UEFA was informed that it was given a time limit until the same date at 5:00 pm to submit its observations on OLA's request.

Also on 21 October 2011, UEFA objected to OLA's request of even date.

Also on 21 October 2011, the Parties were informed by CAS that OLA was granted an extension of the time limit to express its position/observations on the requests for intervention until 24 October 2011.

On 24 October 2011, OLA filed four submissions regarding the requests for intervention of the four clubs participating in Group I of the UEL 2011/2012. OLA objected to all interventions.

Also on 24 October 2011, the Panel confirmed that the language of the proceedings was English, allowing the Parties *"to file their submissions either in French or in English as per their agreement"*. Furthermore, the Panel fixed the procedural calendar and informed the Parties that the request for a preliminary decision on jurisdiction had been deferred to the final award. The Panel informed the Parties that the hearing would be held on 24 November 2011.

On 25 October 2011, OLA requested the CAS Court Office to answer the following questions:

1. *A combien de reprises les arbitres Nater et Fumagalli ont-ils été nommés par (a) l'UEFA, (b) la FIFA, (c) l'une des associations nationales affiliées à l'UEFA? D'autre part, je souhaiterais également savoir à combien de reprises ils ont siégé dans des affaires impliquant les entités précitées.*

2. *Pourriez-vous m'indiquer la procédure suivie pour la désignation du président. En particulier, je souhaiterais savoir si les deux arbitres ont choisi librement ou s'ils l'ont fait parmi un choix limité proposé par une instance du TAS.*

On 25 October 2011, CAS, upon request by OLA, informed the Parties about the past activities of Dr Nater and Professor Fumagalli as CAS arbitrators. The Parties were also informed that Dr Nater was appointed as President of the Panel by mutual agreement of the two co-arbitrators.

On the same day, OLA addressed a letter to the International Council of Arbitration for Sport (ICAS) challenging Professor Fumagalli as arbitrator.

On 28 October 2011, the CAS Court office informed the Parties that Professor Fumagalli was actually appointed only once by UEFA in the last three years and invited OLA to declare if it wished to maintain the challenge in view of such information.

On 1 November 2011, OLA informed CAS that it maintained its challenge against Professor Fumagalli.

Also on 1 November 2011, UEFA filed its Statement of Claim and First Reply to the Exception of Lack of Jurisdiction.

On 2 November 2011, Professor Fumagalli informed CAS that he had decided to resign as arbitrator in order to favour a smooth resolution of the dispute, even though he strongly refuted OLA's grounds for his challenge.

On 4 November 2011, UEFA appointed Mr Patrick Lafranchi, Attorney-at-law in Bern, Switzerland, as arbitrator in replacement of Professor Fumagalli.

On 7 November 2011, the Parties were informed that Mr Lafranchi accepted his appointment and signed the *"Acceptance and Statement of Independence form"* and that the Panel was amended accordingly.

On 8 November 2011, the Panel issued four orders admitting Atlético, Celtic, Udinese and Stade Rennais as Third Parties (parties intéressées) to the present proceedings and invited the Parties to file their observations with respect to the rights which should be granted to the Third Parties.

On 10 November 2011, following a request made by OLA, the Parties were informed that Mr Lafranchi had been nominated three times since 2002 by either FIFA, UEFA, SFA and/or SFL and that he sat in seven Panels involving decisions by FIFA organs. In these cases, FIFA, UEFA, SFA and/or SFL were not involved as parties.

On the same day, following a request by OLA, Respondent was granted a time extension to submit its response.

On 11 November 2011, UEFA informed CAS that the Third Parties should be given full access to the CAS file, the right to file written submissions and the right to take part in the hearing.

On the same day, OLA reiterated that the four clubs should not be accepted as third parties. It further stated that the interventions of four new parties would affect its rights in the proceedings and that its Counsel would not be able to handle the increase of work incurred by the interventions. It requested the establishment of a new procedural calendar.

Also on 11 November 2011, the Third Parties submitted their position with regard to the rights which they should be granted in the proceedings, each of them concluding that they should be given access to the file, be allowed to file written submissions and be allowed to attend the hearing.

On 14 November 2011, the Panel issued the following decision with regard to the Third Parties' rights in the proceedings:

1) *The four interested parties will each receive a copy of the file, which has been mailed to them by DHL today.*

2) *The four interested parties are excluded from submitting written submissions unless formally requested by one of the main party [sic] by fax on or before 16 November 2011 at 4 pm in which case, the third parties requesting such submission will be invited to transmit by fax to the CAS and directly to the other parties at the latest on 21 November 2011 at 9 am a written summary of its pleadings limited to a maximum of 5 pages.*

3) *The four interested parties will in any event be allowed to attend the hearing and to plead during 15 minutes (max).*

4) *The four interested parties will not be allowed to make any requests on their own but only to support, if they wish, the main parties' requests.*

5) *The four interested parties who will attend the hearing can be represented by a maximum of one legal counsel and one representative of the club (who will have to sit at the back of the hearing room).*

On 14 November 2011, OLA filed its Response and requested the following evidentiary measures:

a) *Regarding the alleged financial links between football bodies and ICAS, respectively CAS:*
   - *production par la fondation du conseil international de l'arbitrage en matière de sport de ses comptes annuels: bilan, compte d'exploitation (ou PP) de 2000 à 2010;*

- *production par la fondation du conseil international de l'arbitrage des rapports annuels sur les comptes (du réviseur/du CIAS);*
- *audition en qualité de témoin de la (des) collaborateur(s) de X. SA qui ont effectué la révision des comptes de la fondation de 2000 à 2010;*
- *audition en qualité de témoin de M. Jean-Jacques Leu, c/o CIAS;*
- *audition en qualité de témoin de M. Joseph Blatter, FIFA, Zürich;*
- *expertise comptable pour laquelle il est proposé Z., Z. & Associés SA, Neuchâtel.*

b) *Regarding the alleged possibility for CAS Secretary General to have an influence on the Panel/on the issuance of a dispute*

OLA requested to hear, as witnesses
- *Matthieu Reeb, secrétaire général du TAS;*
- *Joseph Blatter, c/o FIFA, Zürich;*
- *Marco Villiger, c/o FIFA, Zürich;*
- *Gianni Infantino, c/o UEFA, Nyon.*

c) *Regarding the closed list of CAS arbitrators*

OLA requested the hearing of Matthieu Reeb and the filing of the following documents:

- *Production par le conseil de la fondation de tous les documents comportant des propositions d'arbitres provenant des fédérations sportives, en particulier de FIFA et UEFA (pour la liste générale et pour la liste football);*
- *Production par le même conseil de tous les documents en relation avec la désignation des arbitres intégrés dans les listes depuis l'adhésion du « monde du football » au TAS (liste générale et liste football);*
- *Production par le secrétaire général du TAS d'une liste de tous les arbitres ayant siégé depuis 2003 jusqu'à ce jour dans des affaires en relations avec la FIFA, l'UEFA et leurs associations affiliées (lorsque la partie est un joueur, un club, une association) avec indication de la partie qui l'a désigné et du nombre de causes où l'arbitre a siégé, ces informations devant comprendre notamment la production des données ci-dessus; si le TAS juge cette offre de preuve trop étendue, même réquisition en lien avec tous les arbitres suisses, et les arbitres Bernasconi, Haas, Coccia, et Pinto, D'autres offres de preuves seraient alors réservées en fonction du résultat.*

On 16 November 2011, Claimant filed its Final Reply to Exception of Lack of Jurisdiction.

Between 16 and 18 November 2011, all the Parties signed the Order of Procedure dated 15 November 2011. However, OLA emphasized that its Counsel had signed the order but not agreed to the proceedings as conducted.

On 21 November 2011, the fiduciary company X. SA informed OLA that in view of its obligation related to professional secrecy it would not be represented at the hearing.

Also on 21 November 2011, OLA transmitted to CAS the party-appointed expert report by Professor Walter Stoffel addressing questions related to competition law.

Also on 21 November 2011, OLA informed ICAS that it was challenging the independence of the co-arbitrators Jean Gay and Patrick Lafranchi.

On 22 November 2011, former Federal Tribunal Judge Jean-Jacques Leu informed OLA that he would not testify. Not being a member of the Board of the ICAS, Mr Leu felt he did not have the capacity to represent the ICAS Foundation and considered the best person to answer OLA's queries on the functioning of CAS was Mr Reeb.

On 23 November 2011, Mr Reeb, whose appearance as a witness was requested by OLA, informed the Parties that he would be available to appear as witness at the hearing. Attached to his letter, Mr Reeb filed a witness statement addressing issues of independence and impartiality of CAS which can be summarized as follows:

- It is well known that, after the recognition of CAS by FIFA, the number of cases submitted to CAS raised considerably.

- ICAS is financed by the whole Olympic Movement, *i.e.* IOC, International Federations, including FIFA, and the National Olympic Committees. This financing system was scrutinized in detail and validated by the Swiss Federal Tribunal in the *Lazutina* case. It is worth noting that UEFA is not part of the entities which finance ICAS.

- At the time of the *Lazutina* case, the IOC was financing 31,5% of the ICAS budget whereas FIFA is "only" financing 10,5% of the present ICAS budget. Therefore, the reasoning followed by the Swiss Federal Tribunal in the *Lazutina* case should be *a fortiori* applicable to the present case.

- The vast majority of football cases does not directly involve FIFA but clubs, players, coaches or agents. In such proceedings, the parties generally file an appeal regarding decisions rendered by FIFA,

without FIFA being a party in such procedures.

- Mr Reeb denies OLA's assertions that CAS needs football to exist. A simple explanation is that if CAS should "lose" the football cases, the situation would simply be the same as when FIFA was not recognizing CAS, *i.e.* before 2004.

- As to Article R59 of the CAS Code, Mr Reeb states that his intervention as General Secretary only relates to matters of pure form (clerical mistakes, standardisation of style with other CAS awards, etc.) and that he might draw the Panel's attention to CAS case law when the award to be rendered is manifestly not in line with such case law. Mr Reeb notes that his advice is not binding on the arbitrators.

- As to the list of arbitrators, Mr Reeb states that according to Article S14 of the CAS Code, in force in 2011, IOC, International Federations and National Olympic Committees can propose the nomination of arbitrators but ICAS has the final exclusive competence about such nominations. Following the *Lazutina* case, CAS decided to publish a short biography and the CV of all the arbitrators.

On 23 November 2011, ICAS Board dismissed OLA's petition to challenge Messrs Lafranchi and Gay as arbitrators.

Still on 23 November 2011, OLA, in view of the refusal of Messrs Blatter, Villiger, Infantino and the fiduciary company X. SA to testify before CAS, requested from the Panel to seek the assistance of the State Court in order to summon such persons to testify at the hearing, in application of Articles 375 para. 2 and 356 para. 2 of the Swiss Code of Civil Procedure (CCP). OLA further requested that the hearing be postponed.

Further to Mr Leu's letter dated 22 November 2011, OLA informed CAS on 23 November 2011 that it extended its request to the Panel to seek the State Court's assistance to subpoena Mr Leu.

Also on 23 November 2011, the Panel informed the Main and Third Parties of its decision to maintain the hearing date of 24 November 2011. The Panel further emphasized that Mr Reeb's witness statement addressed most of the issues raised by OLA in its answer, which *"may considerably reduce the discussion related to disputed facts and make the presence of witnesses and experts unnecessary"*. Finally, the Panel stated that it would consider all issues related to evidence at the outset of the hearing and, if necessary, it reserved its right to appoint a second hearing at a later stage in the event that further evidence should be produced.

On 24 November 2011, OLA requested that Mr Reeb's witness statement be removed from the file as the filing of a witness statement by a witness called upon by a party is not foreseen in the CAS Code and as this witness statement amounts to a written submission.

On 24 November 2011, a hearing took place at the CAS headquarters in Lausanne, Switzerland.

On 8 December 2011, the Panel informed the Parties that it dismissed all of the pending requests for production of documents and subpoena of witnesses filed by OLA, the grounds for the decisions would be given in the final award. The Panel further informed the Main and Third Parties that the evidentiary procedure was closed and that the final award would be issued on or before the 23 December 2011.

On 14 December 2011, the Main and Third Parties were informed that the Award, without grounds, would be notified to them on 15 December 2011.

D. Parties' Prayers for Relief

1. UEFA's Prayers for Relief

In its Statement of Claim and First Reply to Exception of Lack of Jurisdiction of 1 November 2011, Claimant requests that the Panel issue an award holding that:

Requests and prayers for relief

a) As to the merits:

(i) To declare that UEFA Regulations, and the Regulations of the UEFA Europa League 2011/2012 in particular, are not for themselves in violation of Swiss law nor constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular;

(ii) To declare that the disciplinary measures taken by UEFA against OLA pursuant to the Regulations of the UEFA Europa League 2011/2012 and the UEFA Disciplinary regulations are not in violation of Swiss law and are not constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular;

(iii) To confirm that OLA is not entitled to be reintegrated in the UEFA Europa League 2011/2012;

(iv) To declare that UEFA did not violate Swiss law nor breach in any manner OLA's personality rights or the personality rights of the six players by considering such six players ineligible as per the applicable UEFA regulations, the six players being Messrs S., P., J., B., M., and G.;

(v) To confirm that the players P., J., B., M., and G. shall not be permitted to participate in the UEFA Europa League 2011/2012 and the mentioned players as well as the player S. are not eligible in accordance with the applicable FIFA, UEFA and SFV/SFL regulations;

(vi) To consequently lift the provisional measures ordered by the Tribunal Cantonal of Vaud (Cour Civile) on 5 October 2011;

(vii) To deny any entitlement of Respondent against UEFA for compensation of damages;

(viii) To grant the Claimant any further or other relief that may be appropriate.

b) As to costs:

To order OLA to bear all costs of these arbitration proceedings and to compensate Claimant for all costs incurred in connection with this arbitration, including but not limited to the arbitration costs, arbitrator fees, and the fees and/or expenses of Claimant's legal counsel, witnesses and experts, in an amount to be shown.

2. OLA's Prayers for Relief

Together with its Response, OLA requested CAS to rule that:

1. *Décliner sa compétence*
2. *Déclarer irrecevable la requête de l'UEFA dans toutes ses conclusions.*
3. *Mettre les frais de l'arbitrage à la charge de l'UEFA.*

E. Hearing

A hearing was held in Lausanne on 24 November 2011.

At the beginning of the hearing, OLA reiterated its request that the Panel solicits the assistance of the State Court (Article 375 para. 2 CCP) in order to subpoena the witnesses called by OLA. UEFA's position in this regard is that the requested evidence is irrelevant as there is no doubt that CAS is an independent arbitral tribunal.

OLA requested again that Mr Reeb's witness statement be removed from the file and asked to be allowed to file the decision of the SFL Appeal Tribunal dated 21 November 2011 annulling the decision rendered by the SFL Disciplinary Commission pursuant to which the Players were suspended for five games.

The Panel informed the Parties that it would decide on OLA's procedural requests at a later stage, depending on the relevance of the requests.

The first witness heard was Mr Matthieu Reeb, Secretary General of CAS.

- Mr Reeb testified on the functioning and the procedural rules of CAS. He first confirmed the content of his witness statement filed on 23 November 2011.

- The witness explained the procedure to nominate arbitrators to appear on the list of CAS according to Article S14 of the CAS Code in force in 2011. 1/5th of the arbitrators are selected from among the persons proposed by the International Olympic Committee (IOC), 1/5th from among the persons proposed by the International Federations, 1/5th from among the persons proposed by the National Olympic Committees, 1/5th, after appropriate consultations, with a view to safeguarding the interests of the athletes and 1/5th from among persons independent from the aforementioned bodies. In this respect Mr Reeb admitted that the proportionality rule referred to in Article S14 of the CAS Code was not always followed, and that Article S14 of the CAS Code would be amended soon.

- With respect to the fact that the "*origin*" of the arbitrators was not publicly known, Mr Reeb testified that ICAS created in 2003/2004 a list of arbitrators to be appointed upon proposal of football entities. He noted that biographies of all the arbitrators were published on the CAS website, thus enabling the parties to check on possible conflicts of interest. Mr Reeb also testified that a simple request to CAS would allow a party to learn which entity proposed which arbitrator.

- Mr Reeb further testified that 1/3 of the arbitrators were often appointed, 1/3 occasionally and 1/3 very rarely. He referred to the freedom of each party to appoint an arbitrator of its choice.

- Mr Reeb testified that in the large majority of cases submitted to the ordinary procedure, *i.e.* except in

case of disagreement between the co-arbitrators, the Chairman of CAS Panels is appointed by the two arbitrators appointed by the parties.

- As to the number of Swiss arbitrators, Mr Reeb declared that there were approximately twenty arbitrators who were regularly appointed and that only a few were rarely appointed.

- Mr Reeb confirmed that in 2010, Article S18 of the CAS Code was amended and that according to that provision, CAS arbitrators could not represent parties as counsel before CAS anymore.

- Mr Reeb testified that if an arbitrator was challenged by a party, Swiss law was applied primarily and the IBA Guidelines on Conflicts of Interest in International Arbitration ("*IBA Guidelines*") were also taken into consideration.

- On cross-examination, Mr Reeb testified that Mr Michele Bernasconi was still an arbitrator. However he refused to answer the question whether his fees as arbitrator were paid to him on his personal or his law firm's bank account. Mr Reeb confirmed that Mr Bernasconi was in the "*top 10*" of the most frequently appointed arbitrators by parties at the CAS.

- OLA referred to the alleged cross nominations among a certain group of lawyers and arbitrators (Messrs Bell, Monteneri, Villiger and Haas in particular) and requested from Mr Reeb the statistics of "*cross nominations*" among those individuals. Mr Reeb testified that it was possible to give statistics on "cross nominations" among arbitrators, but that it would take some time to establish a list of such nominations.

- After consultation of the Parties, the Panel decided to accept Mr Reeb's written witness statement in the file.

The second person to be heard, Professor Marc Amstutz, professor of economic law at the University of Fribourg and Of Counsel for the law firm Bär & Karrer testified as a party-appointed expert. At the outset, Professor Amstutz emphasized that he did not have a labour contract with such law firm but was working "*free-lance*" with it. The President invited Professor Amstutz to tell the truth, subject to sanctions of perjury. Professor Amstutz affirmed, and confirmed his witness statement.

- Professor Amstutz testified that the Meca Medina case law is applicable to Switzerland as the rules contained in Swiss competition law with regard to the abuse of dominant market position are basically a "*copy-paste*" of the European regulations on the matter. In the Meca Medina case, the European Court of Justice set out the criteria to define a restriction of competition in sports matters, in essence legitimate goal, necessity and proportionality of the sanction.

- Following Meca Medina, Professor Amstutz concluded that the UEFA Appeal's Body Decision of 13 September 2011 did not result in a restraint of competition.

- Professor Amstutz finally stated that a subjective intent is not relevant as to the application of Article 7 of the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (the "*Swiss Cartel Act*" or "*CA*").

The President of the Panel asked the Main and Third Parties whether they had a fair chance to present their case. They affirmed, with one reservation: OLA insisted on the reservations made concerning the independence of CAS and its requests for production of documents and subpoena of witnesses.

Extracts from the legal findings

A. Jurisdiction of the CAS

In sports matters, the Federal Tribunal looks with a certain "*benevolency*" at the formal requirements arbitration agreements have to meet in order to facilitate efficient dispute resolution through specialized courts such as the CAS (Decision of the Federal Tribunal [DFT] 4A_246/2011, dated 7 November 2011, para. 2.2.1). The Federal Tribunal is holding arbitration agreements concluded by mere reference as valid (DFT 4P.230/2000, dated 7 February 2001). Statutes are merely a specific instance of arbitration agreements by reference (Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 2nd ed., Bern 2010, para. 432 *et seq.*, 446).

The Panel reaches the conclusion that this dispute falls under the special provisions applicable to the Ordinary Arbitration Procedure according to Article R38 *et seq.* of the CAS Code. The arbitration agreement entered into by the Main Parties is based on (i) the Entry Form to the UEL 2011/2012 signed by OLA, (ii) Articles 2.07 and 32.01 of the UEL Regulations and (iii) Articles 59 *et seq.* of the UEFA Statutes.

In domestic arbitration, the formal validity of the arbitration agreement is determined by Article 358

CCP. The substantive validity of the arbitration agreement is subject to the law chosen by the parties, *i.e.* the Entry Form, the UEL Regulations and the UEFA Statutes.

The Parties are in disagreement on the jurisdiction *ratione materiae* of CAS, whether UEFA's claim is subject to the ordinary arbitration procedure of CAS. According to Article 61 (2) of the UEFA Statutes, CAS shall only intervene in its capacity as an ordinary court of arbitration if the dispute does not fall within the competence of a UEFA organ. However, the rule does not specify the disputes which fall within the competence of a UEFA organ.

The Federal Tribunal has already had the opportunity to analyse and interpret Articles 61 and 62 of the UEFA Statutes, in particular Article 61 (2), and reached the following conclusion: *(…) il ressort du commentaire relatif aux propositions de modification des Statuts de l'UEFA adoptées le 23 mars 2006 à Budapest par le Congrès que le nouvel al. 2 de l'art. 61 de ces Statuts devait créer un lien avec le nouvel art. 62 al. 1 "en établissant que les décisions prises par un organe de l'UEFA, parce qu'elles peuvent déjà être soumises au TAS statuant en tant qu'instance d'appel, ne sauraient être portées devant le TAS statuant en tant que juridiction arbitrale ordinaire" (document cité, § 4 ad art. 61). Sur le vu de cette remarque, il paraît raisonnable d'interpréter l'art. 61 al. 2 des Statuts de l'UEFA en ce sens que la compétence* ratione materiae *du TAS en tant que tribunal arbitral ordinaire fait défaut chaque fois que la voie de l'appel est ouverte pour le saisir en qualité de tribunal arbitral d'appel, en application de l'art. 62 al. 1 des Statuts de l'UEFA* (DFT 4A_392/2008, dated 22 December 2008).

The Panel understands the holding of the Federal Tribunal in the sense that disputes are not subject to the CAS Ordinary Arbitration Procedure whenever the object of the claim is only the challenge of a decision by an UEFA organ open for appeal to CAS.

In order to examine whether CAS is competent *ratione materiae* the Panel considers the following:

(i) On 9 September 2011, OLA filed a request for *ex-parte* provisional measures before the State Court of the Canton of Vaud alleging a breach of Swiss and EC competition law by UEFA. OLA submitted that by excluding it from the UEL 2011/2012 UEFA abused its dominant position in the "market" (the organization of football competitions in Europe).

(ii) OLA's claim lodged at the State Court of the Canton of Vaud is based on the CA, not Article 75 CC.

(iii) On 13 September 2011, OLA filed a *Requête de conciliation* with respect to the decision of the UEFA Appeals Body dated 13 September 2011 with the District Court of Nyon, based on Article 75 CC and containing the following statement: *"La procédure devant la Cour civile est examinée au regard de la Loi fédérale sur les cartels alors que la présente procédure est fondée sur l'art. 75 CC".*

(iv) Indeed the procedures conducted by the State Court of the Canton of Vaud (and consequently by CAS) and the District Court of Nyon have different objects: the one before the State Court of the Canton of Vaud relates to the question whether UEFA, by excluding OLA from the UEL 2011/2012, abused its dominant market position with regard to Swiss competition law and whether OLA should be reintegrated in such competition. The procedure before the District Court of Nyon is a pure appeal, based on Article 75 CC, against UEFA Appeals Body decision dated 13 September 2011.

(v) UEFA's Claim was triggered by the provisional measures rendered by the State Court of the Canton of Vaud dated 16 November 2011 requesting UEFA to reintegrate OLA in the UEL 2011/2012 on the grounds that UEFA abused its dominant market position by excluding OLA from that tournament.

As a result of the above, CAS is competent *ratione materiae* to adjudicate the dispute in the Ordinary Arbitration Procedure. Article 61 UEFA Statutes, in conjunction with the Entry Form for the UEL 2011/2012, is to be considered as a binding arbitration clause between the Parties and therefore constitute the basis for the jurisdiction of the Panel, acting as an ordinary arbitration tribunal, to hear the claim filed by UEFA. The Panel reaches the conclusion that the arbitration proceedings at hand are subject to Article 38 *et seq.* of the CAS Code. Hence, it does not follow OLA's submission that UEFA, by lodging its claim, circumvented the CAS arbitration procedure.

OLA's argument related to the alleged lack of independence and impartiality of CAS will be addressed below.

B. Procedural Requests

1. Mr Reeb's witness statement

OLA requested Mr Reeb's witness statement of 23 November 2011 to be removed from the file. UEFA disagreed.

The Panel, after consultation of the Parties in the course of the hearing, decided to reject OLA's request to remove Mr Reeb's witness statement from the file on the grounds that according to Article R44.3 (2) of the CAS Code, the Panel may at any time order the production of additional documents or the examination of witnesses. The Panel notes that it is standard practice for witnesses heard in international arbitration proceedings to submit witness statements prior to the hearing.

2. Evidence requested by OLA

In view of the refusals of Messrs Blatter, Infantino, Villiger and Leu to testify at the hearing OLA requested that the Panel seek the assistance of the state courts in order to summon such persons to testify at the hearing, in application of Article 375 para. 2 and Article 356 para. 2 CCP. In addition, OLA requested the filing by ICAS of *"ses comptes annuels, bilan, compte d'exploitation (ou PP) de 2000 à 2010"* and of the *"rapports annuels sur les comptes (du réviseur/du CIAS)"* as well as a chartered accountancy.

On 8 December 2011, the Panel informed the Parties that OLA's request to seek the assistance of the state courts in order to summon the aforementioned witnesses and all other procedural requests filed by OLA were dismissed. The Panel takes the view that the documents requested by OLA are irrelevant. It is satisfied by Mr Reeb's detailed testimony that this Panel and CAS in general meet the requirements of independence and impartiality required by Swiss law. In a recent decision, the Federal Tribunal stated that the CAS is providing adequate guarantee for an independent and impartial dispute resolution (DFT 4A_246 2011, dated 7 November 2011).

According to Article R44.3 (1) of the CAS Code: *"[a] party may request the Panel to order the other party to produce documents in its custody or under its control. The party seeking such production shall demonstrate that the documents are likely to exist and to be relevant"*. The CAS Code is however silent with respect to orders directed at third persons.

Furthermore, according to Article R44.2 (5) of the CAS Code: *"the Panel may limit or disallow the appearance of any witness or expert, or any part of their testimony, on the grounds of irrelevance"*.

In casu, the evidence and testimonies requested by OLA are related to three allegations, (i) les *"[l]iens financiers entre les instances du football (FIFA et ses affiliées) et le CIAS, respectivement le TAS"*; (ii) la *"[p]ossibilité pour une personne extérieure – le secrétaire général – d'influencer la formation/d'influencer l'issue du litige"*; and (iii) la *"[l]iste fermée des arbitres"*.

2.1 The financial links between the world of football and CAS

The evidence requested by OLA *"visent notamment à établir: (i) la manière dont le football contribue au financement du CIAS/TAS, (ii) l'évolution du budget du TAS depuis l'adhésion du football, (iii) la part du football dans les recettes du TAS de 2000 à 2010 et (iv) les conséquences financières pour le TAS d'un retrait éventuel du football. Leur administration est nécessaire pour démontrer la dépendance financière du TAS face au monde du football. L'audition de M. Blatter a pour but d'établir les circonstances et les négotiations menées entre FIFA et CIO, aboutissant à l'abandon du TAF au profit du TAS. Ces preuves sont pertinentes"*.

The Panel is of the opinion that the information provided by the CAS Secretary General answered all the questions raised by Respondent.

According to the statement of the Secretary General, FIFA's budget participation is by far lower than the contribution of the IOC at the time the Federal Tribunal rendered the Award in the *Lazutina* case (ATF 129 III 445). Mr Reeb stated that FIFA is not a party in the present proceedings and the financial links between CAS and the world of football can in no way jeopardize the Panel's independence and impartiality.

In 2003, the Federal Tribunal rendered a landmark decision confirming that CAS is independent from the IOC (ATF 129 III 445). It noted that CAS is not "*the vassal*" of the IOC and is sufficiently independent to render awards comparable to awards of state courts. The Federal Tribunal reached this conclusion by analysing in detail the functioning of CAS and ICAS. In this decision the Federal Tribunal also confirmed that the system of the closed list of arbitrators, as adapted in 1994, meets the constitutional requirements of independence and impartiality applicable to arbitral tribunals.

The Panel underlines here that, according to CAS Secretary General's statement, upon which the Panel sees absolutely no reasons not to rely on, the part of the CAS budget that comes from FIFA is by far less important than the one coming from the IOC when the *Lazutina* award was issued, and (ii) FIFA is not a party to the present proceedings and, (iii) the financial links between CAS and the world of football can therefore in any event not jeopardize the Panel's independency and impartiality towards either the Claimant UEFA, which does not contribute at all to the funding of ICAS, or the Respondent.

2.2 Article R46 (1) of the CAS Code

According to such provision: *"Before the award is signed, it shall be transmitted to the CAS Secretary General who may make rectifications of pure form and may also draw the attention of the Panel to fundamental issues of principle. Dissenting opinions are not recognized by the CAS and are not notified".*

OLA' s position in this regard is that *"[d]ans son principe même, cette possibilité instituée par le règlement autorisant le secrétaire général à demander au Tribunal arbitral de «revoir» sa sentence ne peut qu'aboutir à la conclusion qu'une «circonstance extérieure à la cause est susceptible d'influer l'issue du litige» (ATF 129 III 454). Cet élément a aussi été relevé par la Cour d'Appel de Bruxelles dans l'affaire «Keisse» comme étant contraire à 6 §1 CEDH".*

The Panel first notes that the quotation of the Federal Tribunal in *Lazutina* is not applicable to the case at hand, as it was made in the context of the challenge of an arbitrator. Furthermore the reference to a decision rendered by a Belgian court in the *Keisse* case is also irrelevant, first because such decision was not filed and commented on. Besides, according to Mr Reeb's witness statement and confirmed by UEFA at the Hearing that decision seems to have been squashed by a higher Belgian court.

Furthermore, Mr Reeb stated in his witness statement that his intervention only relates to matters of pure form (clerical mistakes, standardisation of style with other CAS awards, etc.). Moreover, he might also draw the Panel's attention to CAS case law when the award about to be rendered is manifestly not in line with such case law and that the Panel has not motivated its decision in this regard. The "*influence*" of the CAS Secretary General is therefore limited to a power of suggestion which does not affect the freedom of the Panel.

In view of the information provided by the CAS Secretary General, the Panel holds that the examination of other witnesses with regard to the role of the Secretary General according to Article R46 of the CAS Code is not necessary.

2.3 The closed list of arbitrators

With this respect, OLA made, in its Response, the following procedural requests:

(…) production par le conseil de la fondation de tous les documents comportant des propositions d'arbitres provenant des fédérations sportives, en particulier de FIFA et UEFA (pour la liste générale et pour la liste football).

Production par le même conseil de tous les documents en relation avec la désignation des arbitres intégrés dans les listes depuis l'adhésion du «monde du football» au TAS (liste générale et liste football).

Production par le secrétaire général du TAS d'une liste de tous les arbitres ayant siégé depuis 2003 jusqu'à ce jour dans des affaires en relation avec la FIFA, l'UEFA et leur association affiliées (lorsque la partie est un joueur, un club, un association) avec indication de la partie qui l'a désigné et du nombre de causes où l'arbitre a siégé, ces informations devant comprendre notamment la production des données ci-dessus; si le TAS juge cette offre de preuve trop étendue, même réquisition en lien avec tous les arbitres suisses, et les arbitres (sic !) Bernasconi, Haas, Coccia et Pinto. D'autres offres de preuves seraient alors réservées en fonction du résultat.

Témoin: Matthieu Reeb, secrétaire hors conseil de la fondation.

Again, the Panel relies on the *Lazutina* decision, which approves the so-called "*closed list*". Moreover, the IBA Guidelines (point 3.1.2) provide an exception: *"for certain specific kinds of arbitration, such as maritime or commodities arbitration, to draw arbitrators from a small, specialized pool. If in such fields it is the custom and practice for parties frequently to appoint the same arbitrator in different cases, no disclosure of this fact is required where all parties in the arbitration should be familiar with such custom and practice".* The Panel is of the opinion that sports law is a kind of arbitration subject to this exception provided for the IBA Guidelines.

The Panel is satisfied with the information provided for by the CAS Secretary General.

2.4 Conclusion

In view of all the above, the Panel hereby confirms its decisions of 8 December 2011, to dismiss all procedural requests including the request to subpoena witnesses.

C. Independence and Impartiality of the CAS

OLA submits that CAS cannot adjudicate this dispute as it is not an independent and impartial arbitral tribunal.

The Panel disagrees referring to the Federal Tribunal's reasoning in the *Lazutina* decision (see para. 32).

The Panel concludes that CAS is an independent and impartial arbitral tribunal and, accordingly, confirms the jurisdiction of CAS in the case at hand.

D. UEFA's Prayers for Relief

1. Admissibility

It is OLA's submission that UEFA's Prayers for Relief on the merits are not admissible. It contends that there is neither a legal interest of UEFA to obtain the declaratory relief nor any uncertainty concerning UEFA's rights. OLA addresses each prayer for relief substantiating the reasons for considering each and every prayer inadmissible ("*irrecevable*").

In its Final Reply to Exception of Lack of Jurisdiction of 16 November 2011, UEFA submits the following:

According to Swiss case law, a request for declaratory relief is notably admissible when Claimant is threatened by an uncertainty concerning either its rights or those of third parties, and that such uncertainty can only be clarified with a declaratory award précising the existence and content of the legal relationship [ATF 123 414 par. 7b; ATF 120 II 20 par. 3a]. The interest of Claimant to obtain such declaratory relief exists anytime its future actions or those of third parties are potentially limited because of the uncertainty of the legal relationship between the parties [ATF 136 III 102 para 3.1; ATF 135 III 378 par. 2.2; ATF 133 III 282 par. 3.4, JdT 2008 I 147; ATF 131 III 319 par. 3.5, SJ 2005 I 449; ATF 123 III 414 par. 7b, JdT 1999 I 251]. This case law, developed before the implementation of the Swiss Code of Civil Procedure, is still fully relevant and applicable under the new federal procedure [MCF, FF 2006, p. 6901; Gehri, BSK ZPO, N 8 ad Article 59].

In the case at hand, Claimant does not need to call for a "public interest", as this case is not about a public administrative matter, but is a civil litigation opposing the Claimant to the Respondent, with a legitimate interest (a "schutzwürdiges Interesse") of Claimant (as well as of the four intervening clubs) to have a decision on the merits. Therefore, the jurisprudence quoted by Respondent (page 26 of the Response) is totally irrelevant and non-applicable.

The decision of the Swiss Federal Tribunal quoted by Respondent, ATF 137 II 199, refers to determination in a public administration procedure and directed to a public administrative authority/ "Verwaltungsverfahren"). Additionally, the decision refers to Article 25 of the Swiss Federal law on Administrative Procedure ("VwVG"), which states that the relevant condition is the existence of a legitimate interest ("schutzwüridges Interesse") of the claiming party. Therefore, the jurisprudence quoted by Respondent is of no help to it.

The interest of UEFA is legitimate and obvious: there is presently a provisional decision of a tribunal, the Cantonal Tribunal of Vaud, that alleges that Claimant has violated Swiss cartel law. As indicated, that statement and the consequences linked to it shall be confirmed (as Respondent probably hopes) or denied (as Claimant is confident to be able to prove).

The Federal Tribunal requires that there is a legal interest by the claimant to obtain declaratory relief, specifying that such legal interest does not merely pertain to abstract, theoretical legal issues but to concrete right and duties (ATF 137 II 199 consid. 6.5). The Federal Tribunal denies a legal interest if a party is merely seeking jurisdiction (so-called "*forum running*") (ATF 131 III 319 consid. 3; cf. Oberhammer P., in: Oberhammer P. (ed.), Kurzkommentar ZPO, Basel 2010, CPC 88 N 23 with further references; Schenker U., in: Baker & McKenzie (ed.), Schweizerische Zivilprozessordnung, Bern 2010, CPC 88 N 2; Morf R., in: Gehri/Kramer (ed.), Kommentar Schweizerische Zivilprozessordnung, Zürich 2010, CPC 59 N 21; Mohs F., in: Gehri/Kramer (ed.), Kommentar Schweizerische Zivilprozessordnung, Zürich 2010, CPC 88 N 2). In exceptional situations, the declaratory relief may relate to legal relations with third parties not involved in the proceedings (Bohnet F., in: Bohnet F. [et al.], Code de procédure civile commenté, Bâle 2011, Art. 88, N 6-8). In a decision related to competition law, the Federal Tribunal decided that a party in an investigation of the Competition Commission only has the right to receive a declaratory judgment if there is an interest in such a judgment concerning not abstract, theoretical question but concrete rights and duties (*"(…) ein entsprechendes schutzwürdiges Feststellungsinteresse, das nicht bloss abstrakte, theoretische Rechtsfragen, sondern nur konkrete Rechte oder Pflichten zum Gegenstand hat"*; ATF 137 II 199 consid. 6.5).

1.1 UEFA's Prayer for Relief (a)/(i):

"To declare that UEFA Regulations, and the Regulations of the UEFA Europa League 2011/2012 in particular, are not for themselves in violation of Swiss law nor constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular".

The Panel takes the view that this Prayer for Relief is inadmissible, as it addresses an abstract legal issue. The Panel follows OLA's conclusion that UEFA lacks a legal interest, as the request does not pertain to concrete rights and duties of the Parties.

1.2 UEFA's prayer for relief (a)/(ii):

"To declare that the disciplinary measures taken by UEFA against OLA pursuant to the Regulations of the UEFA Europa League 2011/2012 and the UEFA Disciplinary regulations are not in violation of Swiss law and are not

constitutive of an abuse of a dominant position pursuant to Swiss competition law and to the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition in particular".

It is OLA's submission that UEFA has no legal interest in prayer for relief (a)/(ii) as it is merely seeking jurisdiction by forum running. The Panel reaches the conclusion that prayer for relief (a)/(ii) aims at a negative declaratory award with regard to an abstract legal issue, *i.e.* the compatibility between its disciplinary regulations and disciplinary measures with Swiss law. On this ground, the Panel declares prayer for relief (a)/(ii) as inadmissible.

However, at this point the Panel wishes to stress that if this request for relief is not admissible the examination of the Parties' submissions on this point will have to be made in order to assess the merits of others requests for relief that are admissible: OLA has not filed an appeal against the UEFA Appeal's Body's decision of 13 September 2011 with CAS. CAS expresses its view on the validity of that decision only in view of its assessment on whether UEFA abused its dominant market position. This issue, which lies at the heart of the case, may be decided differently depending on whether UEFA violated the UEL Regulations by declaring the matches against Celtic forfeit leading to OLA's consequent elimination from the UEL 2011/2012. The section B of the present award will therefore be dedicated to the qualification of the Players in order for the Panel to decide on the Claimant's requests for relief on which it has a very concrete interest.

Since the Panel already considers this request for relief inadmissible, there is no need to further assess the other arguments put forward by OLA in support.

1.3 UEFA's prayer for relief (a)/(iii):

"To confirm that OLA is not entitled to be reintegrated in the UEFA Europa League 2011/2012".

The Panel concludes that this prayer for relief is admissible, as UEFA has a legitimate interest to clarify the uncertainty whether OLA has the right to be reintegrated into the UEL or not. If the Panel were to decide that OLA should be integrated in the UEL 2011/2012 the whole tournament would have to be reorganized. UEFA's rights to render disciplinary measures are at stake.

The Panel's view is supported by its assessment that UEFA has a legitimate interest that the issue of integration and reintegration respectively is clarified, as the State Court of the Canton of Vaud in its decision of 5 October 2011 on conservatory measures, was of the view, that UEFA breached Swiss Cartel Law.

1.4 UEFA's prayer for relief (a)/(iv):

"To declare that UEFA did not violate Swiss law nor breach in any manner OLA's personality rights or the personality rights of the six players by considering such six players ineligible as per the applicable UEFA regulations, the six players being Messrs S., P., J., B., M., and G.".

The Panel concludes that this prayer for relief is inadmissible, as it addresses the relationship between UEFA and the Players who are not involved in the proceedings at hand and cannot be qualified as an exceptional situation justifying the admissibility of the present relief in spite of the absence of the Players. Besides, in its decision dated 16 November 2011 the Tribunal Cantonal of the Canton of Valais lifted the ruling of the Court of Martigny et St.-Maurice dated 3 August 2011 ordering FIFA and SFL to communicate to OLA that the Players are entitled to play.

1.5 UEFA's prayer for relief (a)/(v):

"To confirm that the players P., J., B., M., and G. shall not be permitted to participate in the UEFA Europa League 2011/2012 and the mentioned players as well as the player S. are not eligible in accordance with the applicable FIFA, UEFA and SFV/SFL regulations".

Again, the Panel finds that this prayer for relief is inadmissible as it concerns an abstract legal issue. As the qualification or non-qualification of the Players is concerned, see above and below.

1.6 UEFA's prayer for relief (a)/(vi):

"To consequently lift the provisional measures ordered by the Tribunal Cantonal of Vaud (Cour Civile) on 5 October 2011".

In domestic arbitration, the state court or the arbitral tribunal can order provisional measures in order to avoid in particular that the disputed claims of the parties may be compromised or even frustrated while proceedings are pending (Bohnet F., in: Bohnet F. [et al.], Code de procédure civile commenté, Bâle 2011, Art. 268, N 2-3).

With regard to domestic arbitration, Article 374 para. 1 CCP states the following: *"L'autorité judiciaire ou, sauf convention contraire des parties, le tribunal arbitral peut, à la demande d'une partie, ordonner des mesures provisionnelles, notamment aux fins de conserver des moyens de preuve".*

In the case at hand, OLA requested, and obtained, conservatory measures by decisions rendered by the State Court of the Canton of Vaud dated 13 September 2011 (*ex-parte* interim measures) and 5 October 2011 (provisional measures).

Provisional measures can be modified or revoked in accordance with Article 268 CCP, which states:

"Les mesures provisionnelles peuvent être modifiées ou révoquées, s'il s'avère par la suite qu'elles sont injustifiées ou que les circonstances se sont modifiées.

L'entrée en force de la décision sur le fond entraîne la caducité des mesures provisionnelles. Le tribunal peut ordonner leur maintien, s'il sert l'exécution de la décision ou si la loi le prévoit".

As to the question of which authority is competent to deal with a request to modify or revoke the provisional measures ordered, legal scholar states that *"La compétence matérielle relève en principe du droit cantonal. Sauf réglementation contraire, si le tribunal a été saisi au fond, c'est lui qui est compétent pour modifier des mesures prises par un autre juge avant le dépôt de la demande au fond"* (Bohnet F., in: Bohnet F. [et al.], Code de procédure civile commenté, Bâle 2011, Art. 268, N 9).

In the case at hand, a case is pending before CAS in which the prayers for relief demonstrate that it is the same claim as the one introduced by OLA before the State Court of the Canton of Vaud. Such fact is recognized by OLA in its letter to CAS dated 7 October 2011, in which it states: *"(…) en date du 9 Septembre 2011, Olympique des Alpes S.A. a déposé une requête devant le Tribunal cantonal vaudois, dont les conclusions sont largement connexes à celles prises par l'UEFA dans la présente procédure arbitrale".*

Furthermore, the State Court of the Canton of Vaud stated that CAS was the competent authority to decide on the merits of the case (Order on provisional measures rendered on 5 October 2011 by the State Court of the Canton of Vaud, p. 16).

As the competent authority to decide on the merits of the case, the Panel has therefore, in principle, the competence to lift the provisional measures ordered by the State Court of the Canton of Vaud in the case at hand.

However, as stated by Article 268 para. 2 CCP, the provisional measures are moot once a final decision is taken on the merits.

In this regard, the same author (Bohnet F., in: Bohnet F. [et al.], Code de procédure civile commenté, Bâle 2011, Art. 268, N 12-13) states that *"avec le prononcé final et complet (sur la recevabilité ou le fond, Article 236) entré en force, les mesures provisionnelles tombent, et ce, que la demande ait été admise, partiellement ou entièrement, ou qu'elle ait été rejetée".* Such position is confirmed by a majority of Swiss legal scholars, which state that a formal lifting of the conservatory measures is not necessary (Sprecher Th., in: Spühler/Tenchio/ Infanger (ed.), Basler Kommentar – Schweizerische Zivilprozessordnung, Basel 2010, CPC 268, N 32; Zürcher J., in: Brunner/Gasser/Schwander (ed.), ZPO, Schweizerische Zivilprozessordnung, Kommentar, Zürich/St. Gallen 2011, CPC 268, N 15; Treis M., in: Baker & McKenzie (ed.), Schweizerische Zivilprozessordnung, Bern 2010, CPC 268, N 3; Rohner/Wiget, in: Gehri/Kramer (ed.), Kommentar Schweizerische Zivilprozessordnung, Zürich 2010, CPC 268, N 4; Ehrenzeller S. K., in: Oberhammer P. (ed.), Kurzkommentar ZPO, Basel 2010, CPC 268, N 6; Huber L., in: Sutter-Somm/ Hasenböhler/ Leuenberger (ed.), Kommentar zur Schweizerischen Zivilprozessordnung [ZPO], Zürich/Basel/Genf 2010, CPC 268, N 12).

However, if third parties are affected by conservatory measures, a formal lifting of the measures should be considered. Moreover, a third party having an interest can request a formal lifting of the conservatory measures (Zürcher, *op.cit.*, CPC 268, N 16; Treis, *op.cit.*, CPC 268, N 3; Rohner/Wiget, *op.cit.*, CPC 268, N 4). Another author is even of the opinion that a formal lifting is appropriate (Sprecher, *op.cit.*, CPC 268, N 32).

In view of the above, the Panel concludes that UEFA's prayer for relief (a)/(vi) is admissible.

1.7 UEFA's prayer for relief (a)/(vii):

"To deny any entitlement of Respondent against UEFA for compensation of damages".

UEFA seeks to receive a declaratory award stating that OLA is not entitled to compensation or damages from UEFA, which is not admissible if there are no concrete rights or duties.

As UEFA does not mention any particular grounds or facts related to such claim, the Panel concludes that such claim shall be declared inadmissible.

1.8 UEFA's prayer for relief (a)/(viii):

"To grant the Claimant any further or other relief that may be appropriate".

This prayer for relief lacks specificity. It is upon

Claimant to indicate its prayers for relief.

As this prayer for relief has not been substantiated, the Panel concludes that it is inadmissible.

2. Qualification of the Players

OLA submits that the UEFA Appeal's Body erroneously based its decision of 13 September 2011 on the assumption that the Players were not qualified to play the matches against Celtic. It underlined that the State Court of the Canton of Vaud, in its order of 5 October 2011, approving OLA's request for provisional measures, confirmed that the Players were qualified to play the games against Celtic.

The following issues are in point:

a) Was UEFA allowed to review the eligibility of the players following Celtic's protest?

b) Was OLA banned from registering new players in the summer transfer period 2011/2012?

2.1 Was UEFA allowed to review the eligibility of the players following Celtic's protest?

It is OLA's position that the FIFA Regulations assign the primary competence regarding the eligibility of players to the SFA and the SFL. According to OLA, the competence shifts to FIFA only in case the previous club does not agree to release the player. OLA notes that the Players were released by their previous clubs and, therefore, FIFA did not have jurisdiction to decide on the qualification of the Players. OLA further submits that FIFA and UEFA do not have any competence with regard to the qualification of players. OLA contends that the Players were eligible as the SFL declared the player to be qualified. Moreover, OLA asserts that UEFA, in its letter of 17 August 2011, confirmed that the qualification requirements according to Article 18 of the UEL Regulations had been met. Finally OLA submits that UEFA could not rely on the FIFA DRC's decision of 25 May 2011 on the grounds that the CAS declared the decision non-enforceable.

UEFA's position with respect to the qualification of the Players for the UEL 2011/2012 is that both of its organs applied the applicable rules correctly. In its decision of 13 September 2011, UEFA Appeals Body stated that: *"According to paragraph 18.01 of the UEL regulations in order to be eligible to participate in UEFA club competitions, players must be registered with UEFA to play for a club within the time limits and must fulfil all the conditions set out in the provisions of the regulations. (…) Paragraph 18.02 of the UEL regulations states: «Players must be duly registered with the association concerned in accordance with the association's own rules and those of FIFA, notably the FIFA Regulations on the Status and Transfer of Players»* [emphasis added]. *Each club must announce its players to its association, by means of a duly signed list (para. 18.04). The association then submits the list to UEFA. UEFA can examine questions of player eligibility (para. 18.06). Articles 23 and 24 of the UEL regulations give the clubs the possibility to file protests in relation to player and Article 14bis(3) DR, in particular, provides for a match to be declared forfeit if an ineligible player is fielded, as long as the opposing club files a protest".*

2.1.1 Letter from UEFA dated 17 August 2011

It is OLA's view that the letter of 17 August 2011 is a formal decision on authorization pursuant to Article 18.06 of the UEL Regulations and that this decision is binding and can no longer be amended. The Panel does not follow OLA's reasoning.

The eligibility to play in UEFA club competitions is defined in Articles 18.01 *et seq.* of the UEL Regulations. Article 18 reads as follows:

18.01 In order to be eligible to participate in the UEFA club competitions, players must be registered with UEFA within the requested deadlines to play for a club and must fulfil all the conditions set out in the following provisions. Only eligible players can serve pending suspensions.

18.02 Players must be duly registered with the association concerned in accordance with the association's own rules and those of FIFA, notably the FIFA Regulations on the Status and Transfer of Players.

(…)

18.05 The club bears the legal consequences if it fields a player whose name does not appear on list A or list B or who is not eligible to play for some other reason.

18.06 The UEFA administration decides on eligibility to play. Contested decisions are dealt with by the controlling and disciplinary chamber.

In view of the position of its Appeals Body, UEFA concludes that it can freely review the eligibility of players fielded by a club in the UEL 2011/2012, whenever a protest is filed by the opponent club.

In their submissions, UEFA and the Third Parties insisted on the fact that for international competitions like UEL 2011/2012, which includes the participation of more than 50 countries, the principle of equality among participants should be preserved. If the only competent authorities to review the registration of

players were the national federations, it would not be possible to achieve equality.

It appears that UEFA was allowed to review the qualification of the players registered by their club to participate in the UEL 2011/2012. In view of the hundreds of players qualified it seems obvious that UEFA cannot review the qualification of each player. Therefore, the acceptance of the list with the registered players filed by the clubs cannot be seen as recognition that the players were validly qualified. The acceptance of the list is simply the acknowledgment that the submission was made in the form required.

However, through the possibility offered to the clubs to file a protest in case a player's qualification is disputed, UEFA can verify whether the player is qualified or not. This procedure guarantees a fair and equal application of the FIFA Regulations with regard to the qualification of players taking part in the UEL 2011/2012.

The Panel notes that the possibility to file protests in relation to player-eligibility according to Article 23 and 24 of the UEL Regulations is a strong indication for admitting UEFA's right to review the players' qualification. As a matter of fact a club can protest against a player's qualification only after knowing the names of the players fielded by the opponent club, hence after transmission of the players' list of the opponent club. Was the acceptance of the players' list already to constitute a final decision on eligibility to play, the provisions of Articles 23 *et seq.* UEL Regulations would no longer be applicable as the decision which was taken could no longer be changed, even if an opposing club were to lodge a protest.

As an interim conclusion, it must therefore be noted that Article 18.06 of the UEL Regulations is to be interpreted in the sense that UEFA is entitled to decide on the eligibility of players. The argument put forward by OLA according to which the letter of 17 August 2011 constitutes a formal decision is not convincing as the acceptance of the list of players is not a decision pursuant to Article 18.06 of the UEL Regulations. The list merely serves to indicate the names of the players to be forwarded to the opponent club.

In addition, UEFA expressly stated in its letter of 17 August 2011 that no decision on the Players' eligibility had been taken and that, if the Players were ineligible, the sanction mechanism would apply. The following statement was contained in this letter:

"Would it appear that players have been deemed as eligible while their situation was in fact irregular, UEFA would certainly take appropriate steps against them and their club".

The letter of 17 August 2011 clearly shows that UEFA reserves the right to take legal action should it transpire that the Players are not eligible.

Based on the above, the Panel concluded that OLA cannot derive any arguments in its own favour from the letter of 17 August 2011.

2.1.2 Competence of FIFA or of UEFA

OLA takes the view that under the applicable regulations only the national associations are authorized to decide whether players are eligible to play. It submits that it is within the competence of FIFA to decide on the eligibility of the players.

OLA submits that UEFA must abide the decision taken by a national association granting permission to play and cannot deviate from that decision. As the players were authorized to play by the SFL/SFA, it believes that UEFA is bound by that decision.

However, it must be noted that Articles 18.01 and 18.02 of the UEL Regulations provide that registration, with a national federation, in accordance with the federation's own rules and those of FIFA, is one of the conditions for the players' eligibility.

In the case at hand, the Players had been provisionally registered by SFL based on the *ex-parte* interim measures ordered by the District Court of Martigny and St-Maurice on 3 August 2011, which were directed against FIFA and SFA/SFL. Similar requests directed against UEFA were rejected.

If a third federation, such as the SFL/SFA, (provisionally) authorises a player to play on the basis of a court order, UEFA is indeed not bound by such authorization. The UEL Regulations provide that a player is eligible to play and must be registered with the association concerned on the basis of its own provisions and those of FIFA. However, the Panel notes that the SFL registered the Players only based on the court order on provisional measures.

Moreover, the Panel's interpretation of the applicable rules complies with sports criteria, *i.e.* to establish uniform regulations applicable equally to all clubs. In order to guarantee equality of the competitors, UEFA must be able to review the decisions of other organisations.

It results from the above that UEFA had the authority and was entitled to review the Player's eligibility upon the protests by competitors. It was authorized to state on the ineligibility of the Players based on the applicable regulations.

2.2 Was OLA banned from registering new players in the summer transfer period 2011/2012?

On 16 April 2011, FIFA sanctioned OLA with a ban from registering any new players for a period of two entire consecutive registration periods. In its decision dated 1 June 2010, CAS made clear that it was OLA, and not FC Sion Association which was the subject of FIFA's decision and which shall therefore respect the above-mentioned sanction. The decision of the CAS was confirmed by the Federal Tribunal on 12 January 2011.

It appears that OLA did not register new players for only one entire transfer period, *i.e.* the winter registration period in the 2010/2011 season.

On 25 May 2011, following a request from OLA, the FIFA DRC issued a decision (interpretation) confirming that OLA was barred from registering new players during the following registration period, *i.e.* the summer registration in the season 2011/2012. In its decision, the FIFA DRC stated in particular that *"the DRC noted that the only entire registration period, during which the Swiss club had served the sanction, was the registration period lasting from 16 January 2010 until 15 February 2010. By contrast, during the registration period lasting from 16 January 2011 until 15 February 2011, the petitioner had been able to register players without restriction, and during the summer registration periods from 10 June until 31 August of the years 2009 and 2010, the Swiss club had had more than half of the relevant registration periods at its disposal to register players"*. The FIFA DRC concluded that as OLA only abode by one entire registration ban, it should be barred from registering new players during the following transfer period, *i.e.* the summer registration period in the season 2011/2012.

The reasoning by FIFA DRC is supported by the CAS award addressing the issue in a similar situation in the following terms: *"S'agissant de la période d'interdiction, la Formation relève que le Club même a confirmé avoir pu procéder à des transferts durant la période de juillet et août 2007 et ce malgré le retrait de sa requête d'effet suspensif. Il en résulte que la période d'interdiction n'a pas encore commencé. La Formation considère ainsi qu'il se justifie de confirmer l'interdiction d'enregistrer de nouveaux joueurs nationaux ou internationaux pour les deux périodes de transfert, à compter de la notification de la présente décision"* (CAS 2007/A/1233 & 1234, para. 67).

It must be noted that, on 8 August 2011, OLA withdrew its appeal to CAS against the FIFA DRC ruling of 25 May 2011 (cf. above). The ruling was final and binding, as OLA was banned from registering new players from 10 June to 31 August 2011 regarding international transfers and from 10 June to 30 September 2011 regarding national transfers. The Panel rejects OLA's submission that the transfer ban periods had already ended a long time ago.

OLA submitted that the FIFA DRC decision of 25 May 2011 was neither binding nor directly applicable. At first glance it seems that the CAS supports OLA's view:

"Le Président de la Chambre arbitrale d`appel du TAS a rejeté la demande d`effet suspensif déposée par Olympique des Alpes SA, estimant qu'elle était sans objet en raison du défaut de caractère exécutoire de la décision appelée".

It is not a matter for this Panel to decide whether the FIFA DRC's decision of 25 May 2011 is enforceable. The crucial question in the case at hand is whether OLA violated any transfer ban periods or not. It is the Panel's view that, if OLA fielded players hired during the period of the transfer ban, these players cannot be considered as duly registered, as the registration would violate the FIFA Regulations on the Status and Transfer of Players. The fact is that a transfer ban for the transfer period in Summer 2011 was imposed upon OLA by FIFA on 16 April 2009 as confirmed by the interpretation of 25 May 2011. This decision is final and binding.

Since the Panel does not rely upon the SFL Appeal Tribunal decision of 29July/4 August 2011 to reach its conclusion with respect to the litigious Players' ineligibility, it will not further assess the Parties' arguments related to this decision.

The Panel takes the view that the UEFA Appeal's Body decision dated 13 September 2011 is valid on the grounds that OLA has been banned from registering any new players in the summer transfer period in 2011.

In view of the above, the Panel concludes that UEFA was allowed to review the eligibility of the Players following Celtic's protests and rightly declared the two games of OLA against the latter club lost by forfeit.

3. OLA is not entitled to be reintegrated in the UEFA Europa League 2011/2012

3.1 Arguments of the Parties

3.1.1 OLA's Arguments

OLA submits that UEFA abused its dominant market position by excluding OLA from the UEL 2011/2012 on the false grounds that its players were ineligible. OLA notes that UEFA violated its own statutes and regulations as well as Article 7 CA by rendering forfeit sanctions. Finally, OLA submits that the only reason for its exclusion by UEFA lies in the fact that OLA's six players addressed themselves to the civil courts.

3.1.2 UEFA's Arguments

UEFA opposes the reintegration of OLA into the 2011/2012 tournament and considers the forfeit sanctions rendered by UEFA Appeal's Body on 13 September 2011 lawful both under EC and Swiss competition law. UEFA submits that the sanctions imposed on OLA were appropriate, legitimate sporting sanctions with the purpose to protect the stability of the contracts, fairness and the integrity of the competition. UEFA submits that the reason why two matches of OLA against Celtic FC have been sanctioned as forfeit, twice 0:3, is a normal, ordinary, proper, justified and not abusive decision. According to UEFA's submission, the decisions were made by two independent disciplinary bodies, based on the undisputed fact that OLA fielded some players that had not been transferred nor registered in conformity with the applicable regulations. UEFA further submits that its rules and decisions are in conformity with Swiss and EC competition law. UEFA emphasises that the FIFA Regulations on the Status and Transfer of Players of their application are legitimate. In addition, UEFA submits that, as the organiser of the UEL 2011/2012 it has the right and legitimate interest to establish rules regarding the participation in this competition. Finally, UEFA disputes having sanctioned OLA because their players addressed the civil court.

3.2 The relevant provisions of the Swiss Cartel Act

Hereinafter, the Panel outlines the relevant provisions of the CA and continues its reasoning by addressing the following issues: (i) is UEFA an undertaking according to Article 2 CA? (ii) What is the relevant market and does UEFA hold a dominant market position? (iii) Has UEFA abused its dominant market position?

The relevant provisions read as follows (Zurkinden/Trüeb, Das neue Kartellgesetz, Handkommentar, Zurich 2004, p. 209 *et seq.*):

Article 2 CA (Scope):

"(…)

1bis. Whoever requests or offers goods or services in the marketplace, independent of the legal or organizational structure, shall be deemed to be an 'undertaking'.

(…)".

Article 4 CA (Definitions):

"(…)

2. The term 'undertakings having a dominant position in the market' means one or more undertaking being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, offerors or offerees) in the market.

(…)".

Article 7 CA (Illicit practices of undertakings having a dominant position)

"1. Practices of undertakings having a dominant position are deemed illicit if such undertakings, through the abuse of their position, prevent other undertakings from entering or competing in the market or if they discriminate against trading partners.

2. Such illicit practices may in particular include:

a. a refusal to enter into a transaction (e.g. refusal to supply or buy goods);
b. a discrimination of trading partners with regard to prices or other conditions of trade;

(…)".

3.3 UEFA is an undertaking according to Article 2 CA

Whoever offers goods or services in the marketplace, independent of the legal or organizational structure, shall be deemed to be an undertaking (Article 2 para. 1bis CA).

An undertaking is an entity that participates in the economical process as producer of goods or services, irrespective of its legal or organisational structure (Lehne J., in: Amstutz/Reinert (ed.), Basler Kommentar – Kartellgesetz, Basel 2010, CA 2, N 9). It follows that an association according to Article 60 *et seq.* CC such as UEFA can constitute an undertaking in the sense of the Article 2 para. 1bis CA (Lehne *op.cit.*, CA 2, N 13).

The UEL 2011/2012 is an international sports competition between European football clubs. By participating at the UEFA Europe League 2011/2012 the football clubs pursue financial interests. UEFA, by organising the UEL 2011/2012 in a professional manner, is seeking to maximise its profits. To this end, UEFA issues every year specific regulations that apply to all football clubs aiming to participate in the UEL. Moreover, UEFA controls the marketing of the UEL 2011/2012 as well as the selling of the television rights and the distributions of the proceeds generated with the UEL 2011/2012.

It results from the above that UEFA qualifies as an undertaking in the sense of Article 2 para. 1bis CA. This conclusion is in line with the considerations of the Swiss Competition authority which had ruled already in 1998 that the Swiss Football League has to be considered as an undertaking in the sense of Article 2 CA (RPW 1998/4, p 567 *et seq*., para. 12).

3.4 Market definition and Claimant's dominant market position

The *relevant product market* covers all goods or services which the trading partners consider to be substitutable (Köchli/Reich, in: Baker & McKenzie (ed.), Handkommentar Kartellgesetz, Bern 2007, CA 4, N 42 with further references; Borer J., Wettbewerbsrecht I, 3rd edition, Zurich 2011, CA 5, N 10; Reinert/Bloch, in: Amstutz/Reinert (ed.), Basler Kommentar – Kartellgesetz, Basel 2010, CA 4, N 104 *et seq*.). The market definition has to be conducted from the trading partners' point of view. In the case at hand, the relevant product market is the international sports competition between European football clubs. There are no other football competitions in Europe comparable to the UEL and the UEFA Champions League. The competitions on the national level, e.g. the competitions organised by the Swiss Football League, cannot be considered as a substitute for the international competitions of the UEL 2011/2012, as they differ considerably with respect to their economical and performance potential.

The *relevant geographic market* covers the area in which the goods or services of the relevant product market are offered or demanded (Köchli/Reich, *op.cit*., CA 4, N 44; Borer, *op.cit*., CA 5, N 14). Since UEFA offers participation in football competitions within Europe, the relevant geographic market covers the countries of all national football federations that are qualified to participate in the UEL 2011/2012.

According to Article 4 CA, an undertaking is deemed to have a *dominant position* if it is able to behave in a substantially independent manner with regard to other participants (competitors, offerors or offerees) in the market.

Within the defined market, UEFA, being the sole and exclusive organiser of the international football competitions within Europe, has a dominant market position. UEFA has the power to act independently from the national football federations and clubs and can determine the sports and economic rules that participants are subject to.

3.5 No abuse of UEFA's dominant market position

According to Article 7 para. 1 CA, practices of undertakings having a dominant market position are deemed illicit if they, through the abuse of their dominant position, prevent other undertakings from entering or competing in the relevant market or if they discriminate against trading partners. Such illicit practices include a refusal to enter into a transaction (Article 7 para. 2 lit. a CA) or a discrimination of trading partners (Article 7 para. 2 lit. b CA).

Under Swiss Cartel Law, a dominant market position of an undertaking is not prohibited *per se* (Reinert P., in: Baker & McKenzie (ed.), Handkommentar Kartellgesetz, Bern 2007, CA 7, N 2 with further references). An undertaking abuses its dominant position only if – without legitimate business reasons – it (i) prevents other undertakings from entering or competing in the market or (ii) discriminates against trading partners.

Pursuant to Article 7 para. 2 lit. a CA a refusal of an undertaking to enter into a transaction may be illegal. This provision aims at preventing behaviour of an undertaking with a dominant market position that tries to foreclose competitors from the market or prevent competitors from entering into the market (Borer, *op.cit*., CA 7, N 10 with further references).

Discrimination of trading partners is prohibited according to Article 7 para. 2 lit. b CA. The term "*other conditions of trade*" has to be interpreted extensively (Reinert, *op.cit*., CA 7, N 16). An undertaking with a dominant market position must not disadvantage a competitor unless there is an objective reason for doing so (Amstutz/Carron, in: Amstutz/Reinert (ed.), Basler Kommentar – Kartellgesetz, Basel 2010, CA 7, N 155).

The Swiss Competition authorities usually assess the question whether there is an abuse of a dominant market position by following a two step approach: First, they assess whether the behaviour of an undertaking having a dominant market position

leads to a restraint of competition. Second, if there is a restraint of competition, they investigate whether there are legitimate business reasons justifying the restraint of competition (AMSTUTZ/CARRON, *op.cit.*, CA 7, N 57).

In sports matters, the term "*legitimate business reasons*" cannot be limited to economic reasons. The message of the Federal Council of 23 November 1994 to the Swiss Parliament regarding the CA refers to commercial principles which may constitute legitimate business reasons (Federal Council Message of 23 November 1994, BBL 1995, p. 569) and keeps the range open for a wider interpretation of the term, without explicitly taking into consideration the specificity of sport. In sports matters, the behaviour of sports associations must be legitimated by reasons that are necessary for the proper functioning of the sport in order to qualify as "*legitimate business reasons*" (PHILIPP P., Kartellrecht und Sport, Jusletter, 11 July 2005, para. 36).

The UEFA Appeals Body, in its decision dated 13 September 2011, considered that OLA fielded players in the qualification matches that were ineligible under the UEL Regulations. Due to this violation of the UEL Regulations, the matches against Celtic FC were declared forfeit against OLA and as a consequence OLA has been excluded from the UEL 2011/2012.

The rights, duties and responsibilities of all parties participating and involved in the preparation and organisation of the UEL 2011/2012, including the qualifying phase and the play-offs, are governed by the UEL Regulations. According to the UEL, a football club participating in the UEL 2011/2012 is allowed to field eligible players only (cf. Article 18 of the UEL Regulations for details). In case a football club violates these regulations, UEFA is entitled to render a sanction, in particular to declare the matches forfeited.

Article 18 of the UEL Regulations authorizing UEFA to sanction a club which is fielding ineligible players is a rule to guarantee the efficiency and equal treatment of the clubs participating in the UEL 2011/2012.

3.5.1 No refusal to enter into business relationship (Article 7 para. 2 lit. a CA)

UEFA did not refuse to allow OLA compete, that is to say to enter into a transaction according to Article 7 para. 2 lit. a CA. In fact, OLA participated (successfully) at the UEL 2011/2012.

However, Respondent fielded players that were ineligible according to the relevant regulations. As UEFA pointed out in its Statement of Claim the fact that OLA fielded players who were not properly registered is the source of the forfeit sanction. The exclusion from the group phase of the UEL 2011/2012 by UEFA was solely based on the fact that OLA competed with players that were ineligible.

3.5.2 No discrimination of OLA (Article 7 para. 2 lit. b CA)

There is no indication of any discriminatory behaviour of UEFA, as UEFA applied the UEL Regulations to all (potential) participants of the UEL 2011/2012 and treated each football club in the same way.

There is no indication that UEFA would not have imposed the same sanction, *i.e.* to declare the matches forfeit based on Article 14bis para. 3 of the UEFA Disciplinary Regulations Edition 2011 (the "*UEFA DR*"), to other clubs it had imposed to OLA.

As no unequal treatment of OLA by UEFA has been substantiated let alone proven, there is no discrimination of OLA in the sense of Article 7 para. 2 lit. b CA.

3.5.3 No abuse of UEFA's dominant position pursuant to the general clause (Article 7 para. 1 CA)

The fact that UEFA issued the UEL Regulations cannot be considered as an abuse of its dominant position in the market. The regulations, and in particular the rules for the eligibility of football players, serve to guarantee a proper functioning of the football competition within the UEL 2011/2012. With regard to the eligibility of the players, the UEL Regulations intend to ensure that all football clubs in Europe respect the identical rules, in particular the rules related to transfers. The main intention of the UEL Regulations is to ensure the equal treatment of the clubs.

Taking into consideration the principle of proportionality, the Panel does not see any alternative regulation to the UEL Regulations. The declaration of matches as forfeited, in which ineligible players were involved, is a proportionate measure that cannot be achieved with another sanction such as a fine or a deduction of points. The absence of alternatives is evident particularly during the qualification phase of the tournament, where the deduction of points are not possIt results from the above that UEFA, by issuing the UEL Regulations, did not abuse its dominant market position according to Article 7 para. 1 CA.

The Panel considers that the sanctions, *i.e.* the declaration of the matches as forfeited and as a consequence the exclusion of OLA from the UEL 2011/2012 serves to guarantee a proper functioning of the football competition within the UEL 2011/2012. The sanctions are appropriate, necessary and proportionate. In a previous decision, the CAS expressly considered that the *ratio legis* and the justification of the sanctions are to ensure a legal certainty in the sports competition of the UEL 2011/2012 (CAS 2007/A/1278 and 1279, para. 131).

It must be underlined that UEFA is bound to apply those sanctions to all the participants of the UEL 2011/2012 in the same manner.

In conclusion, the UEL Regulations as well as the sanctions based on the UEFA DR are rules imposed by UEFA as organiser of the UEL 2011/2012. They are appropriate, necessary and proportionate.

By properly enforcing its own rules UEFA did in no way abuse its dominant market position. The disciplinary measures imposed by UEFA on 13 September 2011 were justified and have not been rendered in violation of Article 7 CA.

Even if one were to take the view that UEFA abused its dominant position by applying the rules and sanctions according to the UEL Regulations and the UEFA DR, UEFA's behaviour would have been justified by legitimate reasons. The purpose of these rules is to ensure that each football club plays the matches with duly registered players and, as a consequence, to guarantee a fair sports competition. The enforcement of the rules guarantees the equal treatment of the participants of the UEL 2011/2012.

Finally, the Panel refers to the fact that OLA signed the entry form in May 2011 according to which OLA accepted to respect UEFA's statutes, regulations, directives and decisions, in particular the UEL Regulations and the UEFA DR. Respondent therefore knew the consequences of playing with players that were ineligible.

Even if one were to assume that, contrary to the UEFA Appeals Body decision dated13 September 2011, the Players were qualified to play the two matches against Celtic FC, it is still the Panel's finding that UEFA did not abuse its dominant market position.

UEFA had justifiable reasons to consider the Players were ineligible. In the view of the Panel, the Appeals Body decision of the UEFA of 13 September 2011 was neither arbitrary nor contrary to Swiss Competition Law.

Moreover, UEFA's practice of assessing the eligibility of players only once a protest is filed by a club cannot be challenged from a competition law point of view. Given the club's possibility to file a protest in case an ineligible player is fielded by the opponent club it would be inappropriate, unnecessary and disproportionate to require UEFA to control the eligibility of all players at the beginning of a tournament.

It is the Panel's view that UEFA had justifiable reasons to rely on the FIFA DRC's decision of 25 May 2011. OLA appealed against the decision with CAS, however, on 8 August 2011, withdrew the appeal. Moreover, the SFL initially rejected OLA's request for registration of the Players. The SFL Appeals Tribunal confirmed this decision. The Players were only qualified to play in the Swiss national league based on the Orders by the District Court of Martigny and St-Maurice dated 3 August 2011 and 27 September 2011.

The Panel wishes to underline that UEFA treated all the clubs alike.

The Panel reaches the conclusion that UEFA did not abuse its dominant market position, as it had justified reasons to act in the way it did. The Panel would not reach a different conclusion under the assumption that, contrary to the UEFA Appeals Body's decision dated 13 September 2011, the Players were qualified to play the two qualification matches.

UEFA filed two experts' reports supporting its position that UEFA, by excluding OLA from the UEL 2011/2012, did not violate Swiss competition law.

In his expert report, Professor Amstutz stressed that UEFA applied the UEL Regulations to all football teams alike. He stated and confirmed at the hearing that UEFA did not abuse its dominant market position nor discriminate against other clubs. He denied that the conditions of Article 7 para. 1 lit. b CA and Article 7 para. 1 lit. a CA have been met. He reached the conclusion that, even if UEFA had abused its dominant market position, there were legitimate reasons for doing so.

Professor von Büren, in his expert report, concurs with Professor Amstutz. He points out that the UEL Regulations serve to guarantee a football competition in a proper manner and that the registration of the players is necessary to ensure the orderly running of football matches under equal conditions for all participating clubs. UEFA's issuance of the UEL Regulations cannot be considered as an abuse of a dominant market position. For the same reasons, Professor von Büren confirms the Panel's finding

that UEFA, by adopting the UEFA DR, does not commit any obvious abuse of its market position. He confirms that Article 7 para. 1 CA and Article 7 para. 2 lit. b CA are not applicable. Professor von Büren's considerations are convincing that the sanctions imposed by UEFA were based on objective reasons and legitimate grounds. Finally, Professor von Büren submits that OLA, through its own inadmissible conduct, caused UEFA to declare the matches forfeit. He follows that OLA cannot claim now to be the victim of discrimination simply because UEFA sanctioned it on account of its own behaviour (*venire contra factum proprium*).

OLA submits that it had been excluded by UEFA only because the Players addressed themselves to the civil court of Martigny. UEFA rejects this submission.

The Panel takes the view that OLA has not succeeded in substantiating let alone proving this submission. The decision of the UEFA Appeals Body dated 13 September 2011 as well as its reasons can be followed by this Panel. The UEFA Appeal Body explains in a clear manner that the matches had been declared forfeited, because OLA used players that were ineligible.

Besides, it may be noted that, according to the Swiss doctrine, the issue whether there is an abuse of a dominant market position has to be assessed based on an objective, verifiable behaviour, even if the undertaking has the intention to hinder other undertakings from entering or competing in the market (Reinert, *op.cit.*, CA 7, N 6; Clerc E., in: Tercier/Bovet (ed.), Commentaire Romand – Droit de la concurrence, Bâle 2002, CA 7, N 66).

OLA further submits that UEFA abused its dominant market position by violating its own statutes and regulations. As stated above, the decision of the UEFA Appeals Body is correct. The Panel takes the view that UEFA applied its statutes and regulations correctly. Further, the Panel refers to its finding that UEFA's statutes and regulations do not violate Swiss competition law.

OLA submits that UEFA violated Article 7 CA by refusing to recognize the results on the playing field. However, OLA must account for the fact that it fielded ineligible players. The matches it won against Celtic were correctly declared forfeited. As mentioned above, OLA signed the Entry Form in May 2011 and knew in advance the consequences of fielding players who were ineligible.

OLA compares UEFA's behaviour with the underlying facts of the MOTOE case (C-49/07) of the European Court of Justice. However, the facts in the MOTOE case differ considerably from the facts of the case at hand. In the MOTOE case, the European Court of Justice considered that *"a legal person whose activities consist not only in taking part in administrative decisions authorising the organisation of motorcycling events, but also in organising such events itself and in entering, in that connection, into sponsorship, advertising and insurance contracts, falls within the scope of Articles 82 EC and 86 EC"* (para. 53). In her opinion of 6 March 2008, the advocate general, Juliane Kokott, identified the problem from a competition law point of view in the following way: a legal person which itself organises and markets sports events (in this case motorcycling events), is granted from the State a right of co-decision in the authorisation of these sports events of other, independent service providers (para. 98). However, in the case at hand, it is out of the question that UEFA has the right to exclude other legal entities from organising international football competitions. It is undisputed that UEFA acted merely as organiser of the UEL.

OLA filed an expert report written by Professor Walter Stoffel dated 16 November 2011.

Professor Stoffel based his report on the following facts:

- UEFA refused to accept the fact that SFL had declared the Players qualified;

- UEFA did not comply with the order of the Tribunal Cantonal of Vaud for provisional measures of 13 September 2011.

Based on those facts, Professor Stoffel takes the view that UEFA abused its dominant market position by preventing OLA from continuing to play in the UEL 2011/2012, although it was qualified to do so based on the results on the playing field.

Professor Stoffel did not assess whether UEFA abused its dominant market position by declaring the matches of OLA against Celtic forfeit and excluding OLA from the UEL 2011/2012.

The Panel does not follow the reasoning of Professor Stoffel as he bases his deviating conclusion on different facts, *i.e.* the Players' eligibility.

3.6 Conclusion

The Panel concludes that UEFA did not:

- refuse OLA to enter into a transaction according to Article 7 para. 2 lit. a CA;

- discriminate OLA pursuant to Article 7 para. 2 lit. b CA;

- abuse a dominant market position pursuant to Article 7 para. 1 CA. Even if it were to decide that the UEL Regulations as well as the sanction imposed on OLA based on the UEL Regulations constitute an abuse of UEFA's dominant position, there are legitimate reasons that justify UEFA's decision and behaviour.

4. Provisional measures ordered by the Tribunal of the Canton of Vaud dated 5 October 2011

As seen above, the conservatory measures ordered by the State Court of the Canton of Vaud dated 5 October 2011 will, according to Article 268 para. 2 CPC, automatically be rendered moot by the entry into force of the present Award. As a consequence, a formal lifting is not necessary.

However, as third parties are actually affected by such conservatory measures and in view of the importance of the present dispute, the Panel is of the opinion that a formal lifting of the measures is appropriate and therefore shall be ordered.

Arbitration CAS 2011/A/2654
Namibia Football Association v. Confédération Africaine de Football (CAF)
1 March 2012

Football; nationality of a player; scope of review of the CAS; burden of proof

Panel:
Mr. Mark Hovell (United Kingdom), President
Mr. Goetz Eilers (Germany)
Mr. Raymond Hack (South Africa)

Relevant facts

The Namibia Football Association (NFA; the "*Appellant*") is the national football association of Namibia, with headquarters in Windhoek, Namibia, and is a member of CAF (as hereinafter defined) and of the Fédération Internationale de Football Association (FIFA).

The Confédération Africaine de Football (CAF; the "*Respondent*") is the confederation recognised by FIFA with headquarters in Egypt, which promotes football in Africa.

On 22 January 1984 the footballer Herve Zengue ("*the Player*") was born in Yaounde, Cameroon. The Player took up residency in Burkina Faso in 1994 and married his wife, a Burkina Faso national, on 22 June 2006. The Player was issued with a Burkinabe Nationality Certificate on 14 September 2006.

On 25 March 2011, the Player received a 5 year passport from the African Nation of Burkina Faso.

The national teams of Namibia ("*Namibia*") and of Burkina Faso ("*Burkina Faso*") first played each other on 26 March 2011 in the 2012 Africa Cup of Nations ("*AFCON 2012*") qualification stages, in Ouagadougou, Burkina Faso. Burkina Faso won 4-1 and the Player participated in that match.

On 4 June 2011, Namibia and Burkina Faso played their second qualification match of AFCON 2012, in Windhoek, Namibia. The match was played under protest, as the Appellant had prepared a letter of complaint ("*the Protest Letter*") alleging that the Player was ineligible to participate in that match. Burkina Faso again won the match, 1-4.

On 6 June 2011, the Appellant wrote to the Respondent and forwarded a further copy of the Protest Letter and paying the relevant appeal fee.

On 17 June 2011, the Player received a second 5 year passport from Burkina Faso.

On 28 October 2011, the Bureau of the African Cup of Nations Committee ("*the Bureau*") rejected the protest of the Appellant regarding the ineligibility of the Player on the grounds that the Protest Letter failed to comply with Article 37.1 of the Regulations of the Orange Africa Cup of Nations 2012 ("*the AFCON 2012 Regulations*").

On 31 October 2011, the Appellant appealed to the CAF Appeal Board against the decision of the Bureau submitting that the original Protest Letter had been signed by the captains of both Namibia and Burkina Faso before the 2nd qualification match was played and directed the CAF Appeal Board to Article 36.12 of the AFCON 2012 Regulations.

On 15 November 2011, CAF's Appeal Board heard the Appellant's appeal against the Bureau's decision, with the Appellant and the Fédération Burkinabé de Football ("*the Burkina Faso FF*") present.

On 24 November 2011, CAF's Appeal Board rendered its decision ("*the Appealed Decision*"), which concluded:

"To declare the appeal lodged by the Namibia Football Association to be regular as to form.

To declare invalid the protest submitted by the Namibia Football Association concerning the non-respect of the requirements stipulated by Article 37 of the 2012 CAN Regulations".

On 8 December 2011, the Appellant filed its Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport (CAS). The

Appellant requested the matter be dealt with on an expedited basis. The Appeal contained the following prayers for relief:

"…to set aside the Decision of the CAF Appeal Board of November 24, 2011 and accepting the protest submitted by the Namibia Football Association before the kick-off of the match of June 4, 2011 between Burkina Faso and Namibia because of the non-eligibility of the Player Herve Zengue for the team of Burkina Faso having the result that Burkina Faso should lose the two matches by penalty (3-0). This again would have the consequence that the team of the Namibian Football Association would take part in the final round of the Africa Cup of Nations instead the team of Burkina Faso".

On 14 December 2011, the Appellant confirmed its Statement of Appeal was to serve as its Appeal Brief too and requested a hearing in this matter.

On 19 December 2011, the Respondent agreed that the matter could be dealt with on an expedited basis.

On 24 December 2011, the Respondent requested that the language of the matter be changed to French. After due consideration of the request, in light of the fact that the Appeal was made in English and on an expedited basis, the President of the Panel refused this request, which was confirmed to the parties on 27 December 2011, by the CAS Court Office.

On 2 January 2012, the Respondent filed its Answer, which contained the following prayers for relief:

"…the Confederation of African Football respectfully requests that this Court grant its motion and dismiss Appellant's appeal in its entirety.

The entire costs of the proceedings shall be paid in full by Appellant and a procedural indemnity of 30.000 Swiss Francs shall be granted by the same to the CAF for irrecoverable costs incurred".

The Respondent agreed to a hearing and despite the Respondent disputing the admissibility of the Appellant's appeal, all duly signed the Order of Procedure beforehand.

On 4 January 2012, the Appellant sought to file additional submissions in the form of an answer to the Respondent's submissions. The additional submissions were accepted by the Respondent at the hearing of the matter.

A hearing was held on 6 January 2012 at the CAS premises in Lausanne, Switzerland. All the members of the Panel were present. The parties did not raise any objection as to the constitution and composition of the Panel.

There were no witnesses or experts providing evidence or opinions at the hearing, but the representatives of the NFA and CAF both spoke and were examined by the Panel and the other parties. The parties were given the opportunity to present their cases, submit their arguments and to answer any questions posed by the Panel. After the parties' final, closing submissions, the hearing was closed and the Panel reserved its detailed decision to its written award, but confirmed the operative part of the decision would be rendered in line with the expedited procedure. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their right to be heard and to have been treated equally in these arbitration proceedings. The Panel heard carefully and took into account in its discussion and subsequent deliberation all the evidence and the arguments presented by the parties both in their written submissions and at the hearing, even if they have not been summarised in the present award.

Extracts from the legal findings

A. Admissibility

Firstly, the Respondent submitted that the Appeal was not made in a timely manner, as the Appeal had to be lodged with the CAS Court Office within 10 days of the Appellant being notified of the Appealed Decision, in accordance with Article 51.3 of the CAF Statutes:

"Only CAS is empowered to deal with appeals against decisions or disciplinary sanctions taken in the last instance by any legal body of CAF (…) any appeal must be filed within 10 days of the decision being communicated".

The Respondent notified the Appealed Decision to the Appellant on 24 November 2011, the 10 days began on 25 November 2011 and the 10 days therefore expired at midnight on 4 December 2011. The Appeal was received by the CAS Court Office on 8 December 2011 and as such the Respondent argued it is inadmissible.

The Appellant referred to the final paragraph of the Appealed Decision as set out in para. 3 above. This referred to a 21 day time limit within which to file the Statement of Appeal. The Respondent acknowledged that this was a "*mistake*", but the Appellant argued that it was an acknowledgement of the 21 day time limit within Article R49 of the Code. The Respondent argued that Article R49 of the Code only applies *"in the absence of a time limit set in the statutes or regulations of the federation (…) concerned"* and there was a time limit set

in Article 51.3 of the CAF Statutes, which is 10 days.

The Panel noted that the CAF Secretary General, Mr El Amrani, had signed the Appealed Decision and stated that it was not a reference to Article R49 of the Code, so determined to disregard the Appellant's submission on that point, which seemed self defeating. The Panel therefore had to decide if this was an indulgence by the Respondent to extend the deadline or a mistake. Even if it was the latter, the Panel determined that it would not be right to hold the Respondent's mistake against the Appellant. The Panel noted the CAS jurisprudence in CAS 2008/A/1708 and CAS 2009/A/2439 in which the parties faced a similar conflict between two apparently conflicting time limits set by FIFA. As such, the Panel determined to confirm the Appeal had been made in time, the 21 days expressly granted by the Respondent in the Appealed Decision.

Secondly, the Respondent challenged the extent of the Appellant's prayers for relief in the absence of Burkina Faso as a respondent to these proceedings, claiming the CAF lacked the standing to be sued and that the relief ultimately sought affected the rights of that third party, which was not present to defend itself.

The Panel noted the Respondent's agreement to be a respondent in this matter, confirmed by its participation in this arbitration, the signing of the order of procedure and its clarification given at the hearing that it wished to respond to allegations made against it, but the Panel also noted the Respondent's position that the Burkina Faso FF should have been the "*principle*" respondent in this matter.

The Respondent directed the Panel to Article R48 of the Code. The Appellant did not bring the Burkina Faso FF into these proceedings and the scope of the Panel's review is limited to those prayers that the Respondent is the subject of. The Appellant's prayers for relief included the request that the Panel determine that *"(…) Burkina Faso should lose the two matches by penalty (3-0). This again would have the consequence that the team of the Namibian Football Association would take part in the final round of the Africa Cup of Nations instead the team of Burkina Faso".*

The Panel noted that it was ultimately the choice of the Appellant against whom it appealed, but by not including the Burkina Faso FF as a party, the Panel has determined that its scope of review is limited to a review of the Appealed Decision alone. In the event that, on the merits, it is determined to overturn the Appealed Decision, then this Panel would be unable to go further and issue an award that would have the effect of replacing Burkina Faso with Namibia at AFCON 2012.

The essence of the dispute is between two national federations, where one believes the other has fielded an ineligible player. It has sought a decision to that effect from its Confederation and for the Confederation to then penalize that other national federation firstly by reversing the match scores and then to recalculate the qualification points replacing one national federation with the other in AFCON 2012. The Panel does not consider the CAF as the "*passive subject*" of the claim brought before CAS by way of the appeal against CAF's decision, as CAF's rights are not relevant to the relief sought by the Appellant. The Panel are satisfied that the CAF does not have the standing to be sued in relation to the entirety of the Appellant's prayers for relief, but it has participated in these proceedings willingly and is therefore accepting that its Appealed Decision be reviewed, but not that the relief after that sought by the Appellant be entertained.

B. Did the Bureau have jurisdiction to deal with the Appellant's protest?

The Panel noted the confusion, caused by the Bureau, in its decision of 28 October 2011, by referring to itself as "*the Bureau of the African Cup of Nations Committee CAN 2012*" and then by the CAF Appeal Board referring to it as "*the Bureau of the Organizing Committee of CAN 2012*". At the hearing the Respondent confirmed that there is one Organizing Committee, established pursuant to Article 30 of the CAF Statutes for AFCON 2012 and that the two references were to the same body.

The Appellant questioned whether the Organizing Committee had the ability to establish a bureau or subcommittee, as Article 28.2 of the CAF Statutes refers to the Executive Committee of the CAF having the ability to establish a bureau and then only when urgency required it. At the hearing the representative of the Respondent stated that all Standing Committees are established by the Executive Committee and are able to establish bureaus or subcommittees in accordance with Article 28.2 of the CAF Statutes.

Article 4.3.2 of the AFCON 2012 Regulations gave the Organizing Committee the ability to take decisions regarding complaints or protests, which it commenced pursuant to the Appellant's Protest Letter. The Respondent confirmed that when the draw was approaching for the second phase of AFCON 2012, even though the investigations of the Organizing Committee had not been completed, a bureau was established by it to render a decision.

The Panel is satisfied that the Bureau was established with the necessary powers to deal with the Appellant's Protest Letter.

C. Was the CAF Appeal Board correct in dismissing the protest for a breach of Article 37.1 of the AFCON 2012 Regulations?

The Protest Letter was presented to the CAF Commissioner on 4 June 2011. It was acknowledged at the hearing that it was a requirement of Article 37.1 of the AFCON 2012 Regulations that any protest had to be made to the CAF before the match commenced and then confirmed (pursuant to Article 37.2) to the CAF within 48 hours. The Protest Letter, whilst mentioning the fact that the Player had also played in the first qualifying match between Namibia and Burkina Faso on 26 March 2011, was protesting about the Player about to take the field of play on 4 June 2011. The allegation of ineligibility for the March match was raised after that first match and as such was treated by the Respondent as a notice of a potential fraud, which resulted in an enquiry in accordance with Article 39 of the AFCON 2012 Regulations.

The Protest Letter, so far as Article 37.1 of the AFCON 2012 Regulations is concerned, was therefore directed at the ineligibility of the Player for the match of 4 June 2011 alone.

Both the Bureau and the CAF Appeal Board rejected the Protest Letter as a result of its form, as opposed to substance. The Regulation states that it must be countersigned by the captain of the opposing team from that making the protest. The Respondent also submitted that the "*proper form*" was box 10 on the CAF Commissioner's report.

The Panel noted that there was no separate form to be used and also noted that box 10 had very little space and determined that a letter annexed to and referred to in box 10 of the CAF Commissioner's report (as it was in this case) would fulfill the "*proper form*" requirements of Article 37.1.

The key issue was whether it had been signed by the Burkina Faso captain or not. At the hearing, the NFA Secretary General, Mr Rukoro, who produced the Protest Letter and handed it to the CAF Commissioner, stated that he was with the CAF Commissioner who then summonsed the match referee and informed him of the protest. Mr Rukoro confirmed that there was only a single copy of the letter and that it was signed by the referee and by both the captains in front of him. It was then retained by the fourth official whilst the match was being played. Mr Rukoro did not have the ability to make a copy to keep. He stated that the CAF Commissioner (and he argued it was the Commissioner's job to ensure the Regulations were followed in regard to any protest) confirmed everything was in order. Mr Rukoro stated that later, before the CAF Appeal Board hearing, he spoke again with the captain of Namibia, who confirmed he had signed the Protest Letter, as had the captain of Burkina Faso. He found it "*amazing*" that the version of the Protest Letter on the CAF file only had the signature of the referee on it.

Mr El Amrani stated that he had spoken to the referee and to the CAF Commissioner and that they had both told him that neither of the captains signed the Protest Letter.

The Panel, when faced with conflicting accounts would normally have to determine which account it preferred. In this case, what has surprised the Panel is that neither party has, either at the CAF Appeal Board hearing or in these appeal proceedings sought to produce any witness evidence from the captains of the teams, the referee or the CAF Commissioner. The Panel notes that the burden of proof is upon the Appellant and if it believed the Protest Letter had been signed by both the captains, yet had had its protest dismissed by the Bureau for lack of the signatures, why did it not produce evidence from at least the captain of its own national team to support its appeals to the CAF Appeal Board or to the CAS? The Appellant could see the version of the Protest Letter on the CAS file was one without the signatures of the captains, as such, the burden of proof is upon the Appellant to challenge the reliability of that version. The Panel has determined that the Appellant has failed to come up to the requisite standard of proof to enable it to rebut the fact that the version of the Protest Letter before it has not been signed by the captain of Burkina Faso, as required by Article 37.1 of the AFCON 2012 Regulations.

The Appellant argued, in the alternative, that even if the Protest Letter had not be signed, that was not a material defect and that the protest should stand. It also pointed out that if taken literally and the opposing captain refused to sign, then there could never be a valid protest. The Respondent countered by stating the rules are the rules and that it is not the role of the Panel to rewrite the rules by removing that requirement. Further, if the opposing captain refused to countersign, then that would be recorded by the referee and the CAF Commissioner in their reports.

On balance, the Panel agrees with the Respondent. The requirement of Article 37.1 is not confusing or

unclear, nor is it difficult to satisfy. The Appellant had taken the trouble to prepare a letter of protest in advance of the match and to carry out extensive web-based research into the Player's nationality – it could have and should have fully reviewed and complied with Article 37.1 and the Panel does not see any reason to overturn the decision of the CAF Appeal Board on this point.

D. If not, should the CAF Appeal Board have sanctioned the Burkina Faso FF under either Articles 36 or 39 of the AFCON 2012 Regulations instead?

The Player had citizenship and had been included on the list of players for the AFCON 2012 tournament in accordance with Article 42 of the AFCON 2012 Regulations. The Respondent stated that Article 36 of the AFCON 2012 Regulations dealt with sanctions against players. It was the first Article in the Chapter of the AFCON 2012 Regulations entitled "*Sanctions of Players*". If an association fielded a player after he had been sanctioned for any offence and the penalty against that player was a suspension or if he had been found to be "*non-qualified*", then the association would face losing that match 3-0. However, the sanction against the player was required before this sanction could be imposed against the association. In this case, there were no sanctions against the Player.

The Appellant argued that Article 36.12 of the AFCON 2012 Regulations applied as the sanction against the association, if it could be established at anytime and *"even without protest"* that a player was ineligible (*NdR:* Article 36.12 states: *"A team which allows a non-qualified or a suspended player to take part in group matches shall lose the match by penalty (3 – 0), even in the absence of protests/reservations"*..).

At the hearing, the parties provided their respective views on Articles 15 to 18 of the FIFA Statutes and the Respondent cited the case CAS 2010/A/2071. The Appellant argued that as the Respondent could not provide proof that the Player had lived continuously for 5 years in Burkina Faso after 2002, when he reached his 18th birthday, then he must fail to fulfill the criteria of Article 17 of the FIFA Statutes and is therefore ineligible, as under Article 32 of the AFCON 2012 Regulations, he must comply with these FIFA Statutes. If ineligible, then Article 36.12 applies.

Whilst the Respondent argues that as the case CAS 2010/A/2071 stipulates Article 18 of the FIFA Statutes is applicable. Pursuant to this it is irrelevant where the Player lived for that period.

The Panel again finds that the Appellant has not sufficiently discharged the burden of proof. The CAF Appeal Board could only reach a decision on the Player's eligibility if it had stronger evidence from the Appellant as to where the Player lived at what stage, as opposed to submissions that he played for foreign clubs since 2004 and an attempted reversal of the burden of proof by the Appellant. It is not sufficient to say the CAF did not show the Player lived continuously in Burkina Faso for 5 years after he reached the age of 18. The Appellant needed to provide the evidence to demonstrate where the Player was living; to provide submissions on the application of Article 17 as against Article 18 of the FIFA Statutes; to produce submissions and evidence on what was meant be "*continuously living*" – is it actual residence or maintaining nationality – and to provide submissions to support Article 36.12 can be used in any event, or whether it only has application on an association after a player has been sanctioned.

Turning next to Article 39 of the AFCON 2012 Regulations, the Respondent confirmed at the hearing that it treated the Protest Letter as a notification of a possible fraud and commenced an enquiry pursuant to Article 39. It ultimately determined that the allegations were not proved. Again, from the evidence produced by the Appellant, the Panel agrees with the CAF Appeals Board. The Appellant has raised eligibility issues, but has not brought Burkina Faso into the proceedings, nor sought evidence from it regarding its Player, the granting of his Burkinabe nationality, no correspondence with FIFA regarding his nationality was put in the Appeal, no real enquiries regarding where the Player lived were made. On the other hand the CAF was presented with the Player's Burkina Faso passport, confirmation of his residency since 1994 in Burkina Faso, his marriage and nationality certificates, all of which it took at face value in determining there were insufficient grounds and evidence to conclude there was any type of fraud. The Respondent defined "*fraud*" from its own Regulations as *"(…) any deliberate intention of misleading or cheating by falsification of documents (…)"*. There was no evidence of any deliberate intention to mislead or any allegation that the documents were forged. The Appellant did query why the Player had received a passport the day before the first match in March 2011 and then why he received another after the second match in June 2011. The Panel again notes the decision of the Appellant not to bring the Burkina Faso FF into these proceedings as a respondent. If it had, then perhaps that question could have been answered, but as regards the Respondent, the Panel agreed that there was insufficient proof to determine there was any type of fraud.

E. Conclusion

In summary, the Panel determines to confirm the Appealed Decision of the CAF Appeal Board and to dismiss the Appeal of the Appellant.

4A_640/2010**
Judgment of 18 April 2011
First Civil Law Court

Composition	Federal Judge Klett, President Federal Judge Corboz Federal Judge Kolly Clerk of the Court: Mr Leemann
Parties	A._____, Appellant, represented by Mr. Philipp J. Dickenmann and Reto Hunsperger, **versus** World Anti-Doping Agency (WADA), Respondent 1, represented by Mr. François Kaiser and Mr. Serge Vittoz, & Fédération Internationale de Football Association (FIFA), Respondent 2, represented by Mr. Christian Jenny, & Cyprus Football Association (CFA), Respondent 3, represented by Mr. Antonio Rigozzi.

* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).

* Translator's note: Quote as A._____ v. WADA, FIFA and CFA 4A_640/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

Facts

A.

A.a A._____ is domiciled in X._____ [name of the country omitted] (the Appellant) and is a professional football trainer.

The World Anti-doping Agency (WADA; Respondent 1) is a foundation under Swiss law with headquarters in Lausanne. Its goal is the worldwide fight against doping in sport.

The Fédération Internationale de Football Association (FIFA; Respondent 2) is the international football federation with headquarters in Zurich. The Cyprus Football Association (CFA; Respondent 3) is the national football federation of Cyprus and as such a member of the FIFA.

A.b At the relevant time the Respondent was active within the Cypriot football club of Y._____, which in its turn belongs to the CFA.

After the plays of October 31st, 2008, November 9, 2008 and November 24, 2008 various players of the Y._____ team were made to undergo a doping test. "Oxymesterone" a substance which is on the list of prohibited anabolics was found in two players.

Consequently the CFA conducted an investigation as to the background of the positive doping tests. The person in charge of the investigation found among other things in his report of December 31st, 2008 that the Appellant as trainer of Y._____ offered two white pills to the eleven players before the play. The players were not forced to take the pills and some did not take the pills, which the

Appellant described as caffeine pills.

A.c Based on this investigation the CFA initiated disciplinary proceedings for breach of doping rules against the Appellant and the two players who had tested positive. In a decision of April 2, 2009 the Judicial Committee of the CFA issued a two years ban against the Appellant, valid from the day of the decision. The Judicial Committee held with a view to the sanction to be pronounced that the Appellant's cooperation and his readiness to contribute to the clarification of the matter had to be taken into account. Accordingly the four years ban as per the applicable provisions of the FIFA Disciplinary Code and of the World Anti-Doping Code was to be reduced to two years. In a decision of April 24, 2009 the Judicial Committee banned the two players who had tested positive for a year whilst no disciplinary proceedings were opened against the other players.

B.

B.a On March 30, 2009 Respondent 1 appealed the decisions of the CFA in connection with the events described as to football club Y._____ (proceedings CAS 2009/A/1817) to the Court of Arbitration for Sport (CAS). As Respondent 1 had not participated in the proceedings in front of the bodies of the Federation and had not been notified the decisions they took, it required from the CAS a notification of the corresponding decisions and of other documents. After receiving the decisions Respondent 1 submitted the reasons for its appeal to the CAS on September 8, 2009 and submitted that the decisions of the Disciplinary Committee of the CFA were to be annulled and that the Appellant should be banned for four years and the other players who had taken the pills for two. On May 5, 2009 Respondent 2 appealed to the CAS the decision of the CFA Disciplinary Committee of April 2, 2009 by which the Appellant had been banned for two years and submitted that the Appellant should be forbidden to work as a trainer for at least four years (CAS proceedings 2009/A/1844). In Its brief of September 8, 2009 Respondent 2 repeated its submissions and as an intervening party in proceedings CAS 2009/A/1817 it confirmed the submissions made by Respondent 1. Subsequently the CAS did not formally join both proceedings but informed the parties that both proceedings would be conducted simultaneously and decided by the same arbitrators.

B.b In his answer to the appeal of October 26, 2009 the Appellant challenged the jurisdiction of the CAS and moreover argued that the decision of the CFA Judicial Committee of April 2, 2009 was legally accurate.

The Appellant argued in support of his objection to jurisdiction that the mere reference to the FIFA Statutes in the applicable Rules of the CFA was insufficient because the CFA did not explicitly provide in its Statutes for a right to appeal the decisions of the Judicial Committee to the CAS. Article R47 of the Procedural Rules of the CAS Code demanded an explicit reference to the jurisdiction of the CAS.

B.c In an award of October 26, 2010 the CAS upheld the appeal against the decision of the CFA Judicial Committee of April 2, 2009 to the extent that it concerned the Appellant (award nr 1) and banned the Appellant for four years starting from April 2, 2009 (award nr 2). Furthermore the Appellant was ordered to pay costs (award nr 7).

C.

In a Civil law appeal of November 24, 2010 the Appellant essentially submits that the Federal Tribunal should annul paragraphs 1, 2 and 7 of the CAS award of October 26, 2010 and should find that the Arbitral tribunal has no jurisdiction on the Appellant. Alternatively paragraphs 1, 2 and 7 of the October 26, 2010 arbitral award should be annulled and the matter sent back to the Arbitral tribunal for a finding that the Arbitral tribunal has no jurisdiction as to the Appellant. More alternatively, paragraphs 1, 2 and 7 of the award under appeal should be annulled and the matter sent back to the Arbitral tribunal.

The Respondents submit that the appeal should be rejected to the extent that the matter is capable of appeal. The CAS submits that the appeal should be rejected. On March 28, 2011 the Appellant filed a reply with the Federal Tribunal.

D.

On December 20, 2010 the Federal Tribunal rejected a request for security for costs by Respondent 2. On February 2, 2011 the Federal Tribunal rejected the Appellant's request for a stay of enforcement. On March 17, 2011 a new request for a stay of enforcement was rejected.

Reasons

1.
According to Art. 54 (1) BGG[1] the Federal Tribunal issues its decision in an official language[2], as a rule in the language of the decision under appeal. When that decision was issued in another language, the Federal Tribunal resorts to the language used by the parties. The decision under appeal is in English. As this is not an official language and the Parties used various languages in front of the Federal Tribunal, the decision will be issued in the language of the appeal according to practice.

2.
In the field of international arbitration a Civil law appeal is possible under the requirements of Art. 190-192 PILA[3] (SR291) (Art. 77 (1) (a) BGG).

2.1 The seat of the arbitral tribunal is in Lausanne in this case. The Appellant and Respondent 3 had their seat outside Switzerland at the relevant time. As the parties did not rule out in writing the provisions of chapter 12 PILA they are applicable (Art. 176 (1) and (2) PILA).

2.2 A Civil law appeal within the meaning of Art. 77 (1) BGG may in principle only result in the annulment of the decision (see Art. 77 (2) BGG ruling out the applicability of Art. 107 (2) BGG, to the extent that the provision empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute involves the jurisdiction of the arbitral tribunal, there is however an exception, according to which the Federal Tribunal can decide itself the jurisdiction or lack of jurisdiction of the arbitral tribunal (judgment 4A_456/2009 from May 3, 2010 at 2.4; 4A_240/2009 of December 16, 2009 at 1.2; all with references; compare in the framework of the old public law appeal with BGE 127 III 279 at 1b p. 282; 117 II 94 at 4 p. 95 ff). The Appellant's main submission is therefore admissible.

2.3 The Federal Tribunal bases its judgement on the facts found by the arbitral tribunal (Art. 105 (1) BGG). It may neither correct nor supplement the factual findings of the arbitral tribunal, even when they are obviously inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the applicability of Art. 97 BGG and Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against these factual findings or exceptionally when new evidence (see Art. 99 (1) BGG) is taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references). Whoever relies on an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wants to rectify or supplement the factual findings on this basis must show with reference to the record that the corresponding factual allegations were already made in the arbitral proceedings in accordance with procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

3.
The Appellant argues on the basis of Art. 190 (2) (b) PILA that the Arbitral tribunal wrongly accepted jurisdiction.

3.1 The CAS examined its jurisdiction on the basis of Article R47 of the CAS-Code, according to which a decision of a sport federation can be appealed to the CAS to the extent that the statutes or the regulations of the Federation so provide or when the parties have entered into a specific arbitration agreement. Accordingly it was to be decided whether the statutes or regulations of the CFA, the decision of which was appealed, contained a possibility to appeal to the CAS.

The Arbitral tribunal furthermore considered that Respondents 1 and 2 could rely on Articles 62 and 63 of the FIFA Statutes with regard to the issue of jurisdiction as these provide the following:

"62 Court of Arbitration for Sports (CAS)

1. FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.

2. The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily

1. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

2. Translator's note: The official languages of Switzerland are German, French and Italian.

3. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

apply the various regulations of FIFA and, additionally, Swiss law.

63 Jurisdiction of CAS

1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

3. CAS, however, does not deal with appeals arising from:

   (a) violations of the Laws of the Game;

   (b) suspensions of up to four matches or up to three months (with the exception of doping decisions);

   (c) decisions against which an appeal to an independent and duly constituted arbitration tribunal recognised under the rules of an Association or Confederation may be made.

4. The appeal shall not have a suspensive effect. The appropriate FIFA body or, alternatively, CAS may order the appeal to have a suspensive effect.

5. FIFA is entitled to appeal to CAS against any internally final and binding doping-related decision passed by the Confederations, Members or Leagues under the terms of par. 1 and par. 2 above.

6. The World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed by FIFA, the Confederations, Members or Leagues under the terms of par. 1 and par. 2 above.

7. Any internally final and binding doping-related decision passed by the Confederations, Members or Leagues shall be sent immediately to FIFA and WADA by the body passing that decision. The time allowed for FIFA or WADA to lodge an appeal begins upon receipt by FIFA or WADA, respectively, of the internally final and binding decision in an official FIFA language" [4].

The Arbitral tribunal held that it was proved that the Appellant was registered with the CFA as trainer of the football club Y._____ and that in the framework of that registration he had agreed to comply with the statutes and regulations of the CFA (including their anti-doping provisions).

It stated furthermore that the Appellant, who was bound by the statutes and regulations of the CFA, was also bound by the FIFA Statutes, particularly as:

- the CFA is obliged according to Art. 13.1 (d) of the FIFA Statutes to ensure that its own members comply with the Statutes, Regulations, Directives and Decisions of FIFA bodies;

- Article 11.7 of the FIFA Statutes provides that the anti-doping rules of the CFA must comply with FIFA rules among others;

- according to Art. 21 of the CFA Statutes the FIFA rules are applicable in case of unclear or lacking internal provisions of the CFA;

- Article 22.5 of the CFA Statutes provides for the applicability of the FIFA Statutes to disputes between members of the CFA and foreign law subjects.

The Arbitral tribunal held accordingly that Articles 62 and 63 of the FIFA Statutes were binding for the Appellant. To the extent that an appeal to the CAS was possible according to these Statutes they justified jurisdiction of the CAS to decide the dispute at hand. Based on the general reference to the FIFA Statutes in the CFA Statutes the CAS had jurisdiction to decide the appeal made by Respondents 1 and 2 in conformity with Article R47 of the CAS-Code.

3.2.

3.2.1 The Federal Tribunal reviews freely the legal issues as to the jurisdictional grievance according to Art. 190 (2) (b) PILA, including the preliminary substantive issues from which the determination of jurisdiction depends. Yet it reviews the factual findings of the decision under appeal only when some admissible

4. Translator's note: In English in the original text

grievances within the meaning of Art. 190 (2) PILA are brought against these factual findings or exceptionally when new evidence is taken into account and this applies also in the framework of the jurisdictional grievance (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

3.2.2 The arbitration clause must meet the requirements of Art. 178 PILA. However the Federal Tribunal reviews the agreement of the parties to call upon an arbitral tribunal in sport matters with some "benevolence"; this is with a view to encouraging quick disposition of disputes by specialized tribunals which, like the CAS, offer adequate guarantees of independence and impartiality (BGE 133 III 235 at 4.3.2.3 p. 244 ff with references). The generosity which characterizes case law of the Federal Tribunal in this context appears in the assessment of the validity of arbitration clauses by reference (judgment 4A_548/2009[5] of January 20, 2010 at 4.1; 4A_460/2008[6] of January 9, 2009 at 6.2 with references).The Federal Tribunal has accordingly found valid at times a general reference to the arbitration clause contained in the statutes of a federation (judgement 4A_460/2008[7] of January 9, 2009 at 6.2; 4P.253/2003 of March 25, 2004 at 5.4; 4P.230/2000 of February 7, 2001 at 2a; 4C.44/1996 of October 31st, 1996 at 3c; see BGE 133 III 235 at 4.3.2.3 p. 245; 129 III 727 at 5.3.1 p. 735; all with references). Thus in the case of a football player who was a member of a national federation this Court considered as a legally valid reference to the arbitration clause contained in the FIFA Statutes the provision contained in the Statutes according to which the sportsmen belonging to the federation had to comply with FIFA rules (judgement 4A_460/2008[8] of January 9, 2009 at 6.2).

3.3

3.3.1 The Appellant rightly does not dispute that as a professional trainer he agreed through his registration with the CFA to comply with the statutes and regulations of the CFA. However he disputes that Articles 62 and 63 of the FIFA Statutes apply to him.

The Appellant accurately points out at first that Article 13.1 (d) of the FIFA Statutes, which requires the national football federations to ensure that their members comply with the Statutes, regulations, directives and decisions of FIFA cannot be applied directly to the Appellant as he is not himself a member of FIFA. It is instead necessary that the CFA Statutes, by which the Appellant agreed to be bound in the framework of his registration as a football trainer, provide for the applicability of the corresponding provision of the FIFA Statutes directly or by global reference to the FIFA rules.

Article 11.7 of the CFA statutes provides that the anti-doping rules of the CFA have to comply among others with the Statutes and Regulations of FIFA. Contrary to the Appellant's view this reference is not "clearly a mere reference to the substantive anti-doping rules of FIFA" which cannot accordingly mean a reference to the formal provisions of Article 62 and 63 of the FIFA Statutes but merely seeks to ensure that the strictest rules come to application in a given situation. There are no discernable hints that the reference would be limited to some specified anti-doping rules and that the arbitration clause in Article 62f of the FIFA Statutes would be excluded therefrom. Respondent 2 points out rightly that the FIFA Statutes, to which Article 11.7 of the CFA Statutes refer among others, contain no substantive anti-doping rules but that in Article 63 (5) and (6) they provide for a right of appeal by Respondents 1 and 2 to the CAS against final internal decisions in connection with doping. In view of these specific provisions which serve the international fight against doping, the argument is unpersuasive in the Appellant's reply that Article 24[9] of the final provisions of the FIFA Statutes would indeed contain a substantive doping provision, according to which with reference to Art. 2 (e) of the FIFA Statutes, "FIFA shall take action especially, but not exclusively, against irregular betting activities, doping and racism". It is not clear, neither does the Appellant explain more precisely, to what extent Article 11.7 of the CFA statutes should serve as a direct reference to this general provision, which aims at FIFA directly and illustrates the general objective in Art. 2 (e) of the FIFA Statutes. One should not fail to recognize that in the worldwide fight against doping the CAS is of ever more important significance. Thus an international development towards the CAS jurisdiction

5. Translator's note: English translation available on *www.praetor.ch.*

6. Translator's note: English translation available on *www.praetor.ch.*

7. Translator's note: English translation available on *www.praetor.ch.*

8. Translator's note: English translation available on *www.praetor.ch.*

9. Translator's note: It would appear to be Article 14.

in doping matters is to be upheld with a view to ensuring compliance with international standards in this field. Article 13.2.1 of the World-Anti-Doping Code (WADA-Code) provides for the CAS as appeal body for all doping cases in which international athletes are implicated whilst according to Article 13.2.3 (2) (2) of the WADA-Code WADA and the international federation concerned are entitled to appeal to the CAS when national athletes participate (see already BGE 129 III 445 at 3.3.3.3 p. 462 and judgment 4A_149/2003 of October 31st, 2003 at 2.2.2). This development is also emphasized by the reference in the appeal to the Statutes of the Swiss Football Federation, which are not decisive for the case at hand, but according to whose Article 64bis (3) the decisions of the Disciplinary Chamber for Doping Cases of the Swiss Olympic Association can be appealed to the CAS.

Against this background it is unpersuasive to object that the jurisdiction of the CAS as to appeals against CFA decisions with regard to doping would have been impossible to ascertain for the Appellant. The Arbitral tribunal did not act illegally when it saw a reference in Article 11.7 of the CFA Statutes to the jurisdiction of the CAS to adjudicate appeals against final decisions of national football federations in Article 63 (5) and (6) of the FIFA Statutes to the extent that compliance with international standards by the national bodies must be ensured by way of an appeal to the CAS, this serves directly the worldwide fight against doping in sport (see judgment 4A_17/2007 of June 8, 2007 at 5). The Appellant's argument that Article 62 (f) of the FIFA Statutes as a procedural rule would not be encompassed in the reference at Article 11.7 of the CFA statutes is accordingly not persuasive.

3.3.2 Even if there were no clear reference to Article 62 (f) of the FIFA Statutes in Article 11.7 of the CFA Statute, Article 21 of the CFA Statute would speak in favour of CAS jurisdiction as it provides that in case of unclear internal CFA provisions or failing any, the rules of FIFA are applicable. In this case it would be unclear to what body the internal doping decision of CFA could be appealed, which would call for the application of Article 63 (5) (6) of the FIFA Statutes.

The Appellant may not be followed when he argues that the lack of reference to a possibility to appeal to the CAS would be an intentional omission. He himself concedes that according to Article 64 of the FIFA Statutes the national federations are obliged to adopt a provision in their statutes and regulations preventing their members from bringing football related disputes in front of the state courts. Instead the national federations must provide for the jurisdiction of an arbitral tribunal, which can be either the CAS or another arbitral tribunal. Yet he did not show in the arbitral proceedings or in front of the Federal Tribunal that a doping decision of the CFA could be appealed to an independent arbitral body according to its statutes. In view in this general obligation of the CFA to make possible an appeal either to the CAS or to another independent tribunal and contrary to the point of view argued in the appeal, there can be no finding of an intentional omission whereby decisions of the Judicial Committee of the CFA could be appealed neither to the CAS nor to another arbitral tribunal. To the contrary, it appears even from the legal opinion as to Cyprus law produced by the Appellant, however scantily reasoned, which moreover does not deal with the legal situation of the case at hand.

3.3.3 The reference to the anti-doping rules of the FIFA Statutes contained in the CFA statutes and thus the jurisdiction of the CAS provided in Article 63 (5) and (6) to adjudicate appeals by Respondents 1 and 2 against doping decisions of national football federations must be considered as legally binding in view of case law of the Federal Tribunal as to the validity of arbitration clauses by reference in the field of sport arbitration (see above E 3.2.2). If it is sufficient for a statutory provision to contain the general applicability of the rules of the international sport federation, including an arbitration clause among others, with regard to a sportsman who validly submitted to the statutes of a national federation according to Art. 178 (1) PILA (see judgment 4A_460/2008 of January 9, 2009 at 6.2), then the same must apply to a (limited) reference to parts of the statutes which provide for the jurisdiction of an arbitral tribunal for specific disputes – in this case decisions in the field of doping.

When the Appellant argues in his reply with reference to the formal requirement of Art. 178 (1) PILA that nowhere in the award did the CAS find that he would have issued a written statement joining the CFA or submitting to the CFA statutes, he does not show the

violation of any jurisdictional provisions. The Arbitral tribunal held that it was proved that the Appellant as trainer of football club Y._____ was registered with the CFA and in the framework of that registration had agreed to comply with the Statutes and regulations (including the Anti-Doping provisions) of the CFA. It is true that the award under appeal does not go into the details of that registration. However the Arbitral tribunal had no reason to clarify these circumstances any further as the Appellant did not factually dispute in the arbitral proceedings that there was a formally valid declaration of intent to be bound but merely – and wrongly as was shown – took the view that the reference contained in the pertinent CFA rules to the FIFA Statues was not sufficient but that it was necessary for the CFA statutes to contain an explicit right to appeal the decision of the Judicial Committee to the CAS. In view of this lack of contestation the Arbitral tribunal did not violate Art. 178 (1) PILA when it found that the registration met the necessary requirement of written form. To the extent that the Appellant would want to deny in his argument ever to have made a written statement that can be proved by its text in which he submitted to the CFA statutes, this would be a new argument raised for the first time in front of the Federal Tribunal and therefore inadmissible (Art. 99 (1) BGG).

The same applies to the argument that the Arbitral tribunal would not have found that the Appellant would have had the FIFA Statutes at hand or that their contents would have been known to him at the point in time when he submitted to the CFA statutes. The Appellant's argument that the formal requirement of Art. 178 (1) PILA would not be met appears accordingly unfounded to the extent that his arguments are admissible at all.

4.
The appeal proves to be unfounded and is to be rejected to the extent that the matter is capable of appeal. In view of the outcome of the proceedings the Appellant must pay costs and compensate the other Parties (Art. 66 (1) and Art. 68 (2) BGG).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that matter is capable of appeal.

2.
The Court costs of CHF 5'000 shall be paid by the Appellant.

3.
The Appellant shall pay CHF 6'000 to each of the Respondents for the federal proceedings.

4.
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne 18 April 2011

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:	The Clerk:
Klett	Leeman

4A_404/2010**
Judgment of 19 April 2011
First Civil Law Court

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Kiss Clerk of the Court: Mr Hurni
Parties	A._____, Appellant, represented by Dr Lucien W. Valloni and Dr Thilo Pachmann, **versus** Trabzonspor Kulübü Dernegi, Respondent 1, represented by Dr Martin Bernet and Mrs Hannah Boehm, & Turkish Football Federation (TFF), Respondent 2, represented by Dr Antonio Rigozzi.

*** From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).**
*** Translator's note: Quote as A._____ *v.* Trabzonspor and TFF, 4A_404/2010. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.**

Facts

A.

A.a A._____ (the Appellant) is a professional football player presently domiciled in X._____ (UK). He was born a British citizen on October 8, 1979 and additionally he obtained Turkish citizenship on August 17, 2004.

Trabzonspor Kulübü Dernegi (Respondent 1), a legal person based in Y._____ (Turkey) is a Turkish football club. It is a member of the Turkish Football Federation (TFF, Respondent 2), a legal person based in Istanbul which belongs to the Fédération Internationale de Football Association (FIFA).

A.b In January 2006 the Appellant and Respondent 1 signed a "standard players employment contract"[1] for a fixed time from January 18, 2006 until June 30, 2009 and a "supplementary employment contract"[2] lasting from January 17, 2006 until June 30, 2008 and an option for Respondent 1 to extend the duration of the contract until June 30, 2009.

On January 4, 2008 the Appellant terminated the employment relationship due to an alleged breach of contractual obligations by Respondent 1.

A.c In a fax of January 11, 2008 the Appellant raised a claim with FIFA against Respondent 1. On February 19, 2008 FIFA confirmed receipt of the fax and informed the Appellant in the name of its Dispute Resolution Chamber that

1. Translator's note: In English in the original text.
2. Translator's note: In English in the original text.

FIFA "cannot intervene in matters between two parties of the same nationality, but has to refer them to the decision-making bodies of the relevant member Association"[3].

A.d On April 8, 2008 the Appellant filed a claim against Respondent 1 with the Dispute Resolution Chamber of Respondent 2.

On December 2, 2008 the Dispute Resolution Chamber rejected the Appellant's claim and ordered him to pay damages to Respondent 1. It also banned him from playing for four months. By way of reasons the Dispute Resolution Chamber stated that the Appellant had illegally terminated the employment contract between him and Respondent 1.

A.e In January 2009 the Appellant appealed that decision to the Arbitration Chamber of Respondent 2.

Shortly afterwards the Appellant and the English football club Z._____ entered into an employment contract on February 15, 2009 lasting until June 30, 2009. On April 14, 2009 the single judge of the Players' Status Committee informed the British football association that the Appellant could be provisionally registered as player for Z._____ with immediate effect.

On April 16, 2009 the Arbitration Chamber of Respondent 2 set the amount to be paid by the Appellant to Respondent 1 at 129'353.38 Turkish pounds and confirmed the decision of the Dispute Resolution Chamber under appeal. The decision of the Arbitration Chamber was notified to the Appellant on October 21st, 2009.

B.
On November 11, 2009 the Appellant appealed the decision of the Arbitration Chamber of Respondent 2 of April 16, 2009 to the Court of Arbitration for Sport (CAS).

On June 10, 2010 the CAS issued an award holding that the matter was not capable of appeal.

C.
In a Civil law appeal of July 9, 2010 the Appellant submits that the Federal Tribunal should annul the arbitral award of the CAS of June 10, 2010 and find that the CAS has jurisdiction to handle the matter. Alternatively the matter should be sent back to the CAS for a new decision. As to procedure the Appellant submits among other things that a stay of enforcement should be granted and that a hearing should be conducted for oral arguments.

Respondent 1 and the CAS submit that the appeal should be rejected. Respondent 2 submits that the appeal should be rejected to the extent that the matter is capable of appeal.

The Appellant submitted a reply and a rejoinder to the Federal Tribunal, and Respondent submitted an answer and an additional brief.

On October 19 and 28, 2010 both Respondents applied for security for costs.

D.
A stay of enforcement was granted by presidential decision of September 30, 2010. By presidential decision of November 11, 2010 the Respondents' request for security for costs was granted. The Appellant subsequently deposited the amount requested of CHF 10'000 with the Federal Tribunal. The records of the arbitration proceedings were produced.

Reasons

1.
According to Art. 54 (1) BGG[4] the judgment of the Federal Tribunal is issued in an official language[5], as a rule in that of the decision under appeal. Should that decision have been issued in another language, the Federal Tribunal resorts to the official language used by the parties. The decision under appeal is in English. As that is not an official language and the parties used different languages in front of the Federal Tribunal, the judgment of the Federal Tribunal will be issued according to practice in the language of the appeal.

2.
The matter is ripe for a decision on the basis of the record. Ordering a hearing for oral arguments (Art. 57 BGG) as requested by the Appellant is not advisable. A mandatory public hearing in front of the Federal Tribunal is not required in appeal proceedings against arbitral awards according to Art. 77 BGG as required by law exceptionally, for claims according to Art. 120 (1) (c) BGG or when the Federal Tribunal wants to decide the case itself on the basis of its own finding of facts (Art. 55 BGG and Art. 107 (2) BGG) (see Heimgartner/Wiprächtiger, in: Basler Kommentar, Bundesgerichtsgesetz, 2008, nr 9 to Art. 57

3. Translator's note: In English in the original text.

4. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

5. Translator's note: The official languages of Switzerland are German, French and Italian.

BGG; Jean-Maurice Frésard, in Commentaire de la LTF, 2009, nr 8 ff to Art. 57 BGG). The request for a hearing in front of the Federal Tribunal must therefore be rejected.

3.
In the field of international arbitration a Civil law appeal is possible under the requirements of Art. 190-192 PILA[6] (Art. 77 (1) (a) BGG).

3.1 The seat of the arbitral tribunal is in Lausanne in this case. Both the Appellant and the Respondents had their seat or their domicile outside Switzerland at the relevant time. As the Parties did not rule out in writing the provisions of chapter 12 PILA they are to be applied (Art. 176 (1) and (2) PILA).

3.2 A Civil law appeal within the meaning of Art. 77 (1) BGG is in principle aimed at the annulment of the decision under appeal (see Art. 77 (2) BGG ruling out the application of Art. 107 (2) BGG to the extent that that provision empowers the Federal Tribunal to decide the matter itself). To the extent that the dispute involves the jurisdiction of the arbitral tribunal, there is however an exception in this respect, as already within the framework of the old public law appeal, namely that the Federal Tribunal may itself find the jurisdiction or the lack of jurisdiction of the arbitral tribunal (BGG 127 III 279 at 1b p. 282; 117 II 94 at 4 p. 95 ff; judgment 4A_240/2009 of December 16, 2009 at 1.2). The Appellant's main submission is therefore to be addressed.

3.3. A Civil law appeal within the meaning of Art. 77 (1) (a) BGG may only raise the grievances limitatively spelled out in Art. 190 (2) PILA (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal accordingly reviews only the grievances that are brought forward and reasoned in the appeal; this corresponds to the duty to submit reasons contained at Art. 106 (2) BGG for the violation of constitutional law and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references). Criticism of an appellate nature is not allowed (BGE 134 III 565 at 3.1 p. 567; 119 II 380 at 3b p. 382).

3.4 The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). This Court may neither correct nor supplement the factual findings of the arbitral tribunal, even if they are obviously inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 97 BGG and Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought forward against these factual findings or exceptionally when new evidence is taken into account (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; all with references). He who seeks an exception from the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wishes to supplement or correct the facts must show with reference to the record that the corresponding factual allegations were already made in the arbitral proceedings in accordance with the procedural rules (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

3.5 The Appellant disregards these principles in part:

3.5.1 He precedes his legal arguments with a statement of facts on several pages, in which he presents the background of the dispute and the proceedings from his point of view. In there he differs substantially from the factual findings of the Arbitral tribunal or broadens them, yet without claiming any substantial exceptions from the rule that the factual findings are binding. These statements shall therefore not be considered.

3.5.2 The Appellant then requires that in the framework of the appeal as to jurisdiction according to Art. 190 (2) (b) PILA "a possible criticism of appellate nature to the legal reasoning of the award should be comprehensively reviewed as to its legal soundness". If he wishes to invoke a general exception to the rule that the factual findings are binding according to Art. 105 (1) BGG by doing so, he disregards the fact that the Federal Tribunal is basically bound by the factual findings of the arbitral tribunal also with regard to the review of an appeal as to jurisdiction and that exceptions therefrom are to be raised and reasoned in details by the Appellant. To the extent that without corresponding reasoning he introduces facts which are no to be found in the decision under appeal he may consequently not be heard in this respect. This applies to his factual allegations under the heading "bb)

6. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

statement as to the proceedings in front of the TFF tribunals" in which the Appellant sets forth the alleged reasons why he appealed to the Arbitration Chamber of Respondent 2 and does so by freely supplementing the factual findings of the arbitral award. The same applies to the arguments under the heading "dd) club and TFF help the player to a second citizenship". Admittedly the Appellant alleges in this respect that the Arbitral tribunal left some of his submissions unheeded in violation of the right to be heard, yet he merely refers to a previous brief without showing in detail that the corresponding factual allegations had already been made in the arbitration proceedings in accordance with procedural rules.

3.5.3 Since only the grievances limitatively spelled out in Art. 190 (2) PILA may be raised in an appeal against an international arbitral award and not a direct violation of the federal constitution, of the ECHR or of other international treaties (see judgment 4A_43/2010 of July 29, 2010 at 3.6.1; 4A_320/2009 of June 2, 2010 at 1.5.3; 4P.64/2001 of June 11, 2001 at 2d/aa, not published in BGE 127 III 429 ff) the various arguments as to a violation of such provisions are not capable of appeal in principle. Yet the principles arising from the ECHR may be resorted to in order to apply the guarantees of Art. 190 (2) PILA; in view of the strong requirement for reasons (Art. 77 (3) BGG) the appeal itself must show to what extent one of the grounds for appeal contained in the aforesaid provision should apply.

The Appellant does not meet these requirements when he argues a violation of Art. 29a and 30 BV[7] as well as of Art. 13 ECHR under the heading "A. jurisdiction of the CAS" and "B. violation of the right to be heard", yet without showing at all to what extent the corresponding norms should render effective Art. 190 (2) (b) and (d) PILA. This also applies to the argument that the Federation tribunals of Respondent 2 would not be independent tribunals with reference to a judgment of the Turkish Constitutional Court. The argument shall not be addressed.

4.

Relying on Art. 190 (2) (b) PILA, the Appellant argues that the Arbitral tribunal wrongly accepted jurisdiction. Contrary to its holding, the Parties would have submitted to an arbitration clause which provided for jurisdiction of the CAS.

4.1

4.1.1 The Arbitral tribunal examined its jurisdiction on the basis of Art. R47 of the CAS-Code according to which a decision of a sport federation may be appealed to the CAS insofar as the statutes or regulations of the said body so provide[8]or when the parties have entered into a specific arbitration agreement[9].

In this respect the Arbitral tribunal then referred to the provisions in the employment contract between the Appellant and Respondent 1. § 16 of the supplementary employment contract reads as follows:

"a) Should any dispute occur that is not reasonable[10] resolved by the parties than[11] such disputes will be passed to FIFA for arbitration.

b) The contract shall be governed by the laws of Turkish and reserved under jurisdiction of the Turkish Law Courts."

§ 3 of the "Standard Players Employment Contract" reads as follows:

"The Executive Committee of the Turkish Football Federation and the Arbitration Committee shall have exclusively jurisdiction for the settlement of disputes arising out or in connection with this Contract[12]".

The Arbitral tribunal deducted from that that none of the employment contracts contained an arbitration clause which would provide for jurisdiction of the CAS as to an appeal against decisions of the Arbitration Chamber of Respondent 2. Therefore nothing pointed to a specific arbitration agreement between the parties within the meaning of R47 of the CAS-Code. Such an agreement could not be deducted from Articles 62.1, 63.1 and 64.3 of the FIFA Statutes either.

4.1.2 In a second step the Arbitral tribunal examined whether the Statutes or the Rules of Respondent 2 provided for an appeal to the CAS within the meaning of R47 of the CAS-Code. In this respect the Arbitral tribunal referred first to

7. Translator's note: BV is the German abbreviation for the Swiss Constitution.

8. Translator's note: In English in the original text.

9. Translator's note: In English in the original text.

10. Translator's note: *Sic.*

11. Translator's note: *Sic.*

12. Translator's note: In English in the original text.

Art. 2.1 of the Statutes of Respondent 2 (TFF Statutes) whereby it is one of the purposes of TFF "to recognize (…) the jurisdiction of the Court of Arbitration for Sport ("CAS") as specified in Articles 59 and 60 of the FIFA Statutes and paragraph 1 of Articles 59 of the UEFA Statutes"[13]. That provision was indeed to be interpreted in the light of Art. 64 of the TFF Statutes which reads as follows:

"CAS shall not, however, hear appeals on (...) decisions passed by the independent and duly constituted Arbitration Committee of the TFF"[14]. Furthermore Article 13f of the TFF Statutes had to be taken into a count, according to which it would be left to a member "to apply to the Arbitration Committee as a last instance at all disputes of national dimension arising from or related to the application of the TFF statutes or regulations, and not to take any dispute to any other judicial authorities"[15]. Finally the Arbitral tribunal referred to Turkish laws nr 3813 of November 29, 2007 and 5894 of May 5, 2009 whereby the Turkish law on "foundation and duties of the Turkish Football Federation (TFF)" (football law) was amended. Pursuant to law nr 3813 Art. 14 of the Turkish football law was supplemented as follows:

"The right of appeal to the Court of Arbitration for Sport against the awards of the Arbitration Board with regards to the disputes arising from the transfer, licence, and agreements of the players and agreements of the coaches and managers are reserved"[16].

However, pursuant to law nr 5894 Art. 6, 19 and 20 of the Turkish football law were written as follows:

"Art. 6 (1) The Arbitration Committee is an independent and impartial compulsory arbitration authority which is the top legal committee of TFF under the present Law and is also the legal body of last instance for disputes covered by the TFF Statutes and corresponding regulations.

(2) The Arbitration Committee exclusively and finally examines and decides over the decisions taken by any TFF organ or body, which has decision-making power given by the TFF Statutes and corresponding regulations (...).
(4) Any decision taken by the Arbitration Committee shall be final and binding for the relevant parties and no legal action may be taken against these decisions before any other judicial authorities (...).

Art. 19 (1) Law No. 3813 on the Establishment and Duties of the Turkish Football Federation, (...), was repealed (...).

Art. 20 (1) The present Law shall come into force on the date it is published in the Official Gazette"[17].

Based on Article 6 of the Turkish football law as revised as of May 5, 2009 in comparison with Art. 64 of the TFF Statutes, the Arbitral tribunal reached the conclusion that the CAS did not have jurisdiction as to the Appellant's appeal. That the old Art. 14 of the football law contained a reservation in favour of an appeal to the CAS was considered irrelevant by the Arbitral tribunal as that provision was no longer in force at the time of the appeal to the CAS on November 11, 2009.

4.2.3 In a third step the Arbitral tribunal examined whether or not jurisdiction of the CAS could be deducted from Article 14 of the Rules of the Arbitration Chamber of Respondent 2 (TFF-Rules of arbitration). In this respect the Arbitral tribunal referred to the translations of the provision produced by the Parties. According to the Appellant the provision reads as follows:

"Any objection to decisions of the Arbitration Board for disputes arising out of the contracts of Sportsmen, Managers and Coaches which contain a foreign element may be made to the Court of Arbitration for Sport in light of the regulations and directives of FIFA and UEFA"[18].

According to the Respondents the provision reads to the contrary as follows:

"Decisions of the Arbitration Committee shall be final (...)

Appeals may be filed with the Court of Arbitration for Sport in accordance with the regulations and statutes of FIFA and

13. Translator's note: In English in the original text.
14. Translator's note: In English in the original text.
15. Translator's note: In English in the original text.
16. Translator's note: In English in the original text.
17. Translator's note: In English in the original text.
18. Translator's note: In English in the original text.

UEFA against the resolutions adopted by the Arbitration Committee with regards to the disputes of international dimension arising from contracts of Players, Coaches and Trainers"[19].

Without expressing a view as to which of the two translations is pertinent the Arbitral tribunal then examined whether or not the dispute between the Appellant and Respondent 1 contained a foreign element or an international dimension. In this respect it held that the dispute related to the notice of termination which the Appellant notified to Respondent 1 on January 4, 2008. The Appellant claimed termination for cause as Respondent 1 was in breach of its contractual obligations to the extent that it would not pay the outstanding salary. The Arbitral tribunal deducted from that that the dispute had nothing to do with the Appellant's intent to move to a foreign club and therefore did not fall within the scope of the FIFA Regulations on the Status and Transfer of Players. Yet the Appellant argued the presence of a foreign element as on February 15, 2009 he had concluded a contract with the British club Z_____ and also required a so called International Certificate of Transfer in addition. However the Appellant introduced that element only 13 months after the notice of termination to Respondent 1. The Arbitral tribunal therefore concluded that no foreign club was involved in the dispute between the Appellant and Respondent 1 and that in particular the dispute was not connected with the issuance of an International Certificate of Transfer.

The Arbitral tribunal furthermore referred to the definition of "international dimension" according to Art. 22 (b) of the FIFA Regulations on the Status and Transfer of Players, which according to the official commentary reads as follows:

"The international dimension is represented by the fact that the player concerned is a foreigner in the country concerned"[20].

The Arbitral tribunal then examined whether or not the Appellant was to be considered as a foreigner in Turkey. In this respect it stated that the Appellant came to Turkey from England at the age of 23 as a British citizen and was registered with the Turkish club Q_____. On August 17, 2004, at the age of 24, the Appellant obtained Turkish citizenship. In January 2006, at the age of 26, the Appellant finally moved to Respondent 1 and was registered there as a Turkish player from January 2006 until January 2008.

With that background the Appellant could not be considered as a foreigner in Turkey, especially as the Appellant had definitely made use of the advantages of Turkish citizenship. Thus in a letter of April 12, 2005 he had asked the president of Respondent 2 to be admitted to the Turkish national team and pointed out in this respect that heretofore he had never played for an English team. In two further letters of April 26 and May 16, 2005 he repeated his desire to play with the national Turkish team. It even appears from an official document that on September 9, 2006 the Appellant would have played for Turkey against Germany at the occasion of the "Future Cups". The Arbitral tribunal concluded from this that the Appellant could no longer pretend to be a foreign player in Turkey. Against this background his second nationality as a British citizen, the citizenship of his family, his family life in England and the fact that he had played most of his career in England was incidental and irrelevant as to the issue of a possible international dimension. The dispute between the Appellant and Respondent 1 presented no international element at all which is why the CAS did not have jurisdiction even on the basis of Art. 14 of the TFF Arbitration Rules.

4.2

4.2.1 The Federal Tribunal exercises free judicial review as to the jurisdictional appeal according to Art. 190 (2) (b) PILA including the preliminary material issues from which the issue of jurisdiction depends. As opposed to the foregoing, even in the framework of a jurisdictional appeal it reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190 (2) PILA are brought against these factual findings or exceptionally when new evidence is taken into account (BGE 134 III 565 at 3.1 p. 567; 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733).

4.2.2 Art. 178 PILA applies to the formal requirements of the arbitration clause and determines the law applicable to its material

19. Translator's note: In English in the original text.

20. Translator's note: In English in the original text.

validity, namely with regard to its coming into being, its scope and its expiry. Yet the provision says nothing as to the substantial requirements and the necessary contents of an arbitration clause. In accordance with the traditional understanding of private law arbitration, it is to be understood as an agreement by which two or more determined or determinable parties agree to submit one or several existing or future determined disputes bindingly to an arbitral tribunal and to the exclusion of the original state jurisdiction according to a legal order immediately or indirectly determined. An additional requirement of an arbitration agreement is its clarity and certainty as to private jurisdiction, namely that the arbitral tribunal called upon to decide must be either clearly determined or in any event determinable (BGE130 III 66 at 3.1 with references).

4.3

4.3.1 The Appellant argues at first in his appeal that the Parties would have "joined" the "arbitration clause" of Art. 14 of the Turkish football law as in force until May 5, 2009 and did so at the introduction of the proceedings against Respondent 1 in front of the Arbitration Chamber of Respondent 2. The Appellant would have assumed that an appeal to the CAS was available to him against the decision of this Arbitration Chamber. Whilst Art. 14 of the Football law would no longer have been in force at the time of the appeal to the CAS, a subsequent amendment to the arbitration clause would require the approval of both Parties, which was not given here. It would also correspond to the intent of the Parties that the arbitration clause still valid at the time the arbitration request was filed should be applicable.

The CAS would therefore have had jurisdiction on the basis of Art. 14 of the Turkish Football law "and the arbitration clause contained therein together with to the Regulations in force at the time".

The grievance is unfounded. As the Respondents rightly point out, Art. 14 of the Turkish Football law as amended by law nr 3813 of November 29, 2007 merely contains a reservation in favour of a "right of appeal" to the CAS (The right of appeal to the Court of Arbitration for Sport ... are [sic!] reserved"[21]). That provision, abrogated in the meantime, merely left the possibility open that the Turkish Football Federation could adopt a corresponding right of appeal in its Statutes but, contrary to the Appellant's views, it does not represent an arbitration clause on which the Parties could have referred or "joined" by mutually consented reference. The jurisdiction of the CAS as appeal body against decisions of the Arbitration Chamber of Respondent 2 is not to be based on that.

4.3.2 The Appellant then argues with reference to judgment 4A_548/2009 of January 20, 2009[22] that the mere request of an International Transfer Certificate from FIFA would create "jurisdiction of the CAS for the contractual dispute in connection with that".

The case quoted dealt with a player who wanted to leave his club to play for another federation. In the ensuing dispute as to the termination of the employment contract the federations involved and the player turned to the Dispute Resolution Chamber of FIFA. Consequently the player had to face the provision of Art. 24 (2) of the FIFA Regulations on the Status and Transfer of Players, which provide for an appeal to the CAS against the decision of the FIFA Dispute Resolution Chamber (judgment 4A_548/2009 of January 20, 2009 at 3.2.1; 4.2.1; 4.2.2; 4.2.3). In the case at hand, to the difference of the aforesaid case, the dispute involves according to the factual findings of the Arbitral tribunal exclusively the termination of the employment relationship for an alleged breach of contractual obligations by Respondent 1. According to the Arbitral tribunal the dispute has nothing to do with the Appellant's transfer to another club. Moreover the decision under appeal was not issued by the FIFA Dispute Resolution Chamber but by the Arbitration Chamber of Respondent 2. There is no justification for jurisdiction of the CAS as appeal body against decisions of the Respondent's Arbitration Chamber on the basis of Art. 24 (2) of the FIFA Regulations on the Status and Transfer of Players, which provide for an appeal to the CAS only against decisions of the FIFA Dispute Resolution Chamber.

4.3.3

4.3.3.1 The Appellant furthermore argues that contrary to the views of the Arbitral tribunal, the dispute at hand shows quite a "foreign

21. Translator's note: In English in the original text.

22 Translator's note: An English translation is available at www.praetor.ch. The decision is dated January 20, 2010.

element" or an "international dimension" within the meaning of Art. 14 of the Rules of Arbitration of Respondent 2 (TFF-Rules of Arbitration). This element and this dimension would result firstly from the fact that he is not only a citizen of Turkey but also of the United Kingdom. As such he would be a national in the British football market and not fall within the quotas for foreigners there. Furthermore an international dimension would result from the fact that the supplementary employment contract was drafted in English and contained "an international arbitration clause (FIFA Arbitration)". Moreover the roots and the centre of the interests of the Appellant and his family would be in England; after the termination of the Contract the Appellant and his family would have gone back to England and looked for a new employer there. Finally the international dimension also results from the fact that the Appellant was imposed a four months ban by Respondent 2. Whilst the latter was subsequently lifted by the Arbitration Chamber of Respondent 2, this would give the case an international dimension because due to the ban it would have become more difficult for the Appellant to find a new employer on the worldwide market for football players.

4.3.3.2 Art. 14 of the TFF Rules of Arbitration, whether on the basis of the Appellant's translation or that of the Respondents' (above at 4.1.3) must be interpreted in the light of the FIFA Regulations, namely Article 22 of the FIFA Regulations on the Status and Transfer of Players. This is specifically acknowledged by the Appellant in his appeal to the Federal Tribunal. The decisive criterion for the interpretation of Art. 14 of the TFF-Rules of Arbitration is accordingly the aforesaid FIFA norm.

Art. 22 (b) of the FIFA Regulations on the Status and Transfer of Players determines the jurisdiction of FIFA for employment-related disputes between a club and a player that have any international dimension[23]. According to the FIFA official commentary an "international dimension" within the meaning of that provision is given when the player concerned is a foreigner in the country concerned (Commentary on the Regulations for the Status and Transfer of Players). Accordingly an international dimension or a foreign element within the meaning of Art. 14 of the TFF Rules of Arbitration interpreted in the light of the FIFA Regulations is given only when the claimant is a player who must be considered as a foreigner in the country of the Respondent football federation. According to an interpretation consistent with the FIFA Rules of Art. 14 of the TFF Rules of Arbitration, none of the other elements relied upon by the Appellant is relevant to give the dispute a foreign connection, namely the fact that the Appellant lives in England, his second citizenship, the language in which the supplementary employment contract was drafted or the ban effective on the transfer market worldwide. The Appellant cannot challenge that finding by reference to nr 4b of the Commentary on the Regulations for the Status and Transfer of Players as the developments there do not refer to Art. 22 (b) of the FIFA Regulations but to Art. 22 (a). That provision regulates disputes between a player and a federation as to a claim from an interested party in relation to such ITS Request, in particular regarding its issuance[24]. As mentioned above (above at 4.4.2) the dispute between the Parties does not involve a claim in connection with the issuance of a certificate of transfer but exclusively the alleged breach of contractual provisions by Respondent 1. The Appellant rightly does not claim that the employment dispute between the Parties would have originated from the fact that FIFA was requested to issue a certificate of transfer. His argument that the Arbitral tribunal itself would have assumed an international dimension of the facts by "applying" Art. 23 PILA is equally off the mark. The Arbitral tribunal merely pointed out in the reasons as an obiter dictum how the Swiss rules of conflicts of law in Art. 23 PILA preempt the issue of multiple citizenships, yet the aforesaid provision was not applied, let alone resorted to in order to determine the issue at hand.

Accordingly an international dimension or a foreign element within the meaning of Art. 14 of the TFF Rules of Arbitration would only have been realized if the Appellant were to be considered as a foreigner in a dispute with a Turkish football club. The Appellant rightly does not attempt to dispute seriously

23. Translator's note: In English in the original text.

24. Translator's note: In English in the original text.

that he is a Turkish citizen, who played in the Turkish federations as a citizen and even played for the Turkish national team. In its letter of February 19, 2008 FIFA too pointed out that Respondent 1 and the Appellant had the same nationality and referred the Parties accordingly to the decision making bodies of the Turkish Football Federation. The Appellant raised no objection in this respect. The Arbitral tribunal was accordingly right to deny jurisdiction on the basis of Art. 14 of the TFF Rules of Arbitration interpreted according to FIFA.

5.
The Appellant further argues that the Arbitral tribunal violated the right to be heard within the meaning of Art. 190 (2) (d) PILA as it breached the duty to set forth its reasons several times and denied the request for oral pleadings. The argument is unfounded because according to case law of the Federal Tribunal the principle of the right to be heard within the meaning of Art. 190 (2) (d) PILA does not encompass the requirement the arbitral tribunal give reasons or a right to oral arguments in front of the arbitral tribunal (BGE 134 III 186 at 6 p. 187 ff with references and BGE 117 II 346 at 1b/aa p. 348; judgment 4A_220/2007 of September 21st, 2007 at 8.1).

6.
The Appeal must accordingly be rejected to the extent that the matter is capable of appeal. In such an outcome the Appellant has to pay the costs and compensate the other parties (Art. 66 (1) and Art. 68 (2) BGG). As both Respondents submitted briefs and were represented by different lawyers, they are each entitled to costs. They will be taken from the deposit made by the Appellant for security for costs.

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 4'000 shall be borne by the Appellant.

3.
The Appellant shall pay CHF 5'000 to each Respondent for the federal judicial proceedings. That amount will be paid from the deposit made with the Court.

4.
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, 19 April 2011

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett	Hurni

4A_162/2011**
Judgment of 20 July 2011
First Civil Law Court

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Kiss Clerk of the Court: Mr Leemann
Parties	X._____ Appellant, represented by Mr Philipp J. Dickenmann and Mr Reto Hunsperger, **versus** Jamaican Football Federation Respondent, represented by Abogado Gianpaolo Monteneri Party joined to the proceedings, Fédération Internationale de Football Association (FIFA) , represented by Mr. Christian Jenny.

* From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).
* Translator's note: Quote as X._____ v. Jamaican Football Federation and FIFA, 4A_162/2011. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

Facts

A.

A.a X_____ (the Appellant) was born in what is today Serbia. He was previously a professional football player and is presently active as football coach. He lives in Mexico City and adopted Mexican citizenship. The Jamaican Football Federation (Respondent) is the national football federation of Jamaica and as such a member of the Fédération Internationale de Football Association (FIFA; participant in the proceedings), a non-profit corporation under Swiss law with headquarters in Zurich.

A.b On December 1st, 2006 the Appellant entered into an employment contract with the Respondent. He undertook there to act as technical director and chief coach of the national team of Jamaica between November 15, 2006 and November 14, 2010. A yearly salary of USD 1'000'000, namely a global amount of USD 4'000'000 for the four years of the contract, was foreseen as compensation.

The Appellant's duties were described as follows at paragraph 5 of the employment contract:

5(1): "Be responsible for and undertake the preparation, supervision and management of All National Football Teams; the assessment, supervision and upgrading of all national coaches; and such other matters necessary for the smooth and orderly development of the sport of football in Jamaica";

5(2): "Devote his full time and best efforts to the performance of the terms of this Agreement. In this regard, the Technical Director & Head Coach of The Senior Team agrees not to engage

in the provisions of any other services, or in any business or commercial activity without the prior written approval of the Federation";

5(3): "Advance the coaching methods of football teams island-wide in accordance with the National Football Programme approved by the Federation";

5(7): "Prepare and outline a plan of action for the comprehensive development of local football including all National Teams and present this to the Board of Directors of the Federation within six (6) months of the signing of this agreement."[1]

According to paragraph 9 (2) the Contract is to be terminated without further ado when "the Technical Director & Head Coach of the Senior Team breaches Clause 5 or 7 hereof or habitually neglects the duties he is required to perform under the term of this Agreement, and the Federation gives thirty (30) days written notice to the Technical Director & Head Coach of the Senior Team of its intention to terminate this Agreement upon the expiry of such notice."[2] Paragraph 9 (4) also provides that the Respondent could terminate the employment contract by giving thirty days notice to the extent that the national team should not be qualified for the 2010 World Championship in South Africa.

A.c By letter of November 7, 2010 the Respondent terminated the contract with the Appellant and relied in this respect on paragraph 9 (2), 5 (1), 5 (3) and 5 (7) of the employment contract. It claimed that the Appellant would in summary have failed:

a) To prepare, supervise and train the national team and other football teams with the required knowledge, care and involvement, which would have contributed to the bad results and therefore violated paragraph 5 (1) of the employment contract;

b) To develop a program to improve the national coaches, which would be a further violation of paragraph 5 (1);

c) To develop a plan for the improvement of the coaching methods of the football teams of Jamaica in accordance with the national football program, which would have violated paragraph 5 (3) of the employment Contract;

d) To present a plan of action for the comprehensive development of local football, which would be a violation of paragraph 5 (3).

The Respondent pointed out in its letter that it would pay the Appellant USD 62'500 as compensation for disregarding the thirty days notice requirement contained in the Contract, USD 330'500 for the salary due until November 15, 2007 for the first contractual year and USD 7'553 as reimbursement of expenses, namely USD 400'553 in total.

B.

B.a On February 28, 2008 the Appellant filed a claim with the Players' Status Committee of FIFA against the Respondent and demanded payment of more than USD 3'000'000 for unjustified termination and USD 1'000'000 as damages to his reputation.

On February 10, 2010 the FIFA Players' Status Committee awarded the Appellant an amount of USD 1'000'000 for unjustified termination. In particular it found that the Respondent had provided no proof of the alleged contractual violations. The Players' Status Committee furthermore found that the employment contract would have terminated as of November 19, 2008 according to paragraph 9 (4) as it turned out that the Jamaican national team could not be qualified for the 2010 World Championship. Accordingly the Appellant was merely entitled to his salary until that point in time and not until the end of the three contractual years remaining. The Players' Status Committee rejected the claim for damages to the Appellant's reputation.

B.b

B.b.a On April 28, 2010 the Respondent appealed the decision of the FIFA Players' Status Committee of February 10, 2010 to the Court of Arbitration for Sport (CAS). On May 10, 2010 it submitted the reasons in support of its appeal to the CAS. It submitted principally that the decision under appeal should be annulled for lack of jurisdiction of the FIFA Players' Status Committee. Alternatively it submitted that the decision under appeal of February 10, 2010 was to be annulled, that the Appellant's claim for damages was to be rejected and that the Appellant should be ordered to pay USD 500'000 with interest at 5%.

1. Translator's note: In English in the original text.

2. Translator's note: In English in the original text.

The Appellant submitted principally that the decision under appeal of the FIFA Players' Status Committee of February 10, 2010 should be upheld. Alternatively he submitted a counterclaim that the Respondent should be ordered to pay USD 3'000'000.

B.b.b In a communication of June 30, 2010 the CAS requested the Parties to make further submissions as to certain issues in dispute as to jurisdiction, as to the breach of contract and the mitigation of damages. Furthermore the Parties were to express their views as to whether or not there were any witnesses that had to be heard at the hearing. The submissions were made to the CAS on July 20 and July 21st, 2010. The Parties stated their position furthermore with submissions on July 28 and 29, 2010.

On November 15 and 17, 2010 the Parties signed the Order of Procedure[3] issued by the CAS as to the subsequent proceedings. The hearing took place on November 22, 2010 in Lausanne. Two witnesses were heard over the telephone.

On November 23, 2010 the CAS requested the Respondent to produce the minutes of the meetings of its Board of Directors between December 2006 and November 2007 and to express its position as to some newspaper articles and media communications.

On November 30, 2010 the Respondent submitted to the CAS the minutes of the Board of Directors meeting of June 9, 2007 and September 9, 2007 with an indication that they were the only minutes that it could find for the pertinent time. It stated its position with regard to the newspaper articles and press communications mentioned in the CAS letter and in addition it filed various witness statements[4].

Pursuant to a corresponding request of the CAS the Appellant expressed its views in a letter of December 14, 2010 as to the Respondent's submission. He requested in his letter that a new hearing should be held, during which Y_____, the Respondent's president at the time, should be heard as a witness. The CAS rejected the request based on the procedural rules of Article R55 and R56 of the CAS-Code. It pointed out in this respect that the Appellant had neglected to call Y_____ as a witness when this would still have been possible procedurally, although he had been specifically requested by letter of June 30, 2010 to name any additional witnesses for the hearing. According to Article R56 furthermore, the chairman of the Arbitral tribunal could only in exceptional cases allow new factual allegations or evidence after the filing of the reasons supporting the appeal or that of the answer to the appeal; yet the Appellant had claimed no exceptional circumstances to justify his late request for evidence.

B.b.c In an arbitral award of February 2, 2011 the CAS partly granted the Respondent's appeal against the decision of the Players' Status Committee of February 10, 2010 (award paragraph 1) and ordered the Respondent to pay damages in the amount of USD 19'691.90 to the Appellant in addition to the amounts (USD 62'500 + USD 330'500 + USD 7'553) contained in the Respondent's letter of November 7, 2007 (award paragraph 2). Furthermore the CAS rejected the Appellant's counterclaim for payment of USD 3'000'000 (award paragraph 3). Finally it issued a decision as to costs (award paragraph 4 and 5) and rejected any further submissions (award paragraph 6).

C.
In a Civil law appeal the Appellant submits that the Federal Tribunal should annul paragraphs 1-2 and 4-6 of the CAS arbitral award of February 2, 2011 and that the dispute should be sent back to the Arbitral tribunal for a new decision.

The Respondent and the CAS submit that the appeal should be rejected. FIFA chose not to participate actively in the proceedings.

Reasons

1.
In the field of international arbitration a Civil law appeal is allowed under the requirements of Art. 190-192 PILA[5] (SR 291) (Art. 77 (1) (a) BGG[6]).

1.1 The seat of the Arbitral tribunal is in Lausanne in this case. Neither the Appellant nor the

3. Translator's note: In English in the original text.

4. Translator's note: In English in the original text.

5. Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

6. Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173 110.

Respondent had their domicile, seat or habitual residence in Switzerland at the decisive time. As the Parties did not rule out in writing the provisions of chapter 12 PILA, they are applicable (Art. 176 (1) and (2) PILA).

1.2 Only the grievances limitedly spelled out in Art. 190 (2) PILA are admissible (BGE 134 III 186 at 5 p. 187; 128 III 50 at 1a p. 53; 127 III 279 at 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal; this corresponds to the duty to reason contained in Art. 106 (2) BGG with regard to the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5 p. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 at 3b p. 382).

1.3 The Federal Tribunal bases its judgment on the factual findings of the Arbitral tribunal (Art. 105 (1) BGG). This Court may not rectify or supplement the factual findings of the Arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG, which rules out the application of Art. 97 and Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190 (2) PILA are brought forward against these factual findings or exceptionally when new evidence is taken into consideration (BGE 133 III 139 at 5 p. 141; 129 III 727 at 5.2.2 p. 733; with references). Whoever argues an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wants to rectify or supplement the facts on that basis, must show with reference to the record that the corresponding factual allegations were already made in conformity with procedural rules in the arbitration proceedings (see BGE 115 II 484 at 2a p. 486; 111 II 471 at 1c p. 473; with references).

The Appellant precedes his legal argument with several pages of factual allegations, in which he presents the background of the dispute and of the proceedings from his own point of view. In several respects he departs from the factual findings of the Arbitral tribunal or broadens them without claiming any substantiated exceptions from the rule that the factual findings bind this Court. Furthermore he engages in appellate criticism of the award under appeal in many respects, yet without raising any admissible grievances according to Art. 190 (2) PILA. To that extent his arguments shall not be addressed.

2.
The Appellant argues a violation of the right to be heard and of the principle of equal treatment of the Parties (Art. 190 (2) (d) PILA).

2.1

2.1.1 The Respondent argues that the right to be heard does not only encompass the duty of the arbitral tribunal to take into account the arguments of the parties and to consider them for its decision but also that they find their way in the reasons of the award and that the considerations by which the arbitral tribunal let itself be led and on which it based its award should emerge from the reasons.

With regard to paragraph 5 (7) of the employment contract the Arbitral tribunal reached the conclusion that the contractual provision, properly interpreted, contained an obligation to submit the plan of action to the Board of Directors of the Respondent, which could not have been fulfilled by the facts the Appellant alleged in his briefs, yet without any supporting documents. The Appellant claims that the Arbitral tribunal would not have taken into consideration his argument that the Respondent‘s Board of Directors was informed of the plans he had developed.

2.1.2 Art. 190 (2) (d) PILA allows an appeal only for violation of the mandatory procedural rules according to Art. 182 (3) PILA. The arbitral tribunal must accordingly guarantee in particular the right of the parties to be heard. With the exception of the entitlement to reasons, this corresponds to the constitutionally protected right contained in Art. 29 (2) BV[7] (BGE 130 III 35 at 5 p. 37 ff; 128 III 234 at 4b p. 243; 127 III 576 at 2c p. 578 ff). Case law derives from that in particular that the parties have a right to express their views on all facts relevant for the decision, to submit their legal arguments, to prove their factual allegations important for the decision with appropriate means proposed timely and in conformity with formal requirements, to participate in the hearings and to access the record (BGE 130 III 35 at 5 p. 38; 127 III 576 at 2c p. 578 ff; with references).

7. Translator’s note: BV is the German abbreviation for the Swiss Constitution.

Contrary to what the Appellant seems to assume, there is no entitlement to reasons of the award in the principle of the right to be heard within the meaning of Art. 190 (2) (d) PILA (BGE 134 III 186 at 6 p. 187 ff with references). By way of the allegedly insufficient reasons of the award under appeal he submits none of the grievances contained at Art. 190 (2) PILA (see BGE 134 III 186 at 6.1 p. 187; 127 III 576 at 2b p. 577 ff; with references). Contrary to the opinion expressed in the appeal, it is not the case that the CAS would have disregarded the argument of the alleged cognizance of the Board of Directors. On the one hand it found factually that the Respondent had introduced evidence to the fact that the Board of Directors had been presented no plan of action, whilst the Appellant had produced no evidence to the contrary. On the other hand it found that it could not be concluded from the Appellant's allegations, which incidentally were left unproved, that he would have complied with his contractual duty to present the plan of action to the Board of Directors.

By doing so the Arbitral tribunal satisfied the minimal requirement arising from the principle of the right to be heard (Art. 190 (2) (d) PILA) to review the issues relevant for the decision and to address them (see BGE 133 III 235 at 5.2 p. 248). There can be no claim that judicial oversight would have made it impossible for the Appellant to present his point of view in the arbitration as to an issue relevant for the dispute (see BGE 133 III 235 at 5.2 p. 248; 127 III 576 at 2f p. 580). Rather his arguments are aimed at criticizing the contents of the award under appeal; yet he rightly does not argue that it would be contrary to public policy (Art. 190 (2) (e) PILA).

2.2

2.2.1 The Appellant further argues that the Arbitral tribunal would have disregarded his arguments concerning the real reason for termination by the Respondent in violation of the right to be heard, although he would have pointed out many times in the arbitral proceedings that the termination without notice which took place on November 7, 2007 was only due to the fact that four days previously the then president of the Respondent had been removed and substituted with Z. _____. The reasons relied upon by the Respondent as to the termination of the contract without notice would be mere pretexts.

2.2.2 The Arbitral tribunal summarized the Appellant's arguments as to the issue of the proper performance of the contract. It mentioned expressly in this respect that the Appellant claimed that he had fulfilled his contractual obligations and that the Respondent violated the employment contract to the extent that it pretended to terminate it according to paragraph 9. According to the Arbitral tribunal the Appellant claimed that he had not been terminated for inadequate performance of his contractual obligations but as a consequence of the change in the presidency of the Respondent which took place on November 3, 2007 as Y_____ was substituted by Z_____. In view of the reasons contained in the award under appeal there can be no claim that the Arbitral tribunal would not have taken into consideration the Appellant's argument. The CAS took into consideration in the award the argument that the reasons for termination would have been mere pretexts. To the extent that it found a violation of paragraph 5 (7) of the employment contract by the Appellant and held that the termination was licit, it correspondingly rejected the argument. There was no need of specific reasons in this respect (see BGE 134 III 186 at 6 p. 187 ff). The argument that the right to be heard was violated (Art. 190 (2) (d) PILA) therefore proves to be unfounded.

2.3

2.3.1 The Appellant argues a violation of the principle of equal treatment of the parties and of the right to be heard (Art. 190 (2) (d) PILA) because the Arbitral tribunal, according to him, gave the Respondent an opportunity to introduce further evidence as to the issue of the violation of paragraph 5 (7) of the employment Contract, whilst the Appellant would have been denied additional evidence in this respect, namely the interrogation of Y_____ as a witness. The Arbitral tribunal could not deny that to the Respondent (subsequent designation of evidence; subsequent designation of an additional witness), which it had just granted to the other party in the same situation. The rejection of the request for a second hearing and testimony of Y_____ by the CAS would have violated the Appellant's right to equal treatment and the entitlement to the right to be heard.

2.3.2 The argument of a violation of the right to be heard is unfounded. An entitlement to evidence exists only to the extent that the

evidential submission took place timely and in compliance with formal requirements (BGE 119 II 386 at 1b p. 389; see also BGE 134 I 140 at 5.3 p. 148; 127 I 54 at 2b p. 56; 124 I 241 at 2 p. 242; with references). The Appellant's submission that a new witness should be heard was late according to the procedural provisions applicable to the arbitration. Therefore the Arbitral tribunal did not violate the Appellant's right to be heard when it relied on Article R55 and R56 of the CAS-Code to reject the request, made only in a letter of December 14, 2010, that Y_____ should be heard as a witness.

2.3.3 The principle of equal treatment of the parties demands that the arbitral tribunal should in particular treat the parties equally in all procedural issues (Frank Vischer, in: Zürcher Kommentar, 2 Ed. 2004, nr 25 to Art. 182 PILA, Bernard Dutoit, Commentaire de la loi fédérale du 18 décembre 1987, 4 Ed. 2005, nr 6 to Art. 182 PILA).

There is no entitlement of the Appellant to a subsequent second hearing or to a witness hearing of Y_____ to be deducted from that principle. Also, the Appellant does not quote accurately the CAS Procedural order of November 23, 2010 when he claims generally that the Respondent would have been given an opportunity to introduce subsequent evidence as to the issue of the violation of paragraph 5 (7) of the employment contract and to produce additional evidence. The CAS instead required the Respondent in the aforesaid Procedural order to produce some specific documents (namely the minutes of its Board of Directors meetings between December 2006 and November 2007) and to express a view as to certain newspaper articles and media communications. Contrary to what the Appellant seems to assume, no invitation to the Respondent is to be found there to introduce new evidence as to the issue of the violation of paragraph 5 (7) of the employment contract or to propose new evidence by way of hearings of witnesses. A new hearing of witnesses was neither requested nor ordered. Accordingly the principle of equal treatment of the parties did not require granting the Appellant's new submissions of evidence, in particular as to the hearing of a new witness, let alone a second hearing. The Appellant rightly does not dispute that he was able to express a view as to the Respondent's corresponding submission. The reasons in the award under appeal as to the rejection of the request to introduce new evidence, namely that according to Art. R55 of the CAS-Code witnesses have to be named in the answer to the appeal and that the Appellant had requested that Y_____ be heard as a witness neither in his answer to the appeal nor upon the specific request of the Arbitral tribunal of June 30, 2010 with regard to the hearing and that furthermore even in his submission of December 14, 2010 he did not claim any extraordinary circumstances for a subsequent admission of evidence according to Article R56 of the CAS-Code, does not violate the mandatory procedural requirements of Art. 190 (2) (d) PILA. There is no entitlement of the Appellant to a subsequent second hearing or to the interrogation of Y_____ as a witness to be deducted from the principle of equal treatment.

3.
The appeal proves to be unfounded and is to be rejected to the extent that the matter is capable of appeal. According to this outcome of the proceedings, the Appellant has to pay costs and to compensate the Respondent (Art. 66 (1) and Art. 68 (2) BGG). As the Respondent requested security for costs only in its answer to the appeal, it had already undergone all its costs at the time of the request, which has accordingly become moot (BGE 118 II 87 at 2 p. 88).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 15'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent CHF 17'000 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, 20 July 2011

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk:
Klett	Leeman

4A_530/2011
Arrêt du 3 octobre 2011
Ire Cour de droit civil

Composition Mmes et M. les Juges Klett, Présidente, Kolly et Kiss
Greffier: M. Carruzzo

Parties X._____,
recourant, représenté par Me Pascal de Preux,

contre

Z._____,
intimée, représentée par Me Albert von Braun.

Faits

A.

A.a X._____ (ci-après: l'athlète) est une coureuse de demi-fond, titulaire d'une licence délivrée par la Fédération ... d'athlétisme.

Le 8 décembre 2008, la Commission d'appel de Z._____, entité publique spécialisée dans la lutte antidopage, a confirmé la décision du 10 septembre 2008 par laquelle la Commission des sanctions de Z._____ avait condamné l'athlète à une suspension de deux ans dès le 16 novembre 2007 pour violation des règles antidopage.

Saisi d'un appel de l'athlète, le Tribunal Arbitral du Sport (TAS) l'a déclaré irrecevable par sentence du 9 octobre 2009.

A.b Au printemps 2010, l'Association internationale des fédérations d'athlétisme (ci-après: l'IAAF, selon son acronyme anglais) a chargé Z._____ d'effectuer des contrôles antidopage hors compétition sur un groupe-cible, dont l'athlète faisait partie. Après une première tentative infructueuse, deux agents de Z._____ se sont rendus, le 18 mai 2010, dans une localité ..., au lieu d'entraînement de l'athlète, afin de faire subir à celle-ci et à une autre coureuse de fond un contrôle inopiné. Selon les dires, contestés, de l'un d'eux, l'athlète aurait tenté de fausser le contrôle au moment du prélèvement d'un échantillon d'urine, puis aurait quitté précipitamment la salle de bains et se serait enfuie après avoir jeté dans le lavabo le gobelet qu'elle avait commencé à remplir.

La Commission d'audition de Z._____ a suspendu provisoirement l'athlète par décision du 3 juin 2010. Elle l'a entendue une première fois le lendemain, puis le 11 juin 2010, date à laquelle elle a procédé également à l'audition de témoins et à la confrontation de l'athlète avec les deux agents ayant procédé au contrôle du 18 mai 2010. Par décision n° 18 du 8 juillet 2010, ladite Commission a constaté l'applicabilité des dispositions relatives au refus de se soumettre à

un contrôle antidopage ou à l'absence injustifiée à un tel contrôle et à la contrefaçon ou tentative de contrefaçon d'un échantillon. Sur cette base et compte tenu de la précédente sanction disciplinaire infligée à l'athlète ainsi que du caractère suspicieux d'échantillons prélevés sur celle-ci lors d'un contrôle hors compétition effectué le 10 mars 2010 par l'IAAF, elle a prononcé la suspension à vie de l'athlète.

B.

B.a Le 4 août 2010, l'athlète a interjeté appel auprès du TAS. Elle lui a adressé son mémoire d'appel le 27 du même mois. Z._____ a déposé sa réponse le 25 octobre 2010.

Par fax du 9 novembre 2010, l'appelante a requis le bénéfice de l'assistance judiciaire et s'est déclarée favorable à ce que la cause soit soumise à un arbitre unique. L'intimée a sollicité, pour sa part, la désignation d'une formation de trois arbitres.

Le Conseil International de l'Arbitrage en matière de Sport (CIAS) a octroyé l'assistance judiciaire à l'appelante par ordonnance du 11 janvier 2011. Le même jour, le Greffe du TAS a informé les parties que le différend serait tranché par un arbitre unique dont il leur a indiqué le nom. Le 15 février 2011, il les a avisées de la désignation, par le CIAS, de Me Pascal de Preux en qualité d'avocat d'office de l'appelante.

L'audience d'instruction et de jugement a été tenue le 14 avril 2011 à Lausanne. Au cours de cette séance, l'arbitre unique a procédé à l'audition de plusieurs témoins et experts ainsi qu'à l'interrogatoire des parties avant de clore l'instruction.

B.b Par sentence du 26 juillet 2011, l'arbitre unique, après s'être déclaré compétent, a rejeté l'appel de l'athlète et confirmé la décision qui en formait l'objet.

En substance, l'arbitre unique a considéré que Z._____ était seule compétente, à l'exclusion de la fédération nationale de l'athlète, pour statuer en matière de lutte antidopage en .... Quant au grief par lequel l'appelante se plaignait de ne pas avoir bénéficié d'un procès équitable devant cette instance, il l'a rejeté au motif que le plein pouvoir d'examen du TAS, relativement aux faits et au droit, purgerait en tout état de cause les éventuels vices de forme commis par Z._____. L'arbitre unique a apprécié ensuite les preuves versées au dossier de l'arbitrage pour déterminer si l'intimée, qui avait la charge de cette preuve, avait établi, au degré requis par la réglementation ad hoc, que l'athlète s'était dérobée à un prélèvement d'échantillon d'urine. Arrivant à la conclusion que tel était bien le cas, il s'est alors penché sur la sanction prononcée par Z._____. Bien que jugeant la suspension à vie sévère, puisqu'elle signifie la fin de la carrière de l'athlète, il a estimé devoir la retenir eu égard aux circonstances de l'espèce et parce que, de toute façon, il n'était pas saisi d'une conclusion tendant à la réduction de cette sanction. Celle-ci, a encore ajouté l'arbitre unique, était du reste conforme à une jurisprudence fermement établie du TAS en la matière; au demeurant, elle ne visait pas uniquement à punir l'athlète, mais également à préserver sa santé.

C.

Le 6 septembre 2011, l'athlète a interjeté un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence du 26 juillet 2011. La recourante a requis sa mise au bénéfice de l'assistance judiciaire pour la procédure fédérale et la désignation de son mandataire en qualité d'avocat d'office.

L'intimée et le TAS n'ont pas été invités à déposer une réponse.

Considérant en droit:

1.

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions fixées par les art. 190 à 192 LDIP (art. 77 al. 1 LTF). Qu'il s'agisse de l'objet du recours, de la qualité pour recourir, du délai de recours ou encore des conclusions prises par la recourante, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière.

2.

En premier lieu, la recourante reproche au TAS d'avoir violé son droit d'être entendue et l'égalité des parties, au sens de l'art. 190 al. 2 let. d LDIP, dans le traitement de sa demande d'assistance judiciaire.

2.1 Les motifs qui étayent ce grief manquent singulièrement de clarté et ne permettent guère de cerner la portée de celui-ci. C'est d'autant plus vrai, d'une part, que la demande en question a été admise et, d'autre part, que la décision y relative a été rendue par le CIAS.

2.2 La recourante paraît vouloir se plaindre, en réalité, du temps - trois mois - qui s'est écoulé

entre le dépôt de sa demande d'assistance judiciaire et la désignation de son avocat d'office. A l'en croire, pareille circonstance, autrement dit l'absence de conseil à ses côtés durant cette période, aurait eu pour effet de la priver du droit de voir sa cause jugée par trois arbitres au lieu d'un arbitre unique.

Le rapport entre semblables doléances et le grief considéré est difficilement perceptible. Surtout, on ne voit pas ce qui aurait empêché la recourante, dûment assistée de son conseil à l'audience d'instruction et de jugement tenue le 14 avril 2011, de s'opposer fermement à ce que sa cause soit traitée par l'arbitre unique, en réitérant ses arguments relatifs à la durée de la procédure d'assistance judiciaire, et de réclamer la constitution d'une formation de trois arbitres. Or, la sentence attaquée constate en ces termes que la recourante n'a pas suivi cette voie (p. 11 n° 58):

"Au début de l'Audience, l'Arbitre a rappelé les éléments du dossier qui avaient conduit à la composition de la Formation, limitée à un Arbitre unique. Il a également rappelé les observations qui avaient été présentées par les parties sur ce point. En réponse à la question de l'Arbitre quant à la poursuite et la tenue de l'audience avec une formation composée d'un Arbitre unique, les parties ont répondu ne plus vouloir soulever d'objections quant à la composition de la formation et le déroulement de la procédure devant le TAS en général et accepter la poursuite de l'affaire." (termes mis en évidence par le Tribunal fédéral).

Sans doute la recourante conteste-t-elle ne pas avoir soulevé d'objections lors de cette audience. Elle le fait, toutefois, sur la base d'une citation tronquée du passage reproduit ci-dessus, en se gardant bien de mentionner les termes qui y figurent en gras (cf. mémoire de recours, p. 4, 2e §), ce qui enlève toute crédibilité à ses dires. De surcroît, elle n'indique pas quelles objections elle aurait émises concrètement à cette occasion, mais se contente de renvoyer, sans autres précisions, le Tribunal fédéral à l'audition de la bande-son de la séance du 14 avril 2011, ce qui n'est pas admissible au regard de l'exigence de motivation d'un recours dirigé contre une sentence arbitrale internationale (cf. art. 77 al. 3 LTF).

C'est le lieu de rappeler que la partie qui s'estime victime d'une violation de son droit d'être entendue ou d'un autre vice de procédure doit l'invoquer d'emblée dans la procédure arbitrale, sous peine de forclusion. En effet, il est contraire à la bonne foi de n'invoquer un vice de procédure que dans le cadre du recours dirigé contre la sentence arbitrale, alors que le vice aurait pu être signalé en cours de procédure (arrêt 4A_348/2009 du 6 janvier 2010 consid. 4).

Conformément à ces principes jurisprudentiels, la recourante, pour ne pas avoir agi alors qu'il était encore temps, n'est plus recevable à venir se plaindre aujourd'hui du prétendu vice de la procédure ayant conduit à l'octroi de l'assistance judiciaire et des effets qu'il a pu avoir sur la composition de la formation ayant rendu la sentence attaquée.

Le premier moyen est ainsi dénué de tout fondement.

3.

3.1 En second lieu, la recourante, invoquant l'art. 190 al. 2 let. e LDIP, fait valoir que la sentence entreprise serait incompatible avec l'ordre public procédural, dont le droit à un tribunal indépendant et impartial, garanti par l'art. 30 al. 1 Cst., ferait partie intégrante.

Après un exposé théorique dans lequel elle rappelle le contenu de cette garantie constitutionnelle, la recourante s'emploie à démontrer que Z._____, du fait de ses liens organiques avec l'Etat ... et de la manière dont sa Commission d'audition a conduit la procédure disciplinaire, ne satisferait pas aux exigences que la jurisprudence a déduites de ladite garantie.

La recourante souligne enfin que l'effet guérisseur, invoqué par l'arbitre unique sur la base de l'art. R57 du Code de l'arbitrage en matière de sport (ci-après: le Code; sentence, nos 100 à 102), ne s'appliquerait qu'à la violation du droit d'être entendu et non pas à un vice procédural aussi grave que le manque d'indépendance ou d'impartialité d'un tribunal arbitral.

3.2 Le précédent que la recourante invoque pour rattacher le droit à un tribunal indépendant et impartial à l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP n'a rien de topique.

L'arrêt en question, rendu le 20 juillet 2007 par le Tribunal fédéral dans la cause 4A_137/2007, avait trait à la reconnaissance d'un jugement étatique; c'est dans ce contexte, que la Ire Cour de droit civil y a rappelé, au considérant 6.1, que l'exigence d'indépendance et d'impartialité d'un tribunal fait partie des principes fondamentaux

ressortissant à la conception suisse du droit de procédure, visés par l'art. 27 al. 2 let. b LDIP.

En réalité, le Tribunal fédéral a posé de longue date que le non-respect de la règle voulant qu'un tribunal arbitral présente des garanties suffisantes d'indépendance et d'impartialité conduit à une désignation irrégulière relevant de l'art. 190 al. 2 let. a LDIP (ATF 118 II 359 consid. 3b). Il a d'ailleurs confirmé la chose dans un récent arrêt (ATF 136 III 605 consid. 3.2.1 p. 608). Quant à l'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, il n'y voit qu'une garantie subsidiaire ne pouvant être invoquée que si aucun des moyens prévus à l'art. 190 al. 2 let. a-d LDIP n'entre en ligne de compte (arrêt 4P.105/2006 du 4 août 2006 consid. 5.3 et les références).

Force est de constater que la recourante ne se plaint pas de la violation de l'art. 190 al. 2 let. a LDIP à l'appui de son second grief, mais uniquement de celle de l'art. 190 al. 2 let. e LDIP. En d'autres termes, elle invoque un moyen subsidiaire alors qu'elle aurait dû invoquer le moyen principal qui était à sa disposition. La recevabilité du grief considéré apparaît ainsi déjà sujette à caution.

3.3 Quoi qu'il en soit, même recevable, le grief en question ne pourrait qu'être rejeté.

3.3.1 La recourante ne remet pas en cause l'indépendance et l'impartialité de l'arbitre unique, désigné par le TAS, qui a statué sur son appel en revoyant "les faits et le droit avec plein pouvoir d'examen", pour reprendre les termes de l'art. R57 al. 1, première phrase, du Code. Elle ne prétend pas non plus qu'elle aurait été dans l'impossibilité, pour quelque raison que ce fût, de présenter à l'arbitre unique un élément de preuve propre à étayer sa thèse ou un argument juridique de nature à conforter celle-ci.

Il est ainsi constant que l'intéressée a pu soumettre son cas à une juridiction arbitrale satisfaisant aux exigences posées par la jurisprudence pour être assimilée à un véritable tribunal, juridiction qui jouissait d'une cognition complète à l'égard tant des faits que du droit. Autrement dit, un tribunal digne de ce nom a instruit la cause de novo pour rechercher si les faits imputés à la recourante correspondaient ou non à la réalité. Il a ensuite qualifié juridiquement l'infraction aux règles antidopage que constituaient, à ses yeux, les faits retenus par lui sur la base de son appréciation des preuves administrées. Enfin, il s'est prononcé sur le bien-fondé de la sanction infligée à l'athlète pour réprimer l'infraction commise.

3.3.2 Selon la recourante, l'effet guérisseur, que le TAS attache à sa sentence en vertu de la disposition du Code précitée, ne s'appliquerait qu'à la violation du droit d'être entendu, mais en aucun cas à celle des garanties d'indépendance et d'impartialité d'un tribunal. Or, pour elle, Z._____ n'offrirait pas de telles garanties, qu'il s'agisse des modalités de sa désignation ou de sa manière de fonctionner. Aussi, admettre un effet guérisseur en appel reviendrait à faire du TAS une instance unique dotée de pouvoirs illimités.

Dans l'affaire du coureur cycliste professionnel A._____, le Tribunal fédéral a été saisi d'un moyen comparable par lequel le recourant reprochait au TAS d'avoir voulu assumer les fonctions d'organe d'instruction, d'organe disciplinaire et d'organe d'appel dans une seule et même procédure. Il a rejeté ce moyen au motif qu'il ne voyait pas pourquoi le TAS, fort du large pouvoir que lui confère l'art. R57 al. 1 du Code, ne pourrait pas instruire lui-même l'affaire sur laquelle il doit statuer en appel, lorsque l'autorité de première instance a refusé d'ouvrir une procédure disciplinaire. Il a rappelé, en outre, que l'exigence d'une double instance ou d'un double degré de juridiction ne relève pas de l'ordre public procédural au sens de l'art. 190 al. 2 let. e LDIP (arrêt 4A_386/2010 du 3 janvier 2011 consid. 6.2 et l'arrêt cité). Semblables remarques peuvent être formulées, mutatis mutandis, dans la présente cause.

Dès lors, le moyen pris de la violation de l'art. 190 al. 2 let. e LDIP ne pourrait qu'être rejeté, à le supposer recevable.

4.

Il résulte de ce qui précède que le présent recours était voué à l'échec. Dès lors, la demande d'assistance judiciaire formulée par son auteur ne peut qu'être rejetée en application de l'art. 64 al. 1 LTF. Ce nonobstant, eu égard à la situation financière délicate de la recourante, telle qu'elle ressort des pièces produites, la Cour de céans renoncera à percevoir des frais pour la procédure fédérale (art. 66 al. 1 LTF). Par ailleurs, la question des dépens ne se pose pas puisque l'intimée n'a pas été invitée à déposer une réponse au recours.

Par ces motifs, le Tribunal fédéral prononce:

1.
La demande d'assistance judiciaire est rejetée.

2.
Le recours est rejeté dans la mesure où il est recevable.

3.
Il n'est pas perçu de frais.

4.
Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 3 octobre 2011

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_428/2011
Arrêt du 13 février 2012
Ire Cour de droit civil

Composition	Mmes et M. les Juges Klett, Présidente, Kolly et Corboz Greffier: M. Carruzzo
Parties	A._____, recourant, & B._____, recourant, **contre** Agence Mondiale Antidopage (AMA), intimée, & Fédération flamande de tennis (VTV), intimée.
Objet	arbitrage international, recours en matière civile contre les "sentences partielles" rendues le 10 juin 2011 par le Tribunal Arbitral du Sport (TAS).

Faits

A.

A.a La Fédération royale belge de tennis gère la pratique du tennis en Belgique. Affiliée à la Fédération internationale de tennis (ci-après: l'ITF, selon son acronyme anglais), elle regroupe deux associations distinctes: la ligue francophone et la ligue néerlandophone (Fédération flamande de tennis ou Vlaamse Tennisvereniging; ci-après: la VTV).

A._____ est un joueur de tennis professionnel affilié à la VTV.

B._____ est une joueuse de tennis professionnelle affiliée à la VTV.

L'Agence Mondiale Antidopage (ci-après: l'AMA) est une fondation de droit suisse ayant son siège à Lausanne. Elle a notamment pour but de promouvoir, au niveau international, la lutte contre le dopage dans le sport.

A.b Par décision du 5 novembre 2009, le Vlaams Doping Tribunal (ci-après: le VDT), organisme dépendant de la VTV, a condamné A._____ à une période de suspension d'une année pour violation des règles antidopage (deux manquements du joueur au devoir d'information sur sa localisation et un test manqué).

A la même date, le VDT a condamné B._____ à une période de suspension d'une année pour violation des règles antidopage (trois manquements de la joueuse au devoir d'information sur sa localisation).

B.

B.a Le 16 novembre 2009, A._____ et

B._____, agissant séparément, ont interjeté appel auprès du Tribunal Arbitral du Sport (TAS), lequel a ouvert deux dossiers sous les cotes respectives de TAS 2009/A/1994 A._____ c. VDT (ci-après: la procédure 1994) et TAS 2009/A/1995 B._____ c. VDT (ci-après: la procédure 1995).

Le 21 décembre 2009, l'AMA a, elle aussi, appelé des deux décisions rendues le 5 novembre 2009 par le VDT. Le TAS a alors ouvert les procédures TAS 2009/A/2020 AMA c. VDT, VTV et A._____ (ci-après: la procédure 2020), d'une part, et TAS 2009/A/2021 AMA c. VDT, VTV et B._____ (ci-après: la procédure 2021), d'autre part.

B.b Parallèlement à leurs appels au TAS, A._____ et B._____ (ci-après désignés collectivement: les athlètes ou les recourants) ont introduit plusieurs procédures devant les tribunaux étatiques belges et requis de certains d'entre eux qu'ils adressent à la Cour de Justice de l'Union européenne (CJUE) une question préjudicielle portant notamment sur la conformité de diverses règles du Code Mondial Antidopage (CMA) et du Code de l'arbitrage en matière de sport (CAS) au droit communautaire et à la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (CEDH). Ils ont en particulier déposé, le 16 novembre 2009, une demande en référé, raison pour laquelle le TAS a suspendu les procédures 1994 et 1995 jusqu'à nouvel avis en date du 25 novembre 2009. A la même époque, les athlètes ont encore assigné l'Etat belge devant la Commission européenne.

Se prévalant des procédures pendantes devant les autorités judiciaires belges, resp. européennes, les deux athlètes ont requis la suspension des procédures 2020 et 2021. Ils ont, en outre, contesté la compétence du TAS pour se saisir de ces affaires.

Une audience du TAS a été tenue en français à Bruxelles, le 2 novembre 2010. Les parties n'y ont formulé aucune remarque quant à son déroulement ni quant à la composition de la Formation de trois membres désignée pour statuer sur leurs appels.

Par courrier du 2 mars 2011, le TAS, après avoir recueilli leurs déterminations écrites à ce sujet, a informé les parties que la Formation statuerait prochainement sur la suspension des procédures 1994, 1995, 2020 et 2021 de même que, le cas échéant, sur sa compétence.

B.c Par "sentence partielle" du 10 juin 2011, rendue à la majorité, le TAS s'est déclaré compétent pour connaître des procédures 1994 et 2020; il a rejeté la requête de suspension de la procédure 2020, dit que les procédures 1994 et 2020 seraient traitées de façon consolidée par la Formation et ordonné la reprise de la procédure 1994. Une sentence identique, hormis les numéros des causes, a été rendue le même jour dans les procédures 1995 et 2021 intéressant B._____.

Les arguments sur lesquels reposent ces deux sentences seront développés plus loin dans le cadre de l'examen des griefs s'y rapportant.

C.

Le 7 juillet 2011, les deux athlètes, représentés par le même avocat, ont déposé une écriture intitulée "requête d'effet suspensif en marge d'un recours en matière civile à venir" aux fins d'obtenir la jonction de leurs causes et la suspension des sentences attaquées jusqu'à droit connu sur la requête d'effet suspensif, puis l'octroi de celui-ci jusqu'au prononcé de l'arrêt du Tribunal fédéral.

En date du 13 septembre 2011, les intéressés ont déposé un mémoire de recours unique. Ils y ont repris leurs conclusions préalables tendant à la jonction des deux causes et à l'octroi de l'effet suspensif au recours, ont requis un complètement des faits visant à prendre en compte "les écritures des recourants et non le résumé lacunaire que le TAS en a fait dans les sentences entreprises", "le règlement de la procédure de la Fédération flamande de tennis" et "l'art. O.1 de la réglementation antidopage de la fédération internationale de tennis (ITF)" et ont conclu, sur le fond, à l'annulation des deux sentences attaquées.

Par ordonnance présidentielle du 21 septembre 2011, les causes concernant les deux athlètes ont été jointes. L'effet suspensif a été accordé au recours et il a été constaté que le VDT ne devait pas être considéré comme une partie ou un participant à la procédure de recours fédérale.

Dans sa réponse du 24 octobre 2011, l'AMA a conclu au rejet du recours. Le TAS en a fait de même dans sa réponse du 14 novembre 2011. En revanche, la VTV a conclu à l'admission du recours, à l'annulation des deux sentences et à la suspension des causes arbitrales jusqu'à ce que les juridictions belges, resp. européennes, aient statué dans les procédures visant notamment à remettre en cause la compétence du VDT et/ou du TAS ou, subsidiairement, tant et aussi longtemps que la VTV serait soumise à une

interdiction d'exécuter les sanctions prononcées à l'encontre des deux athlètes.

Les recourants ont déposé une réplique, le 24 novembre 2011. Ils y ont soulevé un incident de procédure relatif aux mandataires de l'AMA sur lequel il y aura lieu de revenir en temps utile. Dans ses observations du 30 novembre 2011, l'AMA a conclu au rejet de l'incident.

Par écriture du 1er décembre 2011, les recourants ont déposé leurs observations au sujet de la réponse du TAS.

Enfin, l'AMA a déposé une duplique en date du 16 janvier 2012. Sur quoi les parties ont été informées, par lettres du 23 janvier 2012, que la procédure d'échange d'écritures était terminée.

Considérant en droit

1.

1.1 Le siège du TAS se trouve à Lausanne. L'une des parties au moins (en l'occurrence, les deux recourants et la VTV) 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).

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions prévues par les art. 190 à 192 LDIP (art. 77 al. 1 LTF). L'acte attaquable peut être une sentence finale, qui met un terme à l'instance arbitrale pour un motif de fond ou de procédure, une sentence partielle, qui porte sur une partie quantitativement limitée d'une prétention litigieuse ou sur l'une des diverses prétentions en cause, voire une sentence préjudicielle ou incidente, qui règle une ou plusieurs questions préalables de fond ou de procédure (sur ces notions, cf. l'**ATF 130 III 755** consid. 1.2.1 p. 757). Pour juger de la recevabilité du recours, ce qui est déterminant n'est pas la dénomination du prononcé entrepris, mais le contenu de celui-ci (**ATF 136 III 200** consid. 2.3.3 p. 205, 597 consid. 4).

Lorsqu'un tribunal arbitral, par une sentence séparée, admet sa compétence, il rend une décision incidente (art. 186 al. 3 LDIP). Tel est le cas en l'espèce, bien que les sentences entreprises soient improprement qualifiées de partielles. En vertu de l'art. 190 al. 3 LDIP, lesdites sentences ne pouvaient être attaquées devant le Tribunal fédéral que pour les motifs tirés de la composition irrégulière de la Formation (art. 190 al. 2 let. a LDIP) ou de l'incompétence du TAS (art. 190 al. 2 let. b LDIP). Ce sont ces deux motifs qu'invoquent les recourants, s'agissant du prononcé relatif à la compétence, en conformité avec la disposition citée.

Il y a lieu, cependant, de réserver l'examen ultérieur de la recevabilité du grief touchant la décision du TAS de ne pas suspendre la procédure, étant donné que ce grief soulève une question spécifique à cet égard (cf. consid. 5.1.1).

1.2 Les recourants sont directement touchés par les sentences attaquées, qui ont écarté l'exception d'incompétence soulevée par eux. Ils ont ainsi un intérêt personnel, actuel et digne de protection à ce que ces sentences n'aient pas été rendues en violation des garanties découlant des art. 190 al. 2 let. a et b LDIP, ce qui leur confère la qualité pour recourir (art. 76 al. 1 LTF).

1.3 En vertu de l'art. 100 al. 1 LTF, le recours contre une décision doit être déposé devant le Tribunal fédéral dans les 30 jours qui suivent la notification de l'expédition complète. Selon la jurisprudence, la notification par fax d'une sentence du TAS en matière d'arbitrage international ne fait pas courir le délai de l'art. 100 al. 1 LTF (arrêt 4A_604/2010 du 11 avril 2011 consid. 1.3 et le précédent cité).

En l'occurrence, les sentences signées ont été reçues le 20 juillet 2011 par le conseil des recourants. En déposant, le 13 septembre 2011, un mémoire qui satisfait aux exigences de forme fixées par la loi (art. 42 al. 1 LTF), ceux-ci ont donc agi dans le délai légal qui a été suspendu du 15 juillet au 15 août 2011 (art. 46 al. 1 let. b LTF).

1.4 La VTV, intimée, conclut à l'admission du recours, motif pris de ce qu'une ordonnance en référé rendue le 14 décembre 2009 par le Tribunal de première instance de Bruxelles lui fait interdiction d'exécuter les décisions de suspension prises le 5 décembre 2009 par le VDT à l'encontre des deux athlètes. Elle craint, en effet, de devoir exécuter des décisions parfaitement contradictoires au cas où les procédures conduites parallèlement devant le TAS, d'une part, et les juridictions étatiques belges, d'autre part, iraient jusqu'à leur terme.

Ladite conclusion est recevable. Ne le sont pas, en revanche, les conclusions de la même partie tendant à l'annulation des deux sentences et à la suspension des causes arbitrales jusqu'à droit connu

sur le sort des procédures pendantes en Belgique: ces deux conclusions actives ne pouvaient pas être prises par une partie intimée n'ayant pas recouru elle-même contre les sentences litigieuses; de surcroît, la seconde d'entre elles méconnaît le caractère purement cassatoire du recours visant une sentence arbitrale internationale (cf. l'art. 77 al. 2 LTF qui exclut l'application de l'art. 107 al. 2 LTF) et elle n'est pas couverte par l'exception permettant au Tribunal fédéral de constater lui-même l'incompétence du tribunal arbitral en cas d'admission du grief correspondant (**ATF 127 III 279** consid. 1b; **117 II 94** consid. 4).

1.5 Dans leur réplique concernant la réponse de l'AMA, les recourants ont soulevé un incident de procédure visant à dénier à Mes C._____ et D._____, ainsi que, de façon générale, à tout avocat de l'étude X._____, la "capacité de postuler" dans la présente procédure pour cause de conflit d'intérêts et à leur imposer de renoncer à la défense des intérêts de l'AMA, cette dernière devant se voir impartir un délai pour mandater un nouvel avocat. Pour justifier cette démarche, ils exposent, en substance, avoir appris, par un dépliant reçu le 26 octobre 2011 de la susdite étude, que Me E._____ était l'un des nouveaux associés de celle-ci, alors que cette personne occupait toujours les postes de directeur financier de l'AMA et de directeur des affaires juridiques de cette institution, même si son contrat de travail avait pris fin. A les en croire, il y aurait là un conflit d'intérêts, Me E._____ ayant des intérêts propres à l'issue du litige en sa qualité "d'organe d'une société cliente".

L'AMA rétorque, dans ses observations, que l'avocat en question n'est pas son employé, qu'il n'est que le conseil juridique de cette organisation internationale à but non lucratif constituée sous la forme d'une fondation de droit suisse et qu'il n'a aucun intérêt personnel à l'issue du litige.

Point n'est besoin d'examiner plus avant la recevabilité des conclusions incidentes soumises à la Cour de céans à ce stade avancé de la procédure fédérale. En effet, la démarche des recourants tient à l'évidence de la mauvaise querelle. La théorie du conflit d'intérêts échafaudée par eux ne repose d'ailleurs sur aucun fondement et n'est en rien étayée par les exemples qu'ils empruntent à la jurisprudence et à la doctrine en la matière. Une éventuelle admission de l'incident n'aurait, de toute façon, aucune conséquence sur l'issue de la présente procédure puisque les recourants ne concluent pas à l'annulation des actes effectués jusqu'ici par les avocats de l'AMA au nom de cette intimée.

1.6 Le Tribunal fédéral statue sur la base des faits établis par le TAS (cf. art. 105 al. 1 LTF). Il ne peut rectifier ou compléter d'office les constatations des arbitres, même si les faits ont été établis de manière manifestement inexacte ou en violation du droit (cf. l'art. 77 al. 2 LTF qui exclut l'application de l'art. 105 al. 2 LTF). En revanche, comme c'était déjà le cas sous l'empire de la loi fédérale d'organisation judiciaire (cf. **ATF 129 III 727** consid. 5.2.2; **128 III 50** consid. 2a et les arrêts cités), le Tribunal fédéral conserve la faculté de revoir l'état de fait à la base de la sentence attaquée 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 sont exceptionnellement pris en considération dans le cadre de la procédure du recours en matière civile (arrêt 4A_128/2008 du 19 août 2008, consid. 2.4, non publié in **ATF 134 III 565**).

Comme les recourants font valoir la nécessité de compléter l'état de fait des sentences attaquées à l'égard de deux des quatre griefs qu'ils soulèvent, il y aura lieu de traiter leur requête ad hoc dans le cadre de l'examen des griefs en question.

2.

Dans un premier moyen, fondé sur l'art. 190 al. 2 let. a LDIP, les recourants soutiennent que le TAS n'est pas un tribunal indépendant dans les affaires de dopage, mais l'organe décentré de toutes les fédérations intéressées à l'issue du litige qui plaident devant lui, de même que celui de l'AMA.

2.1 Lorsqu'un tribunal arbitral présente un défaut d'indépendance ou d'impartialité, il s'agit d'un cas de composition irrégulière au sens de la disposition susmentionnée. En vertu du principe de la bonne foi, le droit d'invoquer le moyen se périme cependant si la partie ne le fait pas valoir immédiatement; elle ne saurait garder à ce sujet ses arguments en réserve pour ne les soulever qu'en cas d'issue défavorable de la procédure arbitrale (**ATF 129 III 445** consid. 3.1 p. 449).

2.2 Les recourants, qui citent eux-mêmes cette jurisprudence, affirment avoir dûment soulevé le grief de composition irrégulière du TAS dans la procédure arbitrale, bien que les sentences attaquées soient muettes à ce sujet. Invoquant les art. 97 al. 1 et 105 al. 2 LTF, ils invitent le Tribunal fédéral à compléter les faits sur ce point.

Il leur a cependant échappé que ces deux dispositions sont expressément déclarées inapplicables dans la procédure du recours en matière civile contre les décisions des tribunaux arbitraux par l'art. 77 al. 2 LTF. Sans doute ont-ils essayé de réparer cette erreur dans leurs écritures subséquentes. Pareille tentative était, toutefois, d'emblée vouée à l'échec car de telles écritures n'ont pas pour objet de permettre à une partie d'invoquer des moyens, resp. de formuler des requêtes, qu'elle a omis de présenter en temps utile, c'est-à-dire dans un mémoire de recours devant être déposé avant l'expiration du délai, non prolongeable (art. 47 al. 1 LTF), fixé par l'art. 100 al. 1 LTF.

Quoi qu'il en soit, le passage de l'écriture du 26 janvier 2011 de leurs conseils belges, que les recourants demandent au Tribunal fédéral de prendre en compte au titre du complètement de l'état de fait (recours, p. 6 i.f./7 i.l.), ne saurait en aucun cas être assimilé à l'énoncé, même implicite, d'un grief se rapportant à la composition du TAS. Il s'agit d'un extrait de la réponse que ces conseils avaient faite à une question que la Formation avait posée, parmi d'autres, aux parties dans une lettre du 5 novembre 2010 et qui avait trait à la compétence de la Formation, plus particulièrement au droit de celle-ci de prendre en compte le facteur de proportionnalité pour fixer une sanction requise par l'AMA.

Le TAS constate, au demeurant, dans ses sentences, que les parties n'ont formulé aucune remarque quant à la composition de la Formation au cours de l'audience qui a été tenue à Bruxelles le 2 novembre 2010 (nos 27 [A._____] et 28 [B._____]).

Dans ces conditions, le premier moyen soulevé par les recourants est frappé de forclusion. Aussi sera-t-il écarté sans examen de ses mérites.

3.
Invoquant l'art. 190 al. 2 let. b LDIP, les recourants reprochent, en outre, au TAS d'avoir admis à tort sa compétence pour statuer sur les appels de l'AMA dirigés contre les décisions rendues le 5 novembre 2009 par le VDT.

3.1
3.1.1 Pour écarter l'exception d'incompétence soulevée par les recourants, le TAS a tenu le raisonnement résumé ci-après.

La Communauté flamande, respectant ses engagements internationaux, a prévu, dans son décret du 13 juillet 2007 (ci-après: le Décret), la compétence exclusive du TAS pour les litiges relatifs au dopage. Cette forme obligatoire d'arbitrage est considérée comme un type spécial d'arbitrage. Ainsi, loin de s'opposer à la compétence arbitrale du TAS, l'ordre juridique belge la reconnaît, au contraire, expressément. Cette compétence est également prévue dans la réglementation antidopage de la VTV. Par ailleurs, la jurisprudence fédérale suisse reconnaît le principe des clauses arbitrales par référence, soit celles contenues dans les statuts de la fédération internationale auxquels renvoient les statuts d'une fédération nationale.

En l'espèce, comme la VTV a délégué ses compétences disciplinaires au VDT, que les athlètes ont tous deux pris part à des compétitions organisées par l'ITF et qu'ils figurent au classement ATP (Association of Tennis Professionals), respectivement WTA (Women's Tennis Association), la compétence du TAS est renforcée par la clause arbitrale contenue dans le programme antidopage de l'ITF. Cette clause prévoit la compétence exclusive du TAS en la matière pour connaître des appels interjetés devant lui par les personnes physiques ou morales qu'elle énumère, au nombre desquelles figurent l'athlète visé par la décision dont est appel et l'AMA.

Le TAS s'est penché à différentes reprises sur la problématique de la concurrence entre le droit national et la réglementation sportive internationale. Le 19 décembre 2006, il a rendu, à ce sujet, une sentence (TAS 2006/A/1119, UCI c. Landaluce et RFEC) dans laquelle il a reconnu comme une nécessité impérieuse que les fédérations internationales aient la possibilité de revoir les décisions des fédérations nationales en matière de dopage, afin de prévenir le risque que les compétitions internationales soient faussées en raison des sanctions trop clémentes que pourrait être tentée de prononcer une fédération nationale ou une autorité publique nationale. La Formation fait sienne cette jurisprudence, d'autant plus que le droit interne belge invoqué par les recourants reconnaît expressément la réglementation disciplinaire du CMA. Sans doute est-elle consciente du fait que ses sentences incidentes pourraient ne pas déployer leurs effets sur le territoire belge au regard du droit interne de ce pays. Il en va toutefois du respect du principe de l'unité de l'ordre sportif, lequel justifie que la décision

rendue par le TAS prime en tout état de cause sur le plan international.

Pour le surplus, force est de constater que les instances nationales ont été épuisées. Partant, la voie de l'appel au TAS est ouverte.

3.1.2 A l'encontre de ce raisonnement, les recourants font valoir, en substance, les arguments suivants.

En premier lieu, les sentences entreprises omettent de préciser que les règlements de procédure de la VTV et du VDT ont été adoptés après la publication du Décret. Cette omission est arbitraire puisqu'elle aboutit à considérer que l'arbitrage prévu par la VTV a été consenti par les recourants. Sur ce point, il conviendra donc de compléter les faits, en y incluant les dispositions topiques du règlement de procédure de la VTV, ce qui permettra au Tribunal fédéral de constater que l'arbitrage imposé au recourant a sa source dans un acte législatif flamand.

En second lieu, il a échappé au TAS que les sanctions infligées aux recourants n'ont pas été ordonnées en vertu du programme antidopage de l'ITF. Par conséquent, la clause arbitrale contenue dans ce programme ne saurait s'y appliquer. Sur ce point aussi, il conviendra de compléter les faits, dès lors que le TAS a arbitrairement omis de mentionner dans ses sentences l'art. O.1 dudit programme.

Par conséquent, la seule clause arbitrale opposable aux recourants est celle prévue par le Décret. Or, elle n'est pas valable, car il ne peut pas être question du consentement d'un athlète à l'arbitrage, si celui-ci est imposé par la loi. C'est, en effet, par son caractère consensuel que l'arbitrage prévu aux art. 176 ss LDIP se distingue de l'arbitrage dit obligatoire qui constitue une forme de juridiction étatique et à l'égard duquel les garanties procédurales de l'art. 6 par. 1 CEDH jouent en plein.

Faute d'autonomie des parties, la clause arbitrale opposée aux recourants n'est, dès lors, pas valable. Il s'ensuit que le TAS n'était pas compétent pour rendre les sentences attaquées.

3.2

3.2.1 Saisi du grief d'incompétence, le Tribunal fédéral examine librement les questions de droit, y compris les questions préalables, qui déterminent la compétence ou l'incompétence du tribunal arbitral (**ATF 133 III 139** consid. 5 p. 141 et les arrêts cités). Il n'en devient pas pour autant une cour d'appel. Aussi ne lui incombe-t-il pas de rechercher lui-même, dans la sentence attaquée, les arguments juridiques qui pourraient justifier l'admission du grief fondé sur l'art. 190 al. 2 let. b LDIP (cf. art. 77 al. 3 LTF). C'est bien plutôt au recourant qu'il appartient d'attirer son attention sur eux, pour se conformer aux exigences de l'art. 42 al. 2 LTF (**ATF 134 III 565** consid. 3.1 et les arrêts cités).

3.2.2 Pour les raisons déjà évoquées, les recourants ne peuvent pas obtenir le complètement des faits qu'ils réclament (cf. consid. 2.2, par. 1 et 2). Il en va ainsi relativement aux deux points visés par leur requête ad hoc. De surcroît, en qualifiant d'arbitraires les deux omissions imputées par eux au TAS, les intéressés utilisent une notion qui n'a pas sa place dans un recours dirigé contre une sentence arbitrale internationale. Le Tribunal fédéral s'en tiendra donc aux seuls faits constatés dans les sentences attaquées.

Par conséquent, les arguments des recourants tirés du caractère non volontaire de l'arbitrage institué par la VTV et de la portée limitée de la clause arbitrale insérée dans le programme antidopage de l'ITF ne seront pas pris en considération. Il en résulte que l'argument tiré du caractère obligatoire de l'arbitrage s'en trouve d'emblée privé de fondement puisqu'il repose sur la prémisse, non avérée, voulant que la seule clause arbitrale opposable aux recourants soit celle que prévoit le Décret.

3.2.3 La convention d'arbitrage doit revêtir la forme prescrite par l'art. 178 al. 1 LDIP. S'il ne saurait faire abstraction totale de cette exigence (arrêt 4A_358/2009 du 6 novembre 2009 consid. 3.2), le Tribunal fédéral examine toutefois avec "bienveillance" le caractère consensuel du recours à l'arbitrage en matière sportive, dans le but de favoriser la liquidation rapide des litiges par des tribunaux spécialisés présentant des garanties suffisantes d'indépendance et d'impartialité, tel le TAS (**ATF 133 III 235** consid. 4.3.2.3). Le libéralisme qui caractérise sa jurisprudence en ce domaine (arrêt cité, ibid.; sur cette question, cf., parmi d'autres: ANTONIO RIGOZZI, L'arbitrage international en matière de sport, 2005, nos 832 ss) se manifeste notamment dans la souplesse avec laquelle cette jurisprudence traite le problème de la clause arbitrale par

référence (arrêt 4A_246/2011 du 7 novembre 2011 consid. 2.2.2 et les précédents cités); il apparaît également en filigrane dans le principe jurisprudentiel selon lequel, suivant les circonstances, un comportement donné peut suppléer, en vertu des règles de la bonne foi, à l'observation d'une prescription de forme (**ATF 129 III 727** consid. 5.3.1 p. 735). En somme, ainsi que le relèvent deux spécialistes de l'arbitrage international, on considère généralement que la clause d'arbitrage du TAS est branchentypisch en matière sportive (KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2e éd. 2010, p. 128 note de pied 150). C'est dire, pour reprendre la conclusion d'un autre spécialiste de ce domaine, qu'il n'y a pratiquement pas de sport d'élite sans consentement à l'arbitrage du sport (PIERRE-YVES TSCHANZ, in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n° 149 ad art. 178 LDIP).

En l'espèce, le TAS s'est fondé notamment sur la réglementation antidopage de la VTV et la jurisprudence du Tribunal fédéral relative à la clause arbitrale par référence pour admettre sa compétence (sentences, n°s 79 [A._____] et 80 [B._____]). Se focalisant sur le caractère prétendument obligatoire de l'arbitrage en cause, censé reposer exclusivement sur le Décret selon eux, les recourants n'exposent pas en quoi ce fondement alternatif, relevant du droit associatif privé, aurait été retenu en violation de cette réglementation ou de la jurisprudence fédérale. Il n'appartient pas à la Cour de céans de le faire à leur place (cf. consid. 3.2.1 ci-dessus).

Il n'est peut-être pas inutile d'ajouter, s'agissant du caractère consensuel ou non de l'arbitrage en cause, que l'on peine à discerner, sous l'angle de la liberté de contracter, quelle différence il peut bien y avoir, pour l'athlète n'ayant pas d'autre choix que d'accepter la clause arbitrale prévue par la réglementation de la fédération sportive à laquelle il est affilié, selon que ladite fédération a adopté cette réglementation de sa propre initiative ou qu'elle l'a fait sur l'injonction de l'Etat dans lequel elle a son siège.

On relèvera, enfin, que les recourants ne formulent aucune critique intelligible au sujet des explications fournies par le TAS quant à l'articulation entre les procédures étatiques et les procédures privées mises sur pied pour sanctionner les athlètes convaincus de dopage. Cela étant, le moyen pris de la violation de l'art. 190 al. 2 let. b LDIP ne peut qu'être rejeté, si tant est qu'il soit recevable.

4.

Les recourants font valoir, par ailleurs, que le TAS n'était pas compétent pour se saisir des appels de l'AMA, faute d'un intérêt à recourir de cette fondation.

4.1

4.1.1 La recevabilité du moyen ne va pas de soi, quoi qu'ils en disent.

Certes, lorsqu'il examine s'il est compétent pour trancher le différend qui lui est soumis, le tribunal arbitral doit résoudre, entre autres questions, celle de la portée subjective de la convention d'arbitrage. Il lui appartient de déterminer quelles sont les parties liées par cette convention et de rechercher, le cas échéant, si un ou des tiers qui n'y sont pas désignés entrent néanmoins dans son champ d'application. Il s'agit là d'une question de compétence ratione personae - à bien distinguer du problème de la légitimation, qui a trait à la titularité active ou passive du droit litigieux (**ATF 128 III 50** consid. 2b/bb p. 55) - qui doit être résolue à la lumière de l'art. 178 al. 2 LDIP (**ATF 134 III 565** consid. 3.2 p. 567). Cependant, cette jurisprudence vise essentiellement l'arbitrage typique ou usuel, qui prend sa source dans une relation contractuelle et qui se caractérise par l'existence d'une clause arbitrale dont il convient de rechercher si elle oblige d'autres personnes que les cocontractants, notamment en cas de succession, de fusion, de cession de créance ou de reprise de dette (pour des exemples, cf. **ATF 134 III 567** consid. 3.2; **129 III 727** consid. 5.3; **128 III 50** consid. 2 et 3; **120 II 155** consid. 3; **117 II 94** consid. 5). En revanche, il est douteux qu'elle vise aussi l'arbitrage atypique, tel l'arbitrage sportif, en particulier l'hypothèse dans laquelle la compétence du tribunal arbitral résulte du renvoi aux statuts d'une fédération sportive qui prévoient une procédure d'arbitrage pour régler les litiges de nature disciplinaire. En ce domaine, le Tribunal fédéral a déjà jugé que le point de savoir si une partie est recevable à attaquer la décision prise par l'organe d'une fédération sportive sur la base des règles statutaires et des dispositions légales applicables ne concerne pas la compétence du tribunal arbitral saisi de la cause, mais la question de la qualité pour agir (arrêt 4A_424/2008 du 22 janvier 2009 consid. 3.3).

Considérée à la lumière de ce dernier arrêt, la recevabilité du moyen examiné apparaît pour le moins douteuse. En effet, si l'on admet que le TAS s'est déclaré à bon droit compétent pour connaître des appels contre les décisions prises le 5 novembre 2009 par le VDT (cf. consid. 3 ci-dessus), la question de savoir si l'AMA avait ou non la qualité pour appeler elle-même de ces décisions-là, à l'instar des deux athlètes punis, ne mettait pas en jeu la compétence de cette juridiction arbitrale, mais portait uniquement sur un point de procédure - la qualité de l'AMA pour interjeter appel - à résoudre selon les règles procédurales pertinentes. Or, il n'appartient pas au Tribunal fédéral, saisi d'un recours contre une sentence arbitrale internationale, de revoir l'application de telles règles.

4.1.2 Les recourants relèvent que "les sentences entreprises sont silencieuses sur l'intérêt à agir de l'AMA..." (recours, p. 16, 3e par.), bien qu'elles fassent état de la contestation élevée par eux à ce propos (sentences, n°s 40 [A._____] et 41 [B._____]). Le TAS, il est vrai, ne paraît pas avoir traité expressément le point litigieux. A supposer que ce soit effectivement le cas, ses sentences auraient alors dû être entreprises, non pas sous l'angle de l'art. 190 al. 2 let. b LDIP, relatif à la compétence du tribunal arbitral, pour autant que le moyen fût recevable (cf. consid. 4.1.1 ci-dessus), mais sous celui du droit d'être entendu, dont la violation est sanctionnée par l'art. 190 al. 2 let. d LDIP. De fait, le droit d'être entendu en procédure contradictoire, au sens de cette disposition, impose aux arbitres un devoir minimum d'examiner et de traiter les problèmes pertinents (**ATF 133 III 235** consid. 5.2 p. 248 et les arrêts cités). Et ce devoir est violé lorsque le tribunal arbitral ne prend pas en considération un argument valablement présenté par l'une des parties et important pour la décision à rendre.

En l'espèce, les recourants n'invoquent pas l'art. 190 al. 2 let. d LDIP pour étayer leur grief touchant la participation de l'AMA à la procédure d'appel. Il y a là un autre motif de mettre en doute la recevabilité de ce grief. L'eussent-ils soulevé, celui-ci n'aurait du reste pu être pris en considération qu'en faisant abstraction de la règle voulant que seuls les motifs prévus à l'art. 190 al. 2 let. a et b LDIP soient recevables contre une sentence incidente (art. 190 al. 3 LDIP; cf., ci-dessus, consid. 1.1, avant-dernier par.).

4.2 En tout état de cause, le grief en question, tel qu'il est présenté, ne pourrait qu'être rejeté, fût-il recevable.

Force est de constater, à cet égard, que les recourants fondent la quasi-intégralité de leur argumentation sur la règle du droit suisse relative à la qualité pour former un recours en matière civile au Tribunal fédéral, soit l'art. 76 LTF, et sur la jurisprudence fédérale concernant la qualité pour recourir reconnue aux associations de droit privé (**ATF 130 I 82** consid. 1.3). De la première, ils déduisent l'obligation d'avoir pris part à la procédure devant l'autorité précédente pour être en droit de saisir l'autorité supérieure (art. 76 al. 1 let. a LTF); de la seconde, l'existence d'un intérêt personnel et direct à la modification de la décision attaquée comme condition nécessaire du droit de recours. Les recourants font observer, s'agissant de la première condition, que l'AMA n'a pas pris part à la procédure devant le VDT et, pour ce qui est de la seconde, que l'intimée ne saurait faire valoir un quelconque intérêt personnel digne de protection à l'aggravation de la sanction disciplinaire qui leur a été infligée. "L'AMA", concluent-ils, "n'est pas un procureur général pouvant se prévaloir de l'intérêt public à l'application uniforme des règles qu'elle a elle-même adoptées" (recours, p. 17, 2e par.).

Ce faisant, les recourants cherchent à appliquer une règle de droit et un principe jurisprudentiel posés pour la recevabilité des recours soumis au Tribunal fédéral, c'est-à-dire à la juridiction suprême d'un Etat déterminé. Or, la recevabilité de tels recours soulève des problèmes spécifiques, de sorte que les conditions auxquelles elle est soumise ne sauraient être étendues, même par analogie, à d'autres juridictions étatiques inférieures ni, à plus forte raison, à des juridictions de nature privée comme les tribunaux arbitraux.

Quoi qu'il en soit, l'AMA expose, dans sa réponse (n. 37), que les recourants, en ayant choisi de mener une carrière professionnelle de joueurs de tennis, ont accepté de se soumettre aux dispositions réglementaires de la VTV, à laquelle ils sont affiliés, et, partant, aux règles antidopage de cette association, qui prévoient un droit d'appel en sa faveur. Elle en déduit qu'elle n'a pas à justifier d'un intérêt spécifique à faire appel. Or, dans leur réplique, les recourants laissent intact cet argument, puisqu'ils se bornent à contester ceux que

l'AMA entendait tirer de la Convention internationale du 19 octobre 2005 contre le dopage dans le sport (RS 0.812.122.2), de la Déclaration de Copenhague contre le dopage dans le sport et du CMA. Dans ces conditions, le grief par lequel les recourants se plaignent de ce que l'AMA s'est vu reconnaître la qualité de partie dans la procédure d'appel conduite devant le TAS, bien qu'elle n'ait pas pris part à la procédure de première instance, ne saurait prospérer, fût-il recevable.

5.

Le dernier moyen soulevé par les recourants a trait à l'application de l'art. 186 al. 1bis LDIP. Cette disposition prévoit que le tribunal arbitral statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.

5.1

5.1.1 Les décisions du tribunal arbitral relatives à la suspension provisoire de la procédure arbitrale constituent des ordonnances de procédure non sujettes à recours; elles peuvent néanmoins être déférées au Tribunal fédéral lorsque le tribunal arbitral, en les prononçant, a statué de manière implicite sur sa compétence (**ATF 136 III 597** consid. 4.2 et les références), autrement dit lorsque, ce faisant, il a rendu une décision incidente touchant sa compétence (ou la régularité de sa composition, si elle était contestée) au sens de l'art. 190 al. 3 LDIP (arrêts 4A_614/2010 du 6 avril 2011 consid. 2.1 et 4A_210/2008 du 29 octobre 2008 consid. 2.1). Cette jurisprudence, il faut le concéder, est contestée par une partie de la doctrine qui préconise l'absence de recours au Tribunal fédéral contre une décision de suspendre ou non l'arbitrage prise en application de l'art. 186 al. 1bis LDIP (KAUFMANN-KOHLER/ RIGOZZI, op. cit., nos 456c et 813b; JEAN-FRANÇOIS POUDRET, Les recours au Tribunal fédéral suisse en matière d'arbitrage international [Commentaire de l'art. 77 LTF], in Bulletin de l'Association suisse de l'arbitrage [ASA] 2007 p. 669 ss, 699 ch. 7.4) ou, à tout le moins, contre la décision du tribunal arbitral relative à l'existence de "motifs sérieux" au sens de cette disposition, s'agissant d'une question d'appréciation devant être laissée à la discrétion des arbitres (SÉBASTIEN BESSON, The Relationships between Court and Arbitral Jurisdiction: the Impact of the new Article 186 (1bis) PILS, in New Developments in International Commercial Arbitration 2007 [Christoph Müller, éd.], p. 57 ss, 74).

5.1.2 Il n'est pas nécessaire d'examiner ici le bien-fondé de cette opinion doctrinale, dès lors que le grief considéré est de toute façon irrecevable à un autre titre (cf. consid. 5.2 ci-après).

A ce stade du développement et à s'en tenir à l'état actuel de la jurisprudence en la matière, on admettra que le recours est recevable sous cet angle. Sans doute le TAS a-t-il examiné séparément la question de la suspension (sentences, consid. 3.2.1) et celle de sa compétence (sentences, consid. 3.2.2). Il a cependant établi clairement un lien entre l'une et l'autre question (sentences, n°s 56 [A._____] et 57 [B._____]), et la décision qu'il a prise au sujet de la première ne s'apparente en rien à une ordonnance de procédure susceptible d'être modifiée ou rapportée en cours d'instance, contre laquelle il ne serait pas possible de recourir (pour un exemple d'un refus de surseoir à statuer entrant dans cette dernière catégorie de décisions, cf. l'arrêt 4A_614/2010, précité, consid. 2.3.2, à comparer avec l'arrêt 4A_210/2008, précité, ibid.).

5.2

5.2.1 Lorsqu'une décision repose sur deux motivations indépendantes, le recourant doit, sous peine d'irrecevabilité, indiquer en quoi chacune des motivations viole le droit (**ATF 133 IV 119** consid. 6.3. p. 121). Cette règle s'applique aussi en matière d'arbitrage international (arrêts 4A_458/2009 du 10 juin 2010 consid. 4.2.2 et 4P.168/2004 du 20 octobre 2004 consid. 2.2.2).

5.2.2 Selon le TAS, l'exception de litispendance pouvant donner lieu à l'application de l'art. 186 al. 1bis LDIP implique le respect de trois conditions cumulatives: d'abord, les deux procédures concurrentes doivent concerner les mêmes parties et porter sur le même litige; ensuite, l'action soumise à la juridiction étatique ordinaire doit avoir été ouverte avant celle portée devant le TAS; enfin, des motifs sérieux doivent justifier la suspension, à charge pour la partie excipant de la litispendance d'en démontrer l'existence.

Examinant ensuite la réalisation de ces trois conditions cumulatives à la lumière des circonstances du cas concret, le TAS constate que la première condition ne paraît pas être remplie, car, d'un côté, l'AMA n'est pas partie

à toutes les procédures ouvertes en Belgique et, de l'autre, la Communauté flamande n'est pas partie à celles pendantes devant lui. S'agissant de la deuxième condition, il retient que les athlètes ne sauraient se prévaloir d'une antériorité de leurs démarches au niveau national, mais, tout au plus d'une simultanéité. Enfin, pour ce qui est de la troisième condition, le TAS expose par le menu les raisons pour lesquelles il estime qu'il n'existe pas, en l'espèce, un motif sérieux de nature à justifier la suspension des procédures 2020 et 2021. Cette analyse l'amène à conclure que "les conditions cumulatives nécessaires à l'application de l'exception de litispendance prévue par l'art. 186 al. 1bis LDIP ne sont pas réunies" (sentences, n°s 75 [A._____] et 76 [B._____]).

5.2.3 Dans leur mémoire de recours (p. 17 à 21), les deux athlètes s'en prennent uniquement aux motifs retenus par le TAS en rapport avec la troisième condition d'application de la disposition citée. On y chercherait en vain, par contre, la moindre critique relative à la première et à la deuxième conditions d'application de la même disposition. Pareille lacune est rédhibitoire, selon la jurisprudence susmentionnée, puisque, s'agissant de conditions cumulatives, elle a pour conséquence de laisser intacts deux motifs qui suffisent aussi bien l'un que l'autre à exclure l'applicabilité de l'art. 186 al. 1bis LDIP in casu.

D'où il suit que le grief tiré de la violation de cette disposition est irrecevable.

6.
Succombant, les recourants seront condamnés solidairement à payer les frais de la procédure fédérale (art. 66 al. 1 et 5 LTF) et à verser des dépens à l'AMA (art. 68 al. 1, 2 et 4 LTF). Quant à la VTV, comme elle a conclu, à tort, à l'admission du recours, elle ne saurait prétendre à l'allocation de dépens (art. 68 al. 1 LTF a contrario).

Par ces motifs, le Tribunal fédéral prononce:

1.
La requête incidente formulée le 24 novembre 2011 par les recourants est rejetée.

2.
Le recours est rejeté dans la mesure où il est recevable.

3.
Les frais judiciaires, arrêtés à 4'000 fr., sont mis à la charge des recourants, solidairement entre eux.

4.
Les recourants sont condamnés solidairement à verser à l'Agence Mondiale Antidopage (AMA), intimée, une indemnité de 5'000 fr. à titre de dépens.

5.
Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 13 février 2012

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_652/2011
Arrêt du 7 mars 2012
Ire Cour de droit civil

Composition	Mmes et M. les Juges Klett, Présidente, Kolly et Corboz Greffier: M. Carruzzo
Parties	Club X._____, recourant, **contre** Club Y._____, intimé,
Objet	arbitrage international; recours en matière civile contre la sentence rendue le 26 septembre 2011 par le Tribunal Arbitral du Sport (TAS).

Faits

A.
Un différend, portant sur une indemnité de 900'000 USD, intérêts en sus, liée au transfert du footballeur professionnel A._____ du club ... de V._____ au club ... de W._____, en mars 2000, oppose actuellement deux clubs ..., soit le club X._____, demandeur, et le club Y._____ SA, défendeur. Après de nombreuses péripéties procédurales, il a trouvé son épilogue devant le Tribunal Arbitral du Sport (TAS).

Par sentence du 26 septembre 2011, la Formation de trois membres, constituée au début janvier de la même année, a rejeté l'appel formé par le club X._____ contre la décision du 14 octobre 2010 au terme de laquelle la Commission d'appel de la Fédération ... de football avait donné tort à l'appelant. Elle a mis les frais et dépens à la charge de l'appelant et rejeté toutes autres ou plus amples demandes.

B.
Le 24 octobre 2011, le club X._____ a formé un recours en matière civile au Tribunal fédéral aux fins d'obtenir l'annulation de ladite sentence. Il se plaint de la violation de l'art. 393 let. c, e et f CPC.

Dans sa réponse du 31 janvier 2012, le club Y._____SA, intimé, a conclu à l'irrecevabilité du recours.

Par lettre du 31 janvier 2012, le TAS a indiqué qu'il renonçait à déposer une réponse circonstanciée, tout en mettant en doute la recevabilité du recours du fait que celui-ci se fonde sur le Code de procédure civile suisse.

Le recourant a déposé une réplique en date du 13 février 2012.

L'intimé a déposé une duplique le 2 mars 2012.

Considérant en droit

1.
D'après l'art. 54 al. 1 LTF, le Tribunal fédéral rédige son arrêt dans une langue officielle, en règle générale dans la langue de la décision attaquée. Lorsque cette décision est rédigée dans une autre langue (ici l'anglais), le Tribunal fédéral utilise la langue officielle choisie par les parties. Devant le TAS, celles-ci ont utilisé l'anglais. Dans les mémoires adressés au Tribunal fédéral, elles ont employé le français. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra, par conséquent, son arrêt en français.

2.
Le siège du TAS se trouve à Lausanne. L'une des parties au moins (en l'occurrence, les deux) 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).

3.
3.1 Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions prévues par les art. 190 à 192 LDIP (art. 77 al. 1 LTF). Le Tribunal fédéral n'examine que les griefs qui ont été invoqués et motivés par le recourant (art. 77 al. 3 LTF).

3.2 En l'espèce, le recourant n'a pas invoqué, dans son mémoire de recours, l'un des motifs prévus à l'art. 190 al. 2 LDIP, mais trois motifs énoncés par l'art. 393 CPC, disposition applicable en matière d'arbitrage interne. Sans doute a-t-il essayé de réparer son erreur dans sa réplique. Pareille tentative était toutefois d'emblée vouée à l'échec car une telle écriture n'a pas pour objet de permettre à une partie d'invoquer des moyens qu'elle n'a pas présentés en temps utile, c'est-à-dire avant l'expiration du délai de recours, non prolongeable (art. 47 al. 1 LTF), fixé par l'art. 100 al. 1 LTF (arrêt 4A_428/2011 du 13 février 2012 consid. 2.2).

Au demeurant, deux des trois motifs invoqués par le recourant - i.e. ceux tirés du caractère arbitraire de la sentence (art. 393 let. e CPC) et de l'ampleur manifestement excessive des dépenses et honoraires des arbitres (art. 393 let. f CPC) - n'ont pas leur pendant à l'art. 190 al. 2 LDIP. Quant au troisième - à savoir le fait d'avoir omis de statuer sur un des chefs de la demande -, il correspond certes à l'art. 190 al. 2 let. c LDIP. Toutefois, l'argumentation qui l'étaye, telle qu'elle est formulée, n'est pas intelligible. Quoi qu'il en soit, eût-il été recevable, le recours aurait dû être rejeté sur ce point. En effet, le chiffre 4 du dispositif de la sentence attaquée, en vertu duquel "All other or further claims and counterclaims are dismissed", exclut la possibilité que les arbitres aient omis de statuer sur un des chefs de la demande (ATF 128 III 234 consid. 4a p. 242; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2e éd. 2010, n° 820).

4.
Il suit de là que le présent recours est irrecevable. En conséquence, son auteur devra payer les frais de la procédure fédérale (art. 66 al. 1 LTF). L'intimé, pour sa part, n'a pas droit à des dépens, car il agit sans l'assistance d'un avocat.

Par ces motifs, le Tribunal fédéral prononce:

1.
Le recours est irrecevable.

2.
Les frais judiciaires, arrêtés à 4'000 fr., sont mis à la charge du recourant.

3.
Le présent arrêt est communiqué aux parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 7 mars 2012

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

Publications récentes relatives au TAS / Recent publications related to CAS

- Loquin E., "*Tribunal Arbitral du Sport (TAS). Chronique des sentences arbitrales*", Journal du Droit International, Janvier-Février-Mars, 1/2012, p. 371 ss
- Maisonneuve M. (dir.), "*Chronique de jurisprudence arbitrale en matière sportive*", Revue de L'Arbitrage, 2011-N°3, p. 801 ss
- Le Reste S., "*L'affaire du FC Sion:une nouvelle épreuve pour l'UEFA*", Les Cahiers de Droit du Sport, n°26-2011, p. 20 ss
- Marmayou J.M., "*Osaka c'est fini!*", Les Cahiers de Droit du Sport, n°25-2011, p. 9 ss.
- Int. Sportschiedsgerichte, CAS: Unwirksamkeit der "*Osaka-Regel*" (m. Anm. Netzle) & CAS: Doping-Strafbarkeit von Minderjährigen, Spurt 6/2011
- Crespo Perez J. D. (dir.), Tribunal Arbitral, Revista Aranzadi de Derecho de Deporte y Entretenimiento, Año 2011-3, Número 33 p. 363 ss

Chambre ad hoc du TAS pour les Jeux Olympiques de Londres/CAS ad hoc Division for the Olympic Games in London

- Judge Juan R. Toruella (Porto Rico), President
- Mr Gunnar Werner (Sweden), Co-President
- Mr Efraim Barak (Israel), arbitrator
- Mr Michele Bernasconi (Switzerland), arbitrator
- Mr Massimo Coccia (Italy), arbitrator
- Mr Ricardo de Buen (Mexico), arbitrator
- Mr Thomas Lee (Malaysia), arbitrator
- Mr Stuart McInnes (United Kingdom), arbitrator
- Mr Graeme Mew (Canada), arbitrator
- Mr Guédel Ndiaye (Senegal), arbitrator
- Mrs Maidie Oliveau (USA), arbitrator
- Mr Sharad Rao (Kenya), arbitrator
- Mr Martin Schimke (Germany), arbitrator
- Mr Alan Sullivan (Australia), arbitrator