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Message of the CAS Secretary General

As always, the winter season has been particularly busy with a significant number of high profile cases handled by the Court of Arbitration for Sport. Among the so called 'leading cases' selected for the Bulletin are several cases related to doping: the failure of an athlete to file whereabouts information, the examination of aggravating circumstances in the context of anti-doping regulations, an interesting discussion with respect to the conditions for benefitting from a reduced sanction for the use of specified substances and with respect to the notion of "intent to enhance sport performance". Turning to football, in the case Shakhtar Donetsk v. FIFA, the CAS has reviewed the FIFA practice of closing disciplinary proceedings as a consequence of insolvency proceedings involving football clubs. The case Urban v. FC Györi ETO kft contemplates the consequences of a breach of contract without just cause and the responsibility for agreeing to contractual terms in writing without understanding them. Finally, in Bursaspor v. UEFA and Besiktas JK v. UEFA, the CAS has examined the issue of disciplinary sanctions due to the violation of the UEFA Club Licensing and Financial Fair Play Regulation (UEFA CL & FFP Regulations).

In 2012, the International Council of Arbitration for Sport (ICAS) reviewed the English version of the Code of Sports-related arbitration (the Code) and decided to amend some provisions of the Code in order to clarify some procedural rules, to harmonize the texts of the ordinary and the appeals procedures and to fill certain gaps. The amendments were adopted by the ICAS and published at the beginning of this year. The new version of the Code entered into force on 1st March 2013. It can be downloaded from the CAS website.

The article of Dr. Despina Mavromati, Counsel to the CAS, entitled "Les délais dans le Code de l'Arbitrage en matière de Sport", included in this issue deals with the time limits according to Article R32 of the CAS Code. It shows how time limits are calculated and describes the consequences in case these are not respected by the parties. The article further illustrates the conditions for the extension and the suspension of time limits through some CAS case law.

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

Matthieu Reeb

Les délais dans le Code de l'Arbitrage en Matière de Sport

Dr Despina Mavromati, Conseiller auprès du TAS

The paper deals with the time limits according to Article R32 of the CAS Code. It shows how time limits are calculated and describes the consequences in case these are not respected by the parties. The paper further illustrates the conditions for the extension and the suspension of time limits as they have been developed through the CAS case law.

I. Introduction : aperçu de l'Article R32 et comparaison avec d'autres règles d'arbitrage

La dernière version[1] de l'Article R32 du Code de l'arbitrage en matière de sport (ci-après "Code TAS" ou "Code") dispose[2] :

R32 Délais
Les délais fixés en vertu du présent Code commencent à courir le jour suivant celui de la réception de la notification effectuée par le TAS. Les jours fériés et non ouvrables sont compris dans le calcul des délais. Les délais fixés en vertu du présent Code sont respectés si les communications effectuées par les parties sont expédiées le jour de l'échéance avant minuit, heure du lieu où la notification doit être faite. Si le dernier jour du délai imparti est férié ou non ouvrable dans le pays où la notification doit être faite, le délai expire à la fin du premier jour ouvrable suivant.

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

La Formation ou, si elle n'a pas encore été constituée, le Président de la Chambre concernée peut, sur requête motivée, suspendre un arbitrage en cours pour une durée limitée.

L'Article R32, qui fait partie des "Dispositions

1. Entrée en vigueur le 1er mars 2013.

2. A noter que les parties du texte soulignées mettent en exergue les ajouts apportés lors de la dernière modification du Code.

Générales" des Articles R27-R37 du Code, s'applique tant aux procédures ordinaires qu'aux procédures d'appel. Ladite disposition nous offre certains outils d'interprétation pour calculer les délais fixés en vertu du Code (premier paragraphe) et précise les conditions pour la prolongation de certains délais (deuxième paragraphe) ainsi que pour la suspension d'une procédure en cours devant le TAS (troisième paragraphe inséré récemment).

De manière sommaire et purement descriptive, l'Article R32 définit le point de départ des délais fixés en vertu du Code TAS. Comme nous le verrons plus en détail ci-dessous, la phrase "*en vertu du Code TAS*" est reprise par le Code lorsque celui-ci se réfère aux divers délais. Alors que ces délais commencent à courir le jour suivant celui de la réception de la notification effectuée par le TAS, ils expirent à minuit le jour du délai imparti, sauf s'il s'agit d'un jour férié ou un non-ouvrable dans le pays où la notification doit être faite. La clarification relative à la détermination de l'heure de notification a été ajoutée lors de la dernière modification du Code en 2013. L'Article R32 contient également des informations sur les jours fériés et non-ouvrables, qui sont inclus dans le calcul des délais.

Le deuxième alinéa de l'Article R32 prévoit des conditions de prolongation des délais *("si les circonstances le justifient et à condition que le délai initial n'a pas encore expiré")*. Ces délais peuvent être prolongés par le Président de la Formation ou, si cette dernière n'a pas encore été constituée, par le Président de la Chambre concernée. La seule exception à la possibilité de prolonger le délai est pour le dépôt de la déclaration d'appel. Suite à la dernière modification du Code, la prolongation d'un délai doit se faire sur requête motivée et *"après consultation de l'autre ou des autres partie(s)"*. Le Secrétaire Général du TAS a toutefois le pouvoir d'accorder une première prolongation n'excédant pas cinq jours *ex parte* (à l'exception du délai pour la déclaration d'appel qui ne peut pas être prolongé). Enfin, le troisième paragraphe (inséré lors de la révision du Code en 2010) prévoit la possibilité de suspendre la procédure en cours par la Formation ou par le Président de Chambre et en fixe les conditions.

Le contenu de l'Article R32 a été systématiquement enrichi au fur et à mesure des modifications du Code TAS durant les dernières années. Dans sa version de 1995, l'Article était plutôt vague sur l'extension des délais: "*Sur requête motivée, le Président de Chambre, ou, à défaut, le Président de la Chambre concernée, peut prolonger les délais fixés par le présent Règlement de procédure si les circonstances le justifient*". Le texte de l'Article R32 a ensuite été affiné et développé en 2000, en 2004 et enfin en 2010 dans le but de déterminer le commencement ainsi que le calcul des délais fixés en vertu du Code, la possibilité et les conditions de prolongation des délais et la suspension d'une procédure en cours.

Au regard des autres règlements d'arbitrage, on peut constater que presque tous prévoient des dispositions relatives au calcul et à la prolongation des délais. Cependant, dans la plupart des cas, on y trouve une disposition commune aux notifications/communications et aux délais, ce qui correspondrait au contenu des dispositions des Articles R31 et R32 du Code du TAS. Le Règlement d'arbitrage de la Cour d'arbitrage de la Chambre de Commerce Internationale (la "CCI") contient, dans son Article 3 al. 4, une disposition similaire à l'Article R32 relativement au point de départ des délais: *"Les délais spécifiés (…) commencent à courir le jour suivant celui où la notification ou la communication est considérée comme faite (…) Les jours fériés et non ouvrables sont compris dans le calcul des délais. Si le dernier jour du délai imparti est férié ou non ouvrable dans le pays où la notification ou la communication a été considérée comme faite, le délai expire à la fin du premier jour ouvrable suivant* [3]*"*.

Contrairement à l'Article R32, le Règlement de la London Court of International Arbitration (la "LCIA") est plus libéral quant à la prolongation des délais : en application des dispositions de l'Article 4, al. 7 de la LCIA, le tribunal arbitral peut proroger ou abréger tout délai *"à tout moment"*, et même a posteriori, après l'expiration du délai imparti. Ledit pouvoir couvre, entre autres, la prolongation des délais pour le service d'une communication par une partie à une autre partie. Dans le cadre de l'Article 22 al. 1 (b), ce pouvoir peut aussi être utilisé par le tribunal pour la prolongation du délai de correction d'une sentence conformément à l'Article 27[4]. L'Article 17, al. 2 du Règlement proposé par la Commission des Nations Unies pour le Droit Commercial International (la "CNUDCI") contient une disposition analogue: *"Le tribunal arbitral peut, à tout moment, après avoir invité les parties à exprimer leurs points de vue, proroger ou abréger tout délai prescrit par les présentes règles ou convenue par les parties"*. A contrario, la CCI ne contient pas de dispositions spécifiques relatives à la prolongation des délais. Toutefois des dispositions sporadiques se trouvent tout au long du texte, comme par exemple dans les Articles 5 al. 2, 23 al. 2 et 30 al. 2 de la CCI.

3. Voir aussi l'Article 4 al. 4 et 6 de la LCIA qui contient une disposition identique à celle de l'Article R32 quant au commencement des délais "*(...) begin to run on the day following the day when a notice or other communication is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating that period*". Voir aussi l'Article 2 al. 6 des Règles; cf. S. Nesbitt, in Mistelis L. (éd.), Concise Intl Arbitration, Kluwer Law International, 2010 p. 409.

4. Voir aussi S. Nesbitt, in Mistelis (éd.), Concise International Arbitration, Kluwer Law International, 2010, p. 410.

Dans les pages suivantes, nous examinerons le calcul des divers délais tels qu'ils sont prévus dans le Code du TAS ainsi que les conditions de prolongation des délais conformément à la jurisprudence du TAS. Nous délimiterons également le champ d'application de l'Article R32 et la disposition spéciale sur le délai d'appel selon l'Article R49 du Code. Nous verrons ensuite comment les délais sont calculés en droit suisse et en application des règles spéciales prévues par les fédérations. Enfin, nous examinerons la question de la suspension de l'arbitrage selon l'Article R32 et les modalités de son octroi selon le Code et à la lumière de la jurisprudence du TAS.

II. Délais selon l'Article R32 et jurisprudence du TAS

A. "Délais fixés en vertu du présent Code"

L'Article R32 renvoie aux "*délais fixés en vertu du présent Code*": dans ce contexte on peut trouver des dispositions pertinentes dans de nombreuses parties du Code: l'Article R37 sur les mesures provisoires et conservatoires prévoit que "*le Président de la Chambre concernée ou la Formation invite la/les autre(s) partie(s) à se prononcer dans les dix jours ou dans un délai plus court si les circonstances l'exigent.*"

Selon l'Article R39 sur la mise en œuvre de l'arbitrage par le TAS et la réponse, le Greffe du TAS "*(…) fixe au défendeur des délais pour formuler toutes indications utiles concernant le nombre et le choix du ou des arbitres figurant sur la liste des arbitres du TAS, ainsi que pour soumettre une réponse à la demande d'arbitrage (...)* ". L'Article R39 al. 2 définit que "*le défendeur peut demander que le délai pour le dépôt de la réponse soit fixé après le paiement par le demandeur de sa part de l'avance de frais prévue à l'Article R64.2 du présent Code.*"

Au surplus, conformément à l'Article R40.2 "*(…) le demandeur désigne un arbitre dans la requête ou dans le délai fixé lors de la décision sur le nombre d'arbitres, à défaut de quoi la requête d'arbitrage est réputée retirée. Le défendeur désigne un arbitre dans le délai fixé par le Greffe du TAS dès réception de la requête*". En application de la disposition de l'Article R41.2 sur l'appel en cause, le Greffe du TAS transmet un exemplaire de la réponse à la personne dont la participation est requise et fixe un délai pour se prononcer sur sa participation à l'arbitrage et à soumettre une réponse. Dans le même sens, le Greffe du TAS fixe un délai au demandeur afin que ce dernier puisse s'exprimer sur la participation de la partie tierce. Plus loin dans le Code du TAS, l'Article R41.3 sur l'intervention se réfère aussi aux délais: "*(...) Le Greffe du TAS transmet un exemplaire de cette demande aux parties et leur fixe un délai pour se déterminer sur la participation du tiers et pour soumettre, dans la mesure applicable, une réponse au sens de l'Article R39*".

S'agissant du dépôt d'une demande reconventionnelle en application de l'Article R44.1, le Greffe du TAS "*fixe un délai au demandeur pour le dépôt de la réponse à la demande reconventionnelle et/ou à l'exception d'incompétence*". L'Article R49 contient une disposition à caractère subsidiaire quant aux délais, puisqu'il s'applique *"[en] l'absence de délai d'appel fixé par les statuts ou règlements de la fédération, de l'association ou de l'organisme sportif concerné ou par une convention préalablement conclue (…)"*. Dans ce contexte, le délai d'appel est de 21 jours dès la réception de la décision faisant l'objet de l'appel. Selon l'Article R51 l'Appelant doit soumettre au Greffe du TAS un mémoire "*contenant une description des faits et des moyens de droit fondant l'appel, accompagné de toutes les pièces et offres de preuves qu'il entend invoquer*".

L'Article R55 prévoit que *"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"*. Tout comme l'Article R39 al. 2 (pour les procédures ordinaires), l'Article R55 al. 3 donne le droit à l'intimé de *"demander que le délai pour le dépôt de la réponse soit fixé après le paiement par l'appelant de sa part de l'avance de frais prévue à l'Article R64.2"*. Enfin, l'Article R59 prévoit que le dispositif de la sentence doit être communiqué aux parties *"dans les trois mois suivant le transfert du dossier à la Formation. Ce délai peut être prolongé par le Président de la Chambre sur demande motivée du Président de la Formation"*.

B. Calcul des délais selon l'Article R32 et l'Article R49

Comme d'autres Règlements d'arbitrage (notamment la CCI et la LCIA), l'Article R32 prévoit que les délais commencent à courir (*dies a quo*) le jour qui suit celui de la réception de la notification par le TAS. En ce qui concerne l'expiration des délais, les communications doivent être effectuées "*avant minuit, heure du lieu où la notification doit être faite*". Le critère décisif pour l'expiration d'un délai n'est donc pas la réception de la communication (p.ex. d'une déclaration d'appel), mais le fait que les écritures soient remises à un bureau de poste avant l'expiration du délai[5].

L'Article R49 du Code contient des dispositions sur le délai pour interjeter appel devant le TAS, en l'absence d'un délai fixé par les règles de la fédération ou d'un autre accord préalable entre les parties. Cette disposition, qui a un caractère subsidiaire, est spécifique au délai d'appel. Conformément à l'Article R49, le délai commence à courir "*à partir de la réception de*

5. Ceci constitue également un principe du droit suisse, v. notamment l'Article 32 al. 3 SR 173 et l'Article 32 de la Loi fédérale sur la poursuite pour dettes et la faillite (LP, 281.1) du 8 avril 1889; cf. CAS 2001/A/343, Rec. III (2001-2003), M. Reeb (éd), Kluwer Law International, p. 230, para 9.

la décision attaquée". Toutefois, l'Article R49 ne précise pas si le délai expire lors de l'envoi de l'appel ou de sa réception par le Greffe du TAS. À cet égard, l'outil d'interprétation qui constitue l'Article R32 peut être utilisé pour le calcul du délai pour interjeter appel selon l'Article R49 du Code TAS, même si l'Article R32 n'est pas directement lié au délai de l'Article R49. Par ailleurs, une partie de la doctrine considère, non sans raison, que certains aspect de l'Article R32 du Code TAS peuvent s'appliquer à l'Article R49 du Code[6].

En conséquence, étant donné que l'Article R49 ne précise pas la façon de calculer le délai d'appel, celui-ci commence à courir lorsque la décision est valablement communiquée ou notifiée à l'appelant, selon les règles de l'association / fédération en question. Dans la sentence CAS 2006/A/1168, la Formation a estimé que l'appel au TAS (dans le cadre de l'Article R49) doit être déposé dans un délai raisonnable, ce qui nécessite que la décision attaquée soit elle-même écrite et motivée, à défaut de quoi l'appelant serait dans l'impossibilité d'établir objectivement le début du délai[7].

Dans le cadre d'une autre sentence[8], la Formation a appliqué l'Article R32 pour calculer l'expiration du délai en concluant que le critère décisif pour le dépôt de l'appel est que les écritures aient été remises à un bureau de poste suisse avant l'expiration du délai. En effet, l'appelant ne pouvait pas influer sur le temps nécessaire pour l'envoi d'une communication. Malgré les critiques quant à la qualité juridique de cette argumentation[9] et le fait que le cas en question est purement national (suisse), le critère de l'envoi de la déclaration d'appel semble être le mieux adapté pour assurer la sécurité juridique. Lorsque les communications sont envoyées de l'étranger, le droit suisse suit, au contraire, le principe de la réception[10].

Les Formations du TAS semblent appliquer la même approche dans des cas portant sur l'interprétation des règles des fédérations concernant les délais pour effectuer certaines communications (à l'exclusion des règles du Code TAS au sens strict ou du délai d'appel au TAS selon l'Article R49 du Code). Dans une Ordonnance sur une requête des mesures provisionnelles[11], la Formation a semblé favorable à l'envoi des documents plutôt qu'à leur réception par le secrétariat, ce qui exigerait une disposition expresse et sans équivoque à cet égard: La Formation a constaté que, si les règles prévoient que le formulaire d'inscription doit être remis au secrétariat de l'organisation sportive et que la liste de l'équipe doit être envoyée dans un délai précis, le sens littéral et la compréhension logique de ces dispositions est que le club doit envoyer les documents demandés et non pas que les documents doivent atteindre le secrétariat dans le délai défini.

L'Article R32 ne précise pas la nature de la notification effectuée par les parties. Dans le cadre d'une sentence, la Formation a conclu qu'il n'est pas pertinent de savoir si les motifs de la décision sont bons ou mauvais, adéquats ou inadéquats. Ces questions doivent être examinées dans le cadre de l'audience sur le fond, mais ne sont pas pertinentes quant au commencement des délais au sens du Code du TAS[12].

C. Calcul des délais selon l'Article R32 du Code et le droit suisse

Quel est le droit applicable au calcul des délais selon l'Article R32 du Code? A la lecture de ce dernier, la référence au "*pays où la notification a été faite"* pourrait signifier que le droit applicable est celui du siège de l'appelant[13]. Toutefois, si la détermination du jour férié ou non ouvrable doit être faite en conformité avec la législation du pays où la notification a été faite, le droit suisse semble s'appliquer à titre subsidiaire à la partie restante de l'Article R32 en tant que règle de procédure d'une institution d'arbitrage ayant son siège en Suisse. Ceci est également conforme à la jurisprudence du TAS[14]. Le siège du tribunal arbitral en Suisse étant un critère suffisant de "rattachement" au droit suisse, cette solution permet également d'éviter certains problèmes techniques[15].

6. Cf. U. Haas, The 'Time Limit for Appeal' in Arbitration Proceedings before the Court of Arbitration for Sport (CAS), SchiedsVZ 2011, 1-13.p. 12; cf. A. Rigozzi, L'arbitrage international en matière de sport, Helbing & Lichtenhahn, Bâle, 2005, p. 539; v. CAS 2004/A/574, Associação Portuguesa de Desportos v. Club Valencia C. F. S.A.D., sentence du 15 septembre 2004, para. 69; CAS 2008/A/1705, Grasshopper v. Alianza Lima, sentence du 18 juin 2009, para. 8.3.3. Dans l'affaire CAS 2011/A/2327, Richard Whitehead v. International Paralympic Sport Federation International Paralympic Committee, sentence du 26 janvier 2011 (para. 7.2), la Formation a même expressément appliqué les règles d'interprétation de l'Article R32 au délai d'appel de 30 jours prévu dans l'Article 60.23 des Règles de l'Association International d'Athlétisme ("IAAF"); voir aussi CAS CG 10/001 Jones v. Commonwealth Games Federation, al. 2.15.

7. Cf. la sentence CAS 2006/A/1168, Baggaley v. International Canoe Federation, sentence du 29 décembre 2006, para. 39 ss.

8. Cf. CAS 2001/A/345, Rec. III (2001-2003), Me Reeb (éd.), Kluwer Lau International, p. 245, para. 9

9. Cf. A. Rigozzi, L'arbitrage international en matière de sport, Bâle 2005, p. 531.

10. Cf. l'Article 143 al. 1 du Code de Procédure Civile Suisse ("CPC").

11. CAS 2007/A/1227 MP.

12. CAS 2006/A/1168.

13. Cf. A. Rigozzi, L'arbitrage international en matière de sport, Bâle 2005, p. 539 s.; cf. aussi TAS 2002/A/403 & TAS 2002/A/408, UCI et FCI c. M. Pantani, sentence du 12 mars 2003, para. 86.

14. *Idem.*

15. Cf. A. Rigozzi, Le délai d'appel devant le Tribunal Arbitral du Sport, Quelques considérations à la lumière de la pratique récente, dans "Le temps et le droit" (Recueil de travaux offerts à la Journée de la Société suisse des juristes 2008), P. Zen-Ruffinen ed., Helbing & Lichtenhahn, 2008, p. 258.

Il est important de noter que l'Article R32 du Code est conforme au droit suisse régissant la question du calcul des délais. Dans le Code suisse des obligations ("CO"), les délais fixés en jours commencent à courir le jour suivant la réception de la décision. Conformément à l'Article 77 al. 1 CO *"si le délai est fixé par jours, la dette est échue le dernier jour du délai, celui de la conclusion du contrat n'étant pas compté; s'il est de huit ou de quinze jours, il signifie non pas une ou deux semaines, mais huit ou quinze jours plein"*. Cette méthode de calcul s'applique également en cas de prolongation de délai conformément à l'Article 80 CO suisse: *"En cas de prolongation du terme convenu pour l'exécution, le nouveau délai court, sauf stipulation contraire, à partir du premier jour qui suit l'expiration du précédent délai"*.

En droit suisse, si le dernier jour d'un délai est un dimanche ou un autre jour férié, le dernier jour est prorogé jusqu'au premier jour ouvrable suivant. L'Article 78 al. 1 CO suisse contient une disposition similaire à celle de l'Article R32 relativement au dernier jour d'une période (un dimanche ou un autre jour férié): "*L'échéance qui tombe sur un dimanche ou sur un autre jour reconnu férié par les lois en vigueur dans le lieu du paiement, est reportée de plein droit au premier jour non férié qui suit"*[16].

D. Calcul des délais prévus dans les règles des Fédérations

La question est de savoir comment les Formations du TAS calculent les délais fixés dans les règles d'une fédération, lorsque les règles sont silencieuses. De manière générale, les règles régissant les délais devraient être interprétées afin d'exclure toute incertitude légale[17].

Dans une sentence du TAS, la Formation a calculé le délai de l'Article 67 al. 1 des Statuts de la Fédération Internationale de Football ("FIFA", version 2012) en comparant celle-ci à la disposition générale de l'Article R32 du Code TAS[18]. Puisque l'Article 63 des Statuts de la FIFA ne contient pas de disposition spécifique relative au calcul des délais, la Formation a appliqué subsidiairement le droit suisse conformément à l'Article R58 du Code et l'Article 66 al. 2 des Statuts de la FIFA. En règle générale, les Formations du TAS appliquent subsidiairement le droit suisse (et non pas l'Article R32) pour le calcul des délais prévus par les règlements des fédérations ayant leur siège en Suisse[19]. Cette pratique résulte indirectement de la lettre de l'Article R32, qui restreint son champ d'application "*aux délais fixés en vertu du présent Code*" (et ne comprend pas les délais prévus par les règles d'une fédération)[20].

Dans ce contexte, et selon le droit suisse, les délais fixés en jours commencent à courir à partir du jour suivant la réception de la décision, le jour de la réception n'étant pas inclus. En outre, si le dernier jour d'un délai est un dimanche ou un autre jour férié, le dernier jour est prorogé jusqu'au premier jour ouvrable qui suit. La décision attaquée dans l'affaire CAS 2007/A/1364 a été notifiée à l'AMA, le 6 août 2007, et l'AMA a déposé sa déclaration d'appel le 27 Août 2007. La Formation a conclu que le délai d'appel était respecté car il a été déposé dans le délai de 21 jours, calculé à partir de 7 août et jusqu'au 26 août (dimanche).

Une telle interprétation serait également conforme au calcul des délais prévus par d'autres règles de la FIFA. Ainsi, selon l'Article 16, al. 7 du Règlement de procédure de la Chambre de Résolution des Litiges de la FIFA ("le Règlement CRL"), ni le jour où un délai est fixé ni la date à laquelle le paiement initiant un délai est effectué ne doivent être pris en considération pour le calcul des délais. Dans l'affaire en question, la décision de la CRL a été notifiée à l'appelant le 17 Octobre et le délai de 21 jours a expiré le 7 Novembre 2008 à 24:00 heures. Par conséquent, l'appelant, en déposant son recours le 7 novembre 2008, a respecté les délais.

Dans le cadre d'une autre affaire du TAS, la Formation a constaté que lorsqu'une règle porte sur la "réception de la décision", afin de définir le délai de l'appel (au lieu du terme "notification / avis du *dies a quo*"), la réception de la décision doit être simplement considérée comme un délai et non pas comme une exigence de recevabilité qui signifierait qu'une partie ne peut pas déposer un appel avant la réception physique de la décision[21]. Dès lors que l'existence de la décision ne pourrait pas être remise en cause, le terme "réception" (dans le cas d'espèce prévu par l'Article 13.5 des Règles antidopage de la

16. Le samedi est considéré comme un jour férié reconnu, conformément à l'Article 1 de la Loi fédérale du 21 juin 1963 sur la supputation des délais comprenant un samedi, SR. 173.110.3.

17. Cf. CAS 2007/A/1396 & 1402 World Anti-Doping Authority ("WADA") & UCI v. Alejandro Valverde & RFEC, sentence du 31 mai 2010, para. 7.44 *et seq.*; cf. aussi CAS 2008/A/1528 UCI v. Caruso & FCI & CAS 2008/A/1546 CONI v. Caruso & FCI, sentence du 21 janvier 2009, para. 7.7.

18. CAS 2007/A/1364 WADA v. FAW & James, sentence du 21 décembre 2007, para. 6.2 ; toutefois, la disposition de l'Article R32 sur la non-prolongation du délai du dépôt d'appel ne peut pas être appliquée aux règles de Fédérations *mutatis mutandis*, voir ci-dessous (chapitre II).

19. Cf. CAS 2007/A/1364, WADA v. FAW & James, sentence du 21 décembre 2007, para. 6.2; cf. aussi CAS 2006/A/1153, WADA v. Assis & FPF, sentence du 24 janvier 2007, para. 41, CAS 2011/A/2354, Elmir Muhic v. FIFA, sentence du 24 août 2011, para. 37 ; cf. CAS 2008/A/1583, Sport Lisboa e Benfica Futebol SAD v UEFA & FC Porto Futebol SAD et CAS 2008/A/1584 Vitória Sport Clube de Guimarães v UEFA & FC Porto Futebol SAD, para. 7.

20. Cf. toutefois CAS 2011/A/2327, Richard Whitehead v. International Paralympic Sport Federation International Paralympic Committee, sentence du 26 janvier 2011, para. 7.2.

21. CAS 2007/A/1284 & 1308 WADA v. Federación Colombiana de Natación (FCN) & Lina Maria Prieto, sentence du 8 juillet 2008, para. 89.

Fédération Internationale de Natation, "FINA") doit être interprété de telle manière que le "*dies a quo*" du délai est, au moins, l'avis (ou la notification) de la décision.

Dans l'affaire CAS 2008/A/1456, la Formation a examiné le calcul des délais pour le cas où une association nationale a agi en tant que représentant d'un joueur dans la procédure de première instance devant la FIFA. L'association représentant le joueur a fait valoir que le délai d'appel ne devrait commencer qu'à partir de la notification de la décision au joueur, ce qui dans le cas d'espèce est survenu quelques jours après la réception de la décision par l'association. Cet argument n'a cependant pas convaincu la Formation, qui a conclu que la notification d'une décision au représentant d'une partie doit être comprise comme une notification à la partie représentée. Si une association nationale agit en tant que représentant d'un joueur dans la procédure devant la organes de la FIFA, le *dies a quo* pour le calcul du délai pour déposer un appel devant le TAS est le jour où cette décision est notifiée à l'association nationale[22].

E. Conséquences de la non-observation du délai d'appel

Dans l'affaire CAS 2006/A/1183[23], la Formation a retenu que, bien que le délai d'appel ne puisse pas être prolongé au sens strict du terme, le TAS aurait le droit de procéder malgré le dépôt tardif du recours si le défendeur ne soulève pas d'objection à la production tardive d'un appel et consente explicitement à la compétence du TAS. Cette approche semble être en conformité avec la nature de l'arbitrage, qui est fondé sur le consentement des parties, dans la mesure où l'accord du défendeur constituerait un accord à conclure une (nouvelle) convention d'arbitrage. En tout état de cause, la date limite pour déposer la déclaration d'appel doit être contrôlée d'office par la Formation, puisque le délai d'appel est un délai dont le non-respect entraîne le rejet de l'appel pour irrecevabilité[24].

Dans un arrêt concernant une sentence du TAS, le Tribunal fédéral a traité la question du respect du délai d'appel, bien que la question de savoir si le non-respect du délai d'appel met ou non en cause la compétence du TAS n'ait pas été tranchée définitivement. La partie recourante a reproché au TAS d'avoir admis un appel déposé tardivement, contrairement à ses règles, en violation de la limite de validité temporelle de la convention d'arbitrage (et plus précisément à la compétence *ratione temporis* selon l'Article 190 al. 2 let. b LDIP)[25]. Tout en acceptant les principes jurisprudentiels mentionnés par la partie recourante, le Tribunal fédéral a toutefois constaté que les principes concernent essentiellement l'arbitrage commercial et non l'arbitrage sportif. Particulièrement dans le domaine de l'arbitrage sportif, le point de savoir si une partie peut attaquer la décision prise par l'organe d'une fédération basée sur des règles de la fédération ne concerne pas la compétence mais la question de la qualité pour agir. La qualité pour agir est un point de procédure qui est résolu selon les règles pertinentes et le Tribunal fédéral ne revoit pas leur application lorsqu'il est saisi d'un recours contre une sentence arbitrale internationale[26].

Dans le jugement précité, le Tribunal fédéral a semblé favorable (bien qu'il ait laissé la question ouverte) à l'interprétation du délai d'appel devant le TAS comme étant un délai de péremption. La conséquence serait que l'inobservation du délai entraîne la perte du droit de soumettre la décision à tout contrôle juridictionnel et non pas l'incompétence. L'argumentation est que s'il suffisait à une partie d'attendre l'expiration du délai d'appel de l'Article R49 du Code pour saisir les tribunaux étatiques, la seule inaction de cette partie pourrait *"court-circuiter la juridiction arbitrale sportive"*[27].

Quant à la motivation de l'appel, en application de l'Article R51 du Code, celle-ci doit être déposée dans les dix jours qui suivent l'expiration du délai d'appel. En principe, le non-respect du délai entraîne le retrait de l'appel mais il est possible, en vertu de l'Article R32 al. 2 du Code, de prolonger ce délai si les *"circonstances le justifient"*[28]. En outre, une requête de prolongation pour la motivation de l'appel est en principe admise si l'autre partie ne soulève pas d'objections[29].

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22. CAS 2008/A/1456 Hammond v. Polis Di-Raja Malaysia FC, sentence du 30 septembre 2008, para. 36.

23. CAS 2006/A/1183 Karol Back v. International Tennis Federation (« ITF »), sentence du 8 mars 2007, para. 21.

24. Cf. CAS 2010/A/2315 Netball New Zealand v. International Netball Federation Limited ("IFNA"), sentence du 27 mai 2011, para. 7.11.

25. Cf. 4A_488/2011, arrêt du 18 juin 2012, consid. 4.3.1 ; cf. aussi les arrêts 4P_284/1994 du 17 août 1995 consid. 2 et 4A_18/2007 du 6 juin 2007 consid. 4.2; Kaufmann-Kohler/Rigozzi, Arbitrage international, 2e éd. 2010, n° 813a; Berger/Kellerhals, International and Domestic Arbitration in Switzerland, 2e éd. 2010, nos 532a ss.

26. Arrêts 4A_428/2011 du 13 février 2012 consid. 4.1.1 et 4A_424/2008 du 22 janvier 2009 consid. 3.3.

27. A. Rigozzi, Le délai d'appel devant le Tribunal arbitral du sport: quelques considérations à la lumière de la pratique récente, in Le temps et le droit, 2008, p. 255 ss; le même, L'arbitrage international en matière de sport, 2005, nos 1028 ss. Cf. Cf. 4A_488/2011, arrêt du 18 juin 2012, consid. 4.3.1.

28. Cf. CAS 96/171, S. v. Fédération Equestre Internationale ("FEI"), Rec. II (2001-2003), M. Reeb (éd.), Kluwer Law International, p. 746 ; cf toutefois CAS 99/A/234 et CAS 99/A/235, p. 4 s.; CAS 2003/A/507, p. 10, para. 7.1.1, *"The Panel does not deem the late filing of the appeal to be withdrawn in the sense of Article R51 of the Code, since the Respondent did not object to the late filing of the appeal brief"* ; cf. A. Rigozzi., L'Arbitrage international en matière de sport, Bâle 2005, p. 505.

29. CAS 2011/A/2576 Curaçao Sport and Olympic Federation v. International Olympic Committee (" IOC"), sentence du 31 août 2012, para. 3.4.

Pour les autres délais définis par le Code du TAS, l'inobservation peut avoir des conséquences diverses, telles qu'elles figurent sous chaque disposition. A titre d'exemple, en application de l'Article R40.2, les parties ont le droit de désigner un arbitre unique dans un délai de quinze jours dès la réception de la requête d'arbitrage. A défaut d'entente dans ce délai, la désignation de l'arbitre unique est effectuée par le Président de la Chambre Ordinaire.

III. Conditions requises pour la prolongation des délais et jurisprudence du TAS

Le deuxième alinéa de l'Article R32 prévoit les conditions spécifiques requises pour obtenir une prolongation de délais. Tout d'abord, il doit y avoir *"une requête motivée"*[30]. Les motifs justifiant une prolongation de délai sont, le plus souvent, la complexité de l'affaire, la consultation d'experts afin de préparer la réponse[31], l'absence ou d'autres obligations professionnelles importantes, un accident du représentant légal/des parties[32], ou une procédure pendante devant un tribunal étatique[33]. Il est également important de noter que l'extension du délai ne doit pas défavoriser l'autre partie ou excessivement retarder la date de l'audience devant le TAS[34].

Ensuite, le délai initial ne doit pas avoir déjà expiré. Si, toutefois, une demande a été déposée à l'expiration du délai, le TAS ne rejette pas automatiquement la requête mais l'indique et invite l'autre partie à s'exprimer sur l'admissibilité d'une telle requête. En cas de contestation ou en l'absence de réponse, la prolongation ne sera pas accordée (sauf dans le cas de force majeur). En cas d'accord, le TAS confirmera la prolongation par écrit.

L'extension du délai est déterminée par le Président de la Formation ou par le Président de la Chambre concernée, même si l'une des parties n'est pas d'accord quant à l'octroi du délai supplémentaire. Pour toutes les requêtes de prolongation déposées dans le délai initial, l'autre partie est consultée dans un court laps de temps (2-3 jours). Il est généralement indiqué que l'absence de réponse sera considérée comme une non-objection, alors que dans le cas d'une objection explicite, le Président de la Formation ou le Président de la Chambre concernée se prononcera sur cette question. Toute décision d'accorder la prolongation malgré l'objection de l'autre partie est brièvement motivée. Si le laps de temps entre le moment où l'autre partie est invitée à s'exprimer par rapport à la requête de prolongation et l'expiration du délai est en dessous de deux jours, le délai est souvent suspendu.

Dans l'affaire CAS 2009/A/1996, l'appelant a demandé une prolongation d'un jour pour déposer ses observations supplémentaires sur la compétence. La demande de prolongation a été accordée par le Greffe du TAS. L'intimé a contesté la recevabilité des arguments supplémentaires de l'appelant et demandé un délai afin de se prononcer sur la recevabilité de la réponse de l'appelant. La Formation a toutefois décidé que *"en raison de l'urgence de la situation"* et *"après avoir évalué les raisons et la durée de la prolongation demandée"* les motifs de l'appelant étaient justifiés. En outre, et dans le but de respecter l'égalité de traitement des parties, la Formation a également prolongé le délai de réponse[35].

Selon la lettre de l'Article R32 al. 2 (1ère phrase), la seule exception à la possibilité d'obtenir une prolongation concerne le dépôt de la déclaration d'appel. Cette disposition particulière est liée à l'Article R49 du Code relatif au délai pour interjeter appel auprès du TAS. Le délai de l'Article R49 est obligatoire et ne peut être prorogé par le président de Chambre, contrairement aux autres délais prévues par l'Article R32[36]. Les Formations du TAS semblent adopter la même approche relativement à la possibilité de prolonger le délai d'appel lorsque ce dernier est prévu par les règles d'une fédération et qu'il n'y a pas de disposition spécifique sur la prolongation du délai[37].

Prenons maintenant l'exemple du délai pour déposer le mémoire, après la déclaration d'appel. Conformément à l'Article R51 du Code TAS, l'appelant doit déposer le mémoire d'appel dans les dix jours après l'expiration du délai pour déposer la déclaration d'appel, *"faute de quoi l'appel est réputé retiré "*.

Dans l'affaire CAS 2010/A/2235, l'appelante a déposé la déclaration d'appel dans le délai fixé par les règles de l'Union Cycliste Internationale (l' " UCI ") et demandé en même temps une prolongation pour la *"déclaration d'appel"* (au lieu de demander une prolongation pour le dépôt de son *"mémoire d'appel"*) fondée sur les Articles R51 et R32 du Code du TAS. Les intimés ont demandé à la Formation de rejeter

30. Cette requête peut être faite par l'appelant ou par l'intimé, cf. CAS 2000/A/262, Rec. II (2001-2003), M. Reeb (éd.), Kluwer Law International, p. 377, 380.

31. CAS 2011/A/2621 David Savic v. Professional Tennis Integrity Officers, sentence du 5 septembre 2012, para. 3.7.

32. CAS 2011/A/2625 Mohamed Bin Hammam v. FIFA, sentence du 19 juillet 2012, para. 39.

33. P.ex. en cas de requête des mesures provisoires, cf. A. Rigozzi, L'arbitrage international en matière de sport, Bâle 2005, p. 980.

34. Cf. CAS 2010/A/2235, UCI v. Tadej Valjavec & Olympic Committee of Slovenia, sentence du 21 avril 2011, para. 64, para. 65.

35. Cf. CAS 2009/A/1996, Omer Riza v. Trabzonspor Kulübü Dernegi & Turkish Football Federation, sentence du 10 juin 2010, para. 31.

36. CAS 2007/A/1266, Russian Boxing Federation v. AIBA, sentence du 15 juin 2007, para. 12.

37. Cf. CAS 2011/A/2327, Richard Whitehead v. International Paralympic Sport Federation & International Paralympic Committee, sentence du 26 janvier 2011, para. 7.7.

cette demande de prolongation[38]. La Formation a rejeté des arguments des intimés en concluant qu'il avait été clair pour toutes les parties que la prorogation demandée concernait le mémoire d'appel et que l'intimé ne pouvait pas tirer des arguments d'une erreur de plume *"could not derive any argument from appellant's obvious clerical slip"*.

Les délais peuvent être prolongés soit par le Président de la Formation soit, si cette dernière n'a pas encore été constituée, par le Président de la Chambre concernée, après avoir consulté l'autre partie et après avoir pris en considération toutes les circonstances de l'affaire. En principe, les requêtes d'extension sont accordées si elles ne sont pas faites de façon abusive, ne retardent pas excessivement la procédure et sont conformes au principe de proportionnalité[39]. Dans ce contexte, le Président de Chambre dispose d'une grande discrétion quant à l'évaluation des motifs soulevés et des intérêts respectifs des parties. De ce fait, une fois que le Président de Chambre a accordé l'extension, la Formation ne peut plus revenir en arrière et reconsidérer la décision prise[40].

Une nouvelle disposition insérée à la fin du deuxième alinéa de l'Article R32 autorise le Secrétaire général du TAS à accorder une première prolongation de cinq jours au maximum, sans qu'il soit nécessaire de demander l'autorisation du Président de la Chambre concernée. Dans la pratique, en application de cette disposition, le Greffe du TAS accorde souvent des prolongations n'excédant pas cinq jours[41].

A. Prolongation des délais en cas d'appel antérieur devant une juridiction incompétente

Dans le cas où l'appelant dépose un recours devant un tribunal étatique incompétent, la question est de savoir s'il est possible de prolonger ou de restaurer les délais. L'affaire CAS 2005/A/953 porte sur la demande d'annulation d'une décision prise par la Fédération International de Hockey sur Glace ("IIHF") à l'encontre d'un athlète. Le texte de la décision mentionnait que l'athlète pouvait déposer un appel contre la décision devant le TAS[42]. Toutefois, l'appelant a déposé son appel auprès d'un tribunal étatique qui a conclu à son incompétence. L'appelant a ensuite interjeté appel auprès du TAS et a demandé à bénéficier d'un délai supplémentaire fondé sur l'Article 139 CO suisse. La Formation devait déterminer si l'Article 139 CO suisse pourrait être appliqué par analogie aux délais énoncés à l'Article 75 du Code Civil suisse et à l'Article 48 des Statuts de l'IIHF. Selon l'Article 139 CO suisse, *"Lorsque l'action ou l'exception a été rejetée par suite de l'incompétence du juge saisi, ou en raison d'un vice de forme réparable, ou parce qu'elle était prématurée, le créancier jouit d'un délai supplémentaire de soixante jours pour faire valoir ses droits, si le délai de prescription est expiré dans l'intervalle"*.

La Formation a constaté que les règlements de l'IIHF sont muets quant à la possibilité de prolonger ou restituer le délai d'appel dans le cas où l'appelant aurait agi devant une juridiction incompétente. La Formation a constaté que le Tribunal fédéral a appliqué l'Article 139 CO suisse par analogie à certains délais de péremption du droit privé fédéral et à certains délais de la Loi fédérale sur la poursuite pour dettes et la faillite ("LP")[43]. Toutefois, la jurisprudence du Tribunal Fédéral ne semble pas avoir appliqué l'Article 139 CO au délai de péremption de l'Article 75 CC[44].

En conclusion, la Formation a laissé ouverte la question de l'application de l'Article 139 CO dans le contexte de l'affaire TAS 2004/A/953, en précisant que l'Article 139 CO prévoit l'octroi d'un délai supplémentaire dans trois cas seulement : lorsque le tribunal saisi se déclare incompétent, lorsqu'il y a une erreur réparable de procédure et lorsque la demande est prématurée[45]. Selon la jurisprudence du Tribunal fédéral suisse, le choix de la mauvaise voie de recours et la violation des règles de procédure ne peuvent être guéris en l'application de l'Article 139 CO suisse[46].

Dans l'affaire CAS 2004/A/953, non seulement l'appelant a délibérément choisi la mauvaise voie de droit (en optant pour un tribunal qui n'avait manifestement pas la compétence) mais aussi il a également dépassé le délai de 21 jours prévu à l'Article 48 des Statuts de la IIHF. Même en déposant sa demande d'annulation de la décision de la IIHR auprès des tribunaux étatiques, l'appelant n'avait pas respecté le délai prévu par l'Article 48 des statuts de la IIHR[47]. La solution adoptée dans l'affaire CAS 2004/A/953 n'a toutefois pas été suivie dans un

38. Cf. CAS 2010/A/2235, UCI v. Tadej Valjavec & Olympic Committee of Slovenia, sentence du 21 avril 2011, para. 66.

39. *Ibidem*, para. 69.

40. *Idem*.

41. Cette pratique existait même avant la mise en vigueur de la disposition, cf. CAS 96/171, S. Fédération Equestre Internationale ("FEI"), Rec. II (2001-2003), M. Reeb (éd.), Kluwer Law International, p. 746.

42. "*The player is entitled to lodge an appeal against this decision at the following court : Court of Arbitration for Sport (CAS), av. de l'Elysée 28, 1006 Lausanne, Switzerland. The time limit for the appeal is twenty-one days after receipt of this decision* ".

43. Cf. ATF 89 II 304, 100 II 278, ATF 108 III 41, 113 III 88; cf. TAS 2004/A/953, Dorthe c. IIHF, sentence du 6 mars 2006, para. 57.

44. *Ibidem*, para. 60.

45. Cf. Robert K. Däppen, Commentaire Bâlois, OR 1, Bâle/Genève/Munich 2003, para. 4 ad art. 139 CO.

46. Cf. 5P.370/2003 ; TAS 2004/A/953, Dorthe c. IIHF, sentence du 6 mars 2006, para. 67.

47. Ibidem, para. 71

autre appel interjeté devant le TAS, où la Formation a considéré que l'Article 139 CO suisse devrait s'appliquer par analogie à une affaire relative à une violation des règles antidopage impliquant la Comité Olympique Italien (Comitato Olimpico Nazionale Italiano, "CONI") et l'Association Mondiale Antidopage ("AMA")[48].

B. Prolongation du délai d'une demande de récusation d'un arbitre

En application de l'Article R34 al. 1 du Code, *"Un arbitre peut être récusé lorsque les circonstances permettent de douter légitimement de son indépendance. La récusation doit être requise dans les sept jours suivant la connaissance de la cause de récusation"*. Dans une affaire impliquant la récusation d'un arbitre, le CIAS a notamment traité la question du délai de récusation et indirectement jugé que la prolongation du délai est possible sur requête motivée expliquant le dépôt tardif[49].

En application de l'Article R32, le CIAS a jugé que la prolongation du délai pour demander la récusation d'un arbitre est possible uniquement sur requête motivée. Le demandeur doit fournir une explication pour le dépôt de sa requête en dehors du délai de l'Article R34 du Code TAS ou un motif pour la récusation tardive, faute de quoi la requête est réputée avoir été déposée hors délai et est donc irrecevable[50].

IV. Suspension de l'arbitrage en cours

Le troisième alinéa de l'Article R32 a été inséré lors de la modification du Code en 2010 et prévoit que l'arbitrage en cours peut être suspendu par le Président de la Formation ou par le Président de la Chambre concernée pour une période de temps limitée par la Formation. Bien que les effets de la suspension soient similaires à ceux de la prolongation d'un délai, la suspension porte en principe sur l'ensemble de l'arbitrage en cours tandis que la prolongation d'un délai concerne exclusivement le délai en question[51].

Conformément à l'Article R32, les parties doivent déposer une *"requête justifiée"*, ce qui signifie que le Greffe du TAS ne peut prendre une telle décision d'office. Si les deux parties sont d'accord sur la suspension de la procédure, le Président de Chambre octroie la suspension. Au sens de l'Article R32, la production, la divulgation ou la traduction de certains documents par l'autre partie peut justifier la suspension de l'arbitrage en cours. La procédure peut également être suspendue jusqu'à ce que la langue de la procédure soit déterminée ou qu'une décision sur l'assistance judiciaire soit prise. Dans certains cas, sous réserve d'une requête, le TAS suspend la procédure à la suite d'une tentative d'accord entre les parties[52]. La suspension de la procédure ouverte devant le TAS est également possible en cas de réexamen/révision de la décision par l'autorité inférieure[53].

En outre, une partie peut demander la suspension de la procédure à la suite de l'existence d'une procédure pénale, à condition que cette dernière soit directement liée à l'affaire en question et que la suspension ne cause pas de préjudice à l'autre partie[54].

En revanche, la récusation d'un arbitre ne peut a priori pas justifier la suspension de la procédure, puisque le choix de l'arbitre n'a pas une influence directe sur le déroulement de la procédure. Toutefois, si la demande de récusation a été déposée après la constitution de la Formation, cette dernière ne prend en principe pas de décisions pendant que la procédure de récusation soit en cours.

La situation prévue à l'Article R55 al. 3 ne définit pas clairement s'il s'agit d'une suspension ou d'une prolongation. Selon ladite disposition *"L'intimé peut demander que le délai pour le dépôt de la réponse soit fixé après le paiement par l'appelant de sa part de l'avance de frais prévue à l'Article R64.2"*. Il semble que les Formations du TAS utilisent le terme *"suspension"* de la procédure même s'il ne s'agit pas d'une suspension au sens strict du terme[55].

Enfin, la suspension au sens de l'Article R32 ne doit pas être confondue avec la suspension de la procédure prévue à l'Article R39 (procédures ordinaires) et R55 (procédures d'appel), en particulier pour les cas où il existe une procédure pendante devant les

48. Cf. CAS 2008/A/1528 & 1546, UCI v. G. Caruso & FCI, Ordonnance sur mesures provisionnelles du 22 août 2008, para 7.12.

49. CAS 2009/A/1893 DR, Panionios v. Al-Ahly SC, décision sur récusation du 19 novembre 2009, para. 18.

50. *Ibidem*, para. 19, cf. toutefois Rigozzi, N. 1358.

51. Par exemple, les arbitres ne sont plus censés travailler sur le dossier pendant que la procédure reste suspendue et de par ce fait ils ne peuvent pas réclamer des honoraires pour une procédure suspendue, dans le cas où celle-ci serait finalement clôturée.

52. Cf. CAS 2011/A/2678, IAAF v. RFEA & Francisco Fernández Peláez, sentence du 17.04.2012, para. 64. ; cf. aussi CAS 2011/A/2436, Associação Académica de Coimbra – OAF v. Suwon Samsung Bluewings FC, sentence du 25.05.2012, para. 3.10 s.

53. Cf. TAS 2011/A/2528 Olympiakos Volou FC c. Union Européenne de Football ("UEFA"), sentence du 10 février 2012, para. 33: dans cette affaire, l'appelant a sollicité la suspension de la procédure devant le TAS jusqu'à ce que la demande de révision déposée par l'appelant auprès de l'Instance d'Appel de l'UEFA soit traitée (à noter que l'UEFA ne s'est pas opposée à une telle suspension).

54. CAS 2010/A/2298, Mr. Jae Joon Yoo v. Association Internationale de Boxe Association ("AIBA"), sentence du 12 juillet 2011, para. 7.1 ; cf aussi CAS 2011/A/2364 Salman Butt v. International Cricket Council, Ordonnance sur requête d'aide financière du 13 décembre 2012, para. 2; cf. aussi CAS 2011/A/2363 Mohammad Amir v. International Cricket Council, Ordonnance de clôture du 7 décembre 2012 (à noter toutefois que dans cet arbitrage les deux parties étaient d'accord sur la suspension de la procédure, qui a finalement été clôturée).

55. Cf. CAS 2011/A/2660, Vincenzo d'Ippolito v. Danubio FC, sentence du 5 octobre 2012, para. 3.9.

tribunaux étatiques ou d'autres tribunaux arbitraux. Les deux dispositions spéciales précitées ont adopté le contenu de l'Article 186 al. 1 bis Loi Fédérale sur le Droit International Privée ("LDIP") selon lequel le Tribunal arbitral statue sur sa propre 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 "*. Cette disposition complexe concerne exclusivement la suspension de l'ensemble de la procédure dans le cas d'une procédure pendante devant les tribunaux étatiques ou d'autres tribunaux arbitraux (généralement les instances juridictionnelles de la fédération en question) à la demande de l'intimé et notamment pour *"des motifs sérieux"*[56].

Les motifs sérieux constituent une des conditions énumérées à l'Article 186 al. 1 LDIP. Sans entrer dans les détails, une Formation arbitrale du TAS a constaté dans l'affaire CAS 2009/A/1881, que des motifs sérieux existent si l'appelant prouve que la suspension est nécessaire pour protéger ses droits et que la continuation de la procédure d'arbitrage lui causerait un préjudice grave. Néanmoins, la simple possibilité que le tribunal étatique saisi de l'affaire puisse rendre une décision différente de celle du TAS ne peut pas être considérée comme un motif sérieux. En fait, la possibilité de décisions contradictoires est présente dans tous les cas de procédures parallèles impliquant un tribunal arbitral et un tribunal civil[57]. Dans le cas contraire, la procédure arbitrale finirait par être toujours suspendue, ce qui n'est manifestement pas le but de l'Article 186 al. 1bis de la LDIP[58].

V. Conclusion

En résumé, l'on peut noter que les principes régissant le calcul des délais en vertu de l'Article R32 du Code du TAS sont en conformité avec les principes généraux du droit suisse. Les Formations du TAS semblent également appliquer en partie les principes énoncés à l'Article R32 pour l'interprétation et le calcul du délai d'appel spécial prévu par l'Article R49. Quant aux délais prévus par les règles des Fédérations, ceux-ci sont interprétés et calculés en fonction du droit du siège de la Fédération (pour de nombreuses Fédérations siégeant en Suisse, ce serait le droit suisse). L'on a également noté que les conditions requises pour la prolongation des délais et la suspension de la procédure en cours ne sont pas prévues par le Code du TAS mais ont été développées par la jurisprudence du TAS, tout en prenant en considération les circonstances particulières du cas d'espèce.

56. Cf. pour plus de détails TAS 2009/A/1994, Xavier Malisse c. Vlaams Doping Tribunaal & TAS 2009/A/2020 AMA v. Vlaams Doping Tribunaal, Fédération flamande de tennis et M. Xavier Malisse, sentence partielle du 10.06.2011 ; cf aussi G. Kaufmann-Kohler & A. Rigozzi, Arbitrage international, Droit et pratique à la lumière de la LDIP, 2ème éd. 2010, p. 265, n. 456.

57. Cf. TAS 2009/A/1881, Mr El-Hadary v. FIFA & Al-Ahly SC, sentence partielle sur la lis pendens et la compétence du 7 octobre 2009, paras. 66-67; cf. aussi l'analyse des "motifs sérieux" dans la sentence partielle du 10 juin 2011, TAS 2009/A/1994 Xavier Malisse c. Vlaams Doping Tribunaal & TAS 2009/A/2020 AMA v. Vlaams Doping Tribunaal, Fédération flamande de tennis et M. Xavier Malisse, paras. 67-74.

58. Bien que la suspension telle que prévue par l'Article R32 et la suspension selon les Articles R39 et R55 ont des bases légales différentes, l'on peut imaginer une partie basant sa requête de suspension de procédure au sens de l'Article 186 al. 1 bis LDIP en se référant à l'Article R32. Dans une telle hypothèse, il nous semble que la Formation devrait appliquer les critères de l'Article R39 ou R55 d'office, tout en écartant les conditions (plus légères) de suspension de la procédure en application de l'Article R32 du Code.

Arbitrage TAS 2011/A/2526
Antidoping Suisse c. C.
11 juin 2012

Athlétisme; Violation de l'obligation de localisation par le sportif; Notification d'avertissements par courrier recommandé à l'issu du délai de garde; Sanction disciplinaire; Atteinte à la vie privée justifiée par un intérêt public prépondérant

Formation:
Me André Gossin (Suisse), Arbitre unique

Faits pertinents

Antidoping Suisse (l'appelante) est une fondation de droit suisse, laquelle est l'un des organes de lutte contre le dopage, selon le Statut concernant le dopage 2009 de l'Association Olympique Suisse (le Statut).

C. (l'intimé), est un athlète de nationalité suisse pratiquant les disciplines d'athlétisme du 100 m et relais 4 X 100 m, ainsi que le 60 m en salle, au sein du club du Stade Genève. À l'époque des faits, il était domicilié à Ferney-Voltaire en France chez ses parents, mais résidait aux Etats-Unis pour ses études et où il s'entraînait également.

Dans une période allant de juin 2010 à mai 2011, C. a fait l'objet de trois avertissements pour violation de l'obligation de renseigner, selon l'article 2.4 du Statut. Antidoping Suisse ayant requis l'ouverture d'une procédure devant la Chambre disciplinaire pour violation des règles antidopage, C. a été provisoirement suspendu, depuis le 22 juin 2011, ceci avant que la Chambre disciplinaire ne décide de le suspendre pour une période de 12 mois à compter de cette dernière date, en application des articles 2.4 et 10.3.3 du Statut.

Plus précisément, la Chambre disciplinaire pour les cas de dopage de Antidoping suisse (la Chambre disciplinaire) a été saisie du dossier et a tenu une audience, le 11 juillet 2011, au cours de laquelle tant C. que Antidoping Suisse et la Fédération suisse d'athlétisme étaient représentés.

Au terme de cette audience, la Chambre disciplinaire a reconnu C. coupable d'infraction aux normes antidopage pour violation de l'obligation de renseigner et, en application des articles 2.4 et 10.3 du Statut, a prononcé une suspension pour une durée de 1 an à l'encontre de C., ceci à partir du 22 juin 2011.

L'intimé n'a, de son côté, pas recouru contre cette décision.

Par déclaration du 10 août 2011, Antidoping Suisse a interjeté appel contre la décision du 11 juillet 2011. Elle retient les conclusions suivantes:

i) L'appel déposé par Antidoping Suisse est recevable;

ii) La décision de la Chambre Disciplinaire de Swiss Olympic du 11 juillet 2011 rendue dans l'affaire C. est annulée;

iii) C. est reconnu coupable d'une violation de l'art. 2.4 du Statut antidopage;

iv) C. est suspendu pour une durée de 2 ans;

v) Les frais de procédure devant la Chambre Disciplinaire sont mis à la charge de C.;

vi) Les frais de procédure devant le TAS sont mis à la charge de C.;

vii) Une indemnité de CHF 1'500.- est accordée à Antidoping Suisse; elle est à payer par C.

L'appelante a déposé son mémoire d'appel le 19 août 2011, dans le cadre duquel les faits retenus par la Chambre disciplinaire n'ont pas été contestés.

En revanche, Antidoping Suisse fait en particulier grief à la Chambre disciplinaire de ne pas avoir mentionné pour quel motif elle a opté pour la peine minimale absolue en cas de violation de l'article 2.4 du Statut, ceci alors que, selon elle, les éléments retenus par la Chambre disciplinaire établissent une négligence flagrante de la part de l'athlète, sans élément à décharge de ce dernier. L'appelante estime qu'il est difficile de violer l'article 2.4 du Statut de

manière plus fautive, sans parallèlement se rendre coupable de violation de l'article 2.3 du Statut, soit de soustraction à un prélèvement d'échantillon.

Dans son mémoire du 30 septembre 2011, l'intimé soulève, quant à lui, préalablement, une exception de composition irrégulière de l'autorité et d'incompétence pour défaut de qualité pour agir.

Il retient les conclusions suivantes:

<u>À la forme</u>

a. Déclarer le présent mémoire recevable.

<u>Au fond</u>

Préalablement

b. Suspendre immédiatement l'instruction de la procédure au fond et ouvrir une instruction séparée sur la compétence.

Principalement

c. Rendre une sentence incidente sur les exceptions d'incompétence soulevées par C.

d. Constater que le TAS n'est pas compétent pour connaître de l'appel d'Antidoping Suisse du 10 août 2011, faute de qualité pour agir de cette dernière.

e. Constater que le TAS n'est pas compétent pour connaître de l'appel d'Antidoping Suisse du 10 août 2011, faute de qualité pour agir de cette dernière.

f. Condamner Antidoping Suisse aux frais de la procédure et à des dépens, lesquels comprendront une indemnité correspondant à l'entier des honoraires d'avocat de C.

g. Débouter Antidoping Suisse de toute autre conclusion.

En outre, il retient encore les conclusions suivantes au fond:

<u>À la forme</u>

a. Déclarer le présent mémoire de réponse recevable.

Préalablement

b. Octroyer un délai à l'intimé pour compléter son mémoire de réponse quant au fond une fois qu'une décision finale aura été rendue sur les exceptions de procédure.

<u>Au fond</u>

c. Constater que les règles de localisation des sportifs du Statut concernant le dopage 2009 de Swiss Olympic sont contraires à la Constitution fédérale et à la Convention européenne des droits de l'Homme.

d. En tous les cas, constater que Swiss Olympic ne pouvait pas sanctionner C., faute de deux avertissements suivis d'une troisième violation à l'obligation de localisation.

e. Débouter Antidoping Suisse des fins de son appel.

f. Condamner Antidoping Suisse aux frais de la procédure et à des dépens, lesquels comprendront une indemnité correspondant à l'entier des honoraires d'avocat de C.

g. Débouter Antidoping Suisse de toute autre conclusion.

Les exceptions de compositions irrégulières de l'autorité saisie et d'incompétence pour défaut de qualité pour agir de l'appelante ont fait l'objet d'une sentence arbitrale incidente rendue le 19 mars 2012, au terme de laquelle les exceptions soulevées par C. ont été rejetées, de sorte que la qualité pour agir d'Antidoping Suisse et la compétence du TAS pour statuer sur l'appel interjeté ont été constatées. Dans le cadre de cette sentence incidente, il a été stipulé que la répartition des frais de procédure et les dépens feront l'objet d'une décision dans le cadre de la présente sentence.

Compte tenu de la sentence arbitrale incidente déjà rendue, seuls les arguments soulevés tout d'abord qu'à titre subsidiaire et sous réserve d'un mémoire complémentaire par l'intimé, puis définitivement selon son courrier du 28 mars 2012, sont présentement résumés.

L'intimé admet les faits tels que retenus par la Chambre disciplinaire dans la partie III de la décision attaquée, contestant uniquement la qualification juridique de certains d'entre eux.

Ainsi, l'intimé précise qu'il a vécu aux Etats-Unis, plus précisément à Miami, entre 2004 et le mois de juin 2011, là où il suivait des études universitaires parallèlement à la pratique de l'athlétisme. Il précise que c'est uniquement pour participer à des compétitions ou rendre visite à sa famille qu'il revenait en Europe.

Il admet que faisant partie depuis le 28 janvier 2010 du groupe cible national de sportifs soumis à contrôle, il était réglementairement tenu de fournir tous les 3 mois des renseignements sur sa localisation et sa disponibilité pour des contrôles antidopage. Il déclare cependant avoir toujours indiqué qu'il vivait et s'entraînait à Miami, ce qui selon lui ressortait du registre SIMON et était connu tant de Swiss athletics

que de son club Stade Genève.

Il déclare ne pas avoir eu connaissance du courrier du 23 juin 2010 mentionnant qu'il avait violé son obligation de renseigner et lui fournissant un délai de 14 jours pour prendre position, joignant une attestation de ses parents affirmant ne l'avoir pas mis au courant de la venue infructueuse d'une personne de la fondation Antidoping Suisse le 20 juin 2010 à son domicile à Ferney-Voltaire.

Il déclare également ne pas avoir eu connaissance du courrier du 13 juillet 2010 qui, à l'instar de celui du 23 juin 2010, n'a pas été retiré par ses parents, ces derniers pensant selon l'attestation fournie que leur fils le recevrait nécessairement aussi à son adresse aux Etats-Unis ou par e-mail. Il fournit également une déclaration du Stade Genève selon lequel celui-ci n'a jamais été contacté par Antidoping Suisse ou Swiss athletics pour les informer des contrôles manqués, respectivement des violations des règles antidopage par C., tout en attestant qu'ils étaient au courant du fait que C. vivait à Miami.

En revanche, il admet avoir pris connaissance du courrier du 2 février 2011, dans le cadre duquel l'appelante lui reprochait d'avoir violé pour la 2e fois son obligation de renseigner, apprenant simultanément qu'un premier avertissement lui avait déjà été adressé par le courrier non retiré du 13 juillet 2010.

Il allègue que n'ayant ainsi pas eu connaissance d'une première violation avant le 5 février 2011, il n'a, par conséquent, pas eu l'opportunité de remédier à ce manquement avant cette date. Cependant, il admet qu'un 2e avertissement figurant dans le courrier du 25 février 2011 est parvenu chez ses parents, alors qu'il ne résidait pas à cette adresse et que le courrier ne lui parvenait que difficilement. Il estime que, selon la jurisprudence du TAS (CAS 2011/A/2499), il n'y a pas de fiction de notification à l'échéance du délai de garde de courriers recommandés non retirés.

N'ayant pas recouru contre la décision attaquée, il conclut au débouté d'Antidoping Suisse de toutes ses conclusions.

Extraits des considérants

A. Au fond

Des pièces au dossier, il ressort que C. a vécu aux Etats-Unis entre l'année 2004 et le mois de juin 2011, plus particulièrement à Miami où il a suivi des études universitaires en parallèle à la pratique de son sport.

De son mémoire d'appel, il ressort qu'il ne revenait en Europe que pour rendre visite à sa famille ou participer à des compétitions. Il admet que depuis le 28 janvier 2010 il faisait partie du groupe cible national des sportifs soumis à contrôle, ce qui impliquait son obligation de fournir tous les trimestres les renseignements nécessaires relatifs à sa localisation pour des contrôles antidopage hors compétition, dans le système SIMON.

Du mémoire de C., daté du 5 juillet 2011, il ressort que "*en Europe, faute d'autre solution,* [il a] *dû laisser comme adresse dans SIMON, pour l'envoi des courriers, le domicile de* [ses] *parents (6 chemin de Collex, 01210 Ferney Voltaire en France) chez qui* [il] *réside lorsqu'* [il] *revient en Suisse*".

Le premier courrier d'Antidoping Suisse, daté du 23 juin 2010, a bien été envoyé à l'adresse de C. auprès de ses parents à Ferney Voltaire. Il en a été de même pour les courriers des 13 juillet 2010, 2 février 2011, 25 février 2011, 27 juillet 2011 et 26 avril 2011.

Le courrier recommandé du 23 juin 2010 a été retourné à son expéditeur Antidoping Suisse qui l'a reçu le 20 juillet 2010 avec la mention "non réclamé". Le courrier du 13 juillet 2010 a subi le même sort avant de parvenir à son expéditeur le 9 août 2010.

En revanche, le courrier du 2 février 2011 a été notifié le 5 février 2011 à l'adresse indiquée selon le suivi postal, ceci alors que le courrier suivant, daté du 25 février 2011, est à nouveau venu en retour le 1er avril 2011 auprès de l'appelante avec la mention "non réclamé". Le courrier du 26 avril 2011 de l'appelante a été notifié à l'adresse de Ferney Voltaire le 28 avril 2011, alors que le courrier du 10 mai 2011 est revenu à son expéditeur le 3 juin 2011 avec la mention "non réclamé".

L'intimé allègue que le premier courrier, dont le contenu est parvenu à sa connaissance, est celui du 2 février 2011, de sorte qu'il dit n'avoir ainsi pas eu l'opportunité de remédier au manquement ressortant du premier avertissement avant cette date, par la suite, il allègue encore que le 2e avertissement du 25 février 2011 avait à nouveau été adressé chez ses parents alors que l'appelante savait qu'il ne résidait pas à cette adresse. Par ailleurs, il invoque la sentence CAS 2011/A/2499, pour prétendre qu'il n'y aurait pas de fiction de notification à l'échéance du délai de garde postale. Cette appréciation ne saurait être suivie. En effet, dans le cadre de la sentence susmentionnée, la question litigieuse était de savoir si les notifications portant sur une violation de l'obligation de renseigner pouvaient être valablement notifiées à l'athlète par l'intermédiaire de sa fédération nationale et non directement à l'intéressé. Il ne s'agissait donc pas de

la question de la notification à l'issue du délai de garde en tant que tel.

Dans le cas présent, l'adresse de domicile pour l'athlète est bien celle de Ferney-Voltaire, l'adresse donnée aux Etats-Unis correspondant non pas à son domicile au sens strict, mais à son lieu de localisation. D'ailleurs, il suffit de constater que l'intimé lui-même savait pertinemment que l'adresse valable pour le courrier était bien celle du domicile de ses parents, comme il l'a admis en page 3 de son courrier 5 juillet 2011. Par conséquent, Antidoping Suisse, en envoyant ses courriers à C. à l'adresse de ses parents à Ferney-Voltaire, les notifiait ainsi valablement.

Il convient en conséquence d'examiner à quelle date les courriers en question étaient effectivement notifiés à C.

Selon la jurisprudence, un pli recommandé non retiré est réputé notifié à l'issue du délai de garde postal (Cf. Arrêt du Tribunal fédéral du 7 octobre 2011 6B_422/2011 et 5A_318/2008 ajp du 28 juillet 2008) qui, en Suisse, est de 7 jours selon les normes postales, alors qu'en France il est de 15 jours (Cf. art.3.2.6 des Conditions générales de vente de La Poste française, accessibles sur www.laposte.fr), à compter du lendemain du jour du dépôt de l'avis de passage. Dès le moment où l'adresse légale de l'intimé se trouve en France, il tombe également sous le sens que c'est le délai de garde selon les normes postales françaises qui doit trouver application, dans la mesure où la jurisprudence se réfère précisément au délai de garde postale applicable pour déterminer la date de notification, en cas de non retrait de l'envoi.

Par conséquent, le recommandé du 23 juin 2010, si l'on prend en compte le délai le plus rapide pour le dépôt de l'avis de passage qui est de 3 jours à compter de la date de l'envoi ainsi que cela ressort du suivi postal annexé à la pièce numéro 9 de la PJ 5 de l'appelante (à savoir jour de l'envoi + jour de dépôt au poste-frontière + jour de notification). Par conséquent, le délai de garde pour l'envoi du 23 juin arrivait à échéance le samedi 10 juillet 2010.

Pour l'envoi du 13 juillet 2010 notifiant un premier avertissement pour violation de l'obligation de renseigner par le fait que selon le courrier du 23 juin 2010 la planification relative au 2e trimestre 2010 (avril à juin 2010) n'avait pas mentionné les modifications intervenues rendant impossible sa localisation et la réalisation du contrôle antidopage à l'instar de la tentative infructueuse du 20 juin 2010, le délai de garde arrivait à échéance le vendredi 30 juillet 2010.

Il faut donc constater que si le délai de 14 jours imparti avant de rendre la décision formelle d'avertissement ne subsiste effectivement pas entre la notification du courrier de juillet 2010 et l'envoi le 13 juillet 2010 de l'avertissement formel, cela reste sans incidence sur la validité dudit avertissement, puisqu'en réalité il a été notifié aussi à l'issue du délai de garde, soit le 30 juillet 2010, donc plus de 14 jours après l'invitation à prendre position. L'intimé n'a donc subi aucun préjudice de ce fait.

L'envoi du 2 février 2011 a été notifié le samedi 5 février 2011.

L'envoi du 25 février 2011, communiquant à M. C. un 2e avertissement pour violation de l'obligation de renseigner, selon le courrier du 2 février 2011, à savoir l'omission de soumettre sa planification pour le premier trimestre 2011 (janvier à mars 2011) rendant ainsi sa localisation et la réalisation de contrôle antidopage impossible, a vu son délai de garde arriver à échéance le mardi 15 mars 2011.

L'envoi du mardi 26 avril 2011 a été notifié le jeudi 28 avril 2011.

Enfin, le 3e avertissement pour violation de l'obligation de renseigner, selon le courrier du 26 avril 2011 (pour avoir omis de mentionner la modification de résidence intervenue durant le 2e trimestre 2011, rendant impossible la localisation de l'athlète et la réalisation du contrôle antidopage, à l'instar de celui resté infructueux le 12 avril 2011 à Miami), a été posté le 10 mai 2011 et notifié le vendredi 27 mai 2011.

Il convient donc d'admettre que tous les courriers ont ainsi été valablement notifiés à l'issue des délais de garde mentionnés ci-dessus.

C. a donc bien fait l'objet de 3 avertissements valablement notifiés pour violation de l'obligation de renseigner selon l'article 2.4 du Statut. Tous ces avertissements rappelaient que, selon l'article 2.4 du Statut, si dans un délai de 18 mois, 3 violations de l'obligation de renseigner étaient commises, l'article 10.3.2 al. 2 du Statut prévoyait une suspension d'au moins un an.

Antidoping Suisse demande que C. soit reconnu coupable d'une violation de l'article 2.4 du Statut concernant le dopage de Swiss Olympic et suspendu pour une durée de 2 ans, estimant que s'il ne s'était pas soustrait à un contrôle, il était cependant très proche d'une non-soumission au sens de l'article 2.3 du Statut.

L'appelante requiert la sanction maximale de 2 ans estimant "*important de ne pas baisser la suspension à moins*

de 2 ans, car sinon un athlète qui a déjà fait l'objet de 2 avertissements pourrait, afin d'échapper à une peine trop lourde, essayer d'écoper d'un 3e avertissement et d'une suspension selon l'article 2.4 plutôt que de risquer la sanction de l'article 2.3".

Une telle position ne saurait être suivie, car elle viderait de tout sens l'article 2.4 du Statut, qui a précisément pour but de sanctionner 3 violations de l'obligation d'annoncer par une suspension qui ne saurait être automatiquement fixée à 2 ans, mais bien à une durée qu'il convient, à chaque fois, de fixer en fonction de l'article 10.3.3 du Statut, soit selon la gravité de la faute du sportif.

En effet, selon l'article 2 du Statut, sont considérées comme des violations des règles antidopage, d'abord selon l'art. 2.3, le "*refus de se soumettre à un prélèvement d'échantillons 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'échantillons",* puis selon l'article 2.4 "*la violation des exigences applicables en matière de disponibilité du sportif pour les contrôles hors compétition, y compris le manquement à l'obligation de transmission d'informations sur la localisation, ainsi que les contrôles établis comme manqués sur la base de règles conformes aux standards internationaux de contrôle. La combinaison de trois contrôles manqués et/ou manquements à l'obligation de transmission d'informations sur la localisation pendant une période de dix-huit mois, telle qu'établie par les organisations antidopage dont relève le sportif, constitue une violation des règles antidopage*".

On doit dès lors constater qu'effectivement l'article 2.3 du Statut sanctionne, s'agissant du refus de se soumettre, un comportement intentionnel de l'athlète, tel que, par exemple, le fait de se cacher pour échapper à un agent de contrôle du dopage comme le relève le commentaire du Code mondial antidopage (CMA) publié par l'AMA (Agence Mondiale Antidopage), alors que le fait de ne pas se soumettre, sans justification valable, mais après notification conforme aux règles, peut reposer sur une conduite intentionnelle ou sur de la négligence.

Parallèlement, la violation de l'article 2.4 sanctionne des manquements en matière de transmission d'informations sur la localisation ou des contrôles manqués précisément en raison de ces manquements. Il tombe sous le sens que les manquements relatifs à la transmission d'informations sur la localisation ont obligatoirement pour effet de ne pas permettre d'effectuer des contrôles inopinés, cependant, il s'agit de contrôles inattendus par l'athlète puisqu'ils n'ont pas fait l'objet d'une notification préalable.

Par conséquent, faute d'éléments permettant d'affirmer que l'athlète a précisément fourni des indications lacunaires pour éviter un contrôle attendu, on ne voit pas en quoi celui-ci pourrait être sanctionné sur la base de l'article 2.3 du Statut.

Selon l'article 10.3.2 du Statut, *"pour les violations de l'article 2.4, la période de suspension sera d'au moins un an et d'au plus 2 ans, selon la gravité de la faute du sportif".*

Sachant que ce qui constitue une violation des règles antidopage au sens de l'article 2.4 du Statut est précisément la combinaison sur une période de 18 mois de 3 contrôles manqués/et où manquement dans la transmission d'informations sur la localisation, il est bien évidemment contraire à cette disposition de tirer pour conclusion que seule la sanction maximale devrait entrer en ligne de compte pour éviter que l'athlète ne fournisse pas d'informations suffisantes précisément pour éviter qu'il puisse être procédé à un contrôle. Une telle interprétation, sans autres éléments probants, rendrait tout simplement impossible le prononcé d'une sanction inférieure à 2 ans, ce qui serait contraire à la disposition du Statut qui laisse une marge d'appréciation dont il convient de pouvoir faire usage.

Selon le commentaire de l'annexe 2 du Statut qui, selon les dispositions finales du Statut, fait partie intégrante de ce dernier, l'article 10.5.2 du Statut ne doit pas s'appliquer dans les cas où l'article 10.3.3 trouve application, puisque cette dernière disposition tient déjà compte de la gravité de la faute du sportif.

Enfin, le commentaire de l'article 10.3.3 précise que la sanction sera de deux ans lorsque les 3 manquements sont inexcusables, sinon, elle doit varier entre un et deux ans selon le cas d'espèce.

Dans le cas particulier, s'agissant du premier manquement ayant abouti au contrôle manqué du 20 juin 2010, C. a justifié son absence à son domicile le 20 juin 2010 dans son courrier du 5 juillet 2011 par le fait qu'il avait dû retarder son vol retour de Miami en Suisse, sans fournir cependant d'autres pièces ou éléments justifiant les motifs pour lesquels il a retardé son vol de retour.

Concernant le 2e avertissement correspondant au fait qu'il avait omis de soumettre sa planification pour le premier trimestre 2011, il a allégué avoir dû entrer ces données dans le système en omettant cependant de les confirmer.

Enfin, s'agissant du 3e avertissement – qui, selon ses dires, l'a surpris, de sorte qu'a contrario, les 2 premiers ne l'avaient pas vraiment surpris –, il allègue avoir entré ces données bien avant le contrôle manqué. Cependant, ici également il déclare avoir réalisé que

sa nouvelle adresse n'avait pas été confirmée dans le système, fournissant à l'appui de ses dires une saisie d'écran dont on ne peut toutefois pas constater la date de la modification d'adresse.

En revanche, il ressort de la pièce numéro 14 de la PJ 5 de l'appelante qu'une modification a bien été effectuée dans le système SIMON en date du 28 avril 2011, alors que sa domiciliation à l'avenue Michigan à Miami datait d'avant le 12 avril 2011, date du contrôle manqué, selon le courrier électronique, non signé électroniquement, du 28 avril 2011.

Il ressort de ce qui précède que, certes, C. a fait preuve de négligence, mais toutefois ce qui est aussi le propre d'une violation de l'article 2.4 du Statut.

Si effectivement C. n'avait strictement commis aucune faute, ou aucune négligence, il apparaît que l'article 10.5.1 permettant l'annulation de toute période de suspension pourrait trouver application, ainsi que l'admet également le commentaire du Statut à l'article 10.5.1 lequel stipule que "*l'article 10.5.1 peut être appliqué à toute violation des règles antidopage*".

Par conséquent, lorsque l'appelante déclare que l'athlète n'a pas démontré le moindre élément tendant à le disculper de toute faute ou négligence, de sorte qu'aucun élément ne peut ainsi atténuer la durée de la suspension, cela n'apparaît pas en tant que tel soutenable.

En effet, l'article 2.4 du Statut présuppose justement l'existence d'une faute, respectivement d'une négligence de la part de l'athlète pour qu'il soit sanctionné. En d'autres termes, c'est uniquement la gravité de sa faute ou l'importance de sa négligence qui doit fonder la durée de la sanction.

Dans le cas particulier, l'appelante et l'intimé ont déclaré ne pas contester les faits tels que retenus par la Chambre disciplinaire, parmi lesquels le fait qu'il a été admis que l'enregistrement des données implique la réception d'un e-mail de confirmation, ce que l'athlète devait savoir puisqu'il avait déjà par le passé procédé à des modifications de données.

En outre, à l'instar de ce qu'a admis la Chambre disciplinaire pour les cas de dopage, la formation universitaire suivie par l'intimé dans le domaine des technologies de l'information devait à l'évidence lui permettre de pouvoir utiliser le système SIMON de manière correcte.

De même, après avoir appris en février 2011 que ses parents ne lui faisaient pas parvenir les courriers, ainsi qu'il l'admet dans son e-mail du 24 février 2011, on peut constater qu'il n'a visiblement pas pris les mesures nécessaires étant donné que le courrier suivant, posté le 25 février 2011, est lui aussi revenu à son expéditeur sans avoir été retiré. Par la suite, il y aura encore notamment le courrier du 10 mai 2011 qui reviendra à son expéditeur à nouveau sans avoir été retiré. On doit dès lors constater que même averti du fait que les courriers ne lui parviennent que de manière visiblement aléatoire, le recourant n'a, à l'évidence, pas pris de mesures correctes pour y remédier, ce qui démontre une négligence administrative importante.

À la décharge de l'intimé, les explications fournies sur ses allers-retours entre son domicile en France et les Etats-Unis, de même que les difficultés financières liées à la difficulté de trouver des sponsors, respectivement aux difficultés alléguées de poursuivre sa carrière sportive, parallèlement à ses études, il peut aussi apparaître compréhensible que face à cette surcharge personnelle, l'intimé ait quelque peu été dépassé dans ses tâches administratives, aboutissant ainsi aux violations sur les informations en matière de localisation établie ci-dessus.

Si l'on tient compte de la jurisprudence invoquée par l'appelante, notamment par sa propre Chambre disciplinaire dans l'affaire jugée le 2 mars 2011 où cette dernière a estimé que l'athlète concerné avait eu un comportement se situant à la frontière entre l'intention et la négligence grossière, lui infligeant une suspension d'une durée de 18 mois, on peut s'en inspirer présentement.

Dans le cas particulier de C., force est de constater que, s'agissant de la première violation, si celle-ci lui a bien été valablement notifiée à l'issue du délai de garde, il en demeure pas moins qu'il n'a pas eu connaissance de son contenu et des conséquences pour lesquelles il avait été mis en garde, de sorte que si cela représente bien une négligence de sa part, en revanche, cela peut partiellement rendre excusable la seconde violation, dont il ne pouvait forcément estimer la portée.

S'agissant de la 2e violation, il en a eu connaissance par le courrier la lui annonçant, courrier au travers duquel il a aussi pu prendre connaissance du fait que ses parents ne l'informaient pas correctement. Il n'a cependant pas remédié correctement à cette situation, puisque, par la suite, de nouveaux courriers ont été retournés à l'expéditeur faute d'avoir été réceptionnés. Enfin, le 3e avertissement découle d'un problème de confirmation des modifications, ce qui, compte tenu de la formation de C. en matière de communication, représente aussi de la négligence, démontrant qu'il n'entendait pas consacrer beaucoup de temps à vérifier si les modifications qu'il entendait introduire étaient

ou non validées. La constance dont a fait preuve C. dans l'absence de prises de mesures efficaces pour que les courriers puissent lui être notifiés autrement qu'à l'issue du délai de garde, ne permet pas de retenir le degré de faute le plus faible et par conséquent le maintien d'une durée de suspension de 12 mois.

On doit donc constater que s'il a fait preuve d'une négligence constante, celle-ci ne saurait toutefois s'apparenter au degré le plus élevé de faute, compte tenu des considérations émises ci-dessus, de sorte que, s'il n'y a pas lieu de retenir la période minimale de suspension, il n'y a pas pour autant lieu de fixer la suspension au maximum possible de 2 ans. Par conséquent, une suspension de 18 mois apparaît proportionnée et adaptée à la faute, tenant également compte du fait que l'intéressé n'avait pas d'antécédent en matière de dopage.

B. Conformité de l'art 2.4 du Statut à la Constitution fédérale et à la CEDH

L'intimé estime que le Statut, en imposant aux athlètes de devoir pour chaque jour du trimestre à venir indiquer l'adresse complète de chacun des lieux de résidence et d'entraînement, sous peine de sanctions, porte atteinte à la liberté personnelle du sportif protégée par l'article 10 al. 2 Cst, ainsi qu'au respect de la vie familiale selon l'article 8 CEDH de manière disproportionnée et, par conséquent, illicite, car ne répondant à aucun intérêt public prépondérant. En outre, selon l'intimé ces règles sur la localisation des athlètes seraient de toute manière impropres à atteindre le but poursuivi de lutte contre le dopage, tant les résultats obtenus par ce moyen sont, selon l'intimé, faibles.

S'il est vrai que l'obligation d'indiquer tous ses lieux de résidence peut, dans des circonstances ordinaires, impliquer une forme d'atteinte à la liberté personnelle, voire une atteinte au respect de la vie privée et familiale selon l'article 8 CEDH, il n'en demeure pas moins qu'il s'agit de contraintes qui sont consenties par les athlètes dès le moment où ils entendent pratiquer le sport de compétition.

En outre, fondamentalement ces contraintes d'annonces des lieux de résidence et d'entraînement n'enlèvent en elles-mêmes rien à la liberté de l'athlète de vivre là où il l'entend, respectivement de se déplacer là où il le souhaite. Par conséquent, si cela correspond certes à des contraintes administratives lourdes, respectivement à une forme d'ingérence dans la vie privée et familiale, notamment en enlevant toute spontanéité dans le choix de ses déplacements et de sa résidence, cela ne constitue pas forcément une atteinte à ses droits constitutionnels au sens strict, l'intimé n'alléguant pas que les contrôles ont eu lieu à des moments violant effectivement son droit au respect de sa vie familiale et privée, comme cela pourrait être éventuellement le cas s'ils étaient intervenus en pleine nuit, par exemple. Au demeurant, C. n'ayant pas été présent au moment des contrôles, l'atteinte n'aurait ainsi pas non plus été actuelle, mais uniquement potentielle.

Au surplus, aux termes de l'article 36 Cst, toute restriction d'un droit fondamental doit être fondée sur une base légale, les restrictions graves devant être prévues par une loi. Enfin, une restriction à un droit fondamental doit être justifiée par un intérêt public ou par la protection d'un droit fondamental d'autrui, la restriction du droit fondamental devant être proportionnée au but visé.

En l'occurrence, la loi fédérale encourageant la gymnastique et les sports (LGS), au terme de laquelle la Confédération a mis en œuvre la concrétisation de la Convention contre le dopage conclue à Strasbourg le 16 novembre 1989 , notamment en dressant une liste des produits et des méthodes dont l'usage est considéré comme dopant. Selon l'article 11e LGS, les organisations sportives nationales sont tenues de procéder dans leur domaine aux contrôles antidopage nécessaires, le Conseil fédéral fixant les exigences minimales auxquelles doivent satisfaire les contrôles ainsi que leur surveillance. En outre, des dispositions pénales ont encore été prévues. Sur cette base, deux ordonnances ont été édictées, l'une sur les exigences minimales à respecter lors des contrôles antidopage (Ordonnance sur les produits dopants) et l'autre concernant les produits et méthodes de dopage (Ordonnance sur les contrôles antidopage).

Il découle de l'ordonnance sur les contrôles antidopage qu'il appartient ainsi à l'association faîtière du sport suisse compétente de confier l'organisation du contrôle antidopage à un organe de contrôle antidopage central indépendant des fédérations sportives. Ces contrôles sont soumis à la surveillance de la Commission fédérale de sport (CFS), aux termes des articles 2 et 3 de ladite ordonnance.

L'article 4 al. 1 lit. c de l'ordonnance en question précise que l'organe de contrôle établit annuellement la répartition des contrôles devant être effectués à l'entraînement et en compétition. Quant aux contrôles eux-mêmes, ceux-ci doivent notamment être effectués de manière inopinée, selon l'art. 4 al. 3 de l'ordonnance du contrôle antidopage, la sphère privée de la personne contrôlée devant être protégée.

Par la suite, la Suisse a encore ratifié le protocole additionnel à la Convention contre le dopage entré en

vigueur le 1er février 2005. Ce protocole additionnel à la Convention contre le dopage a été édicté dans le but d'améliorer et de renforcer l'application des dispositions sur la Convention contre le dopage, notamment par une reconnaissance mutuelle des contrôles antidopage et une reconnaissance de la compétence de l'AMA, ainsi que d'autres organisations de contrôle du dopage opérant sous son autorité, pour réaliser des contrôles hors compétition (art. 1 al. 3 du protocole additionnel à la Convention contre le dopage).

Enfin, la Suisse a ratifié la Convention internationale contre le dopage dans le sport, conclue à Paris le 19 octobre 2005 , laquelle est entrée en vigueur en Suisse le 1er décembre 2008 (Convention de l'UNESCO).

En préambule à la Convention de l'UNESCO, il est en particulier rappelé le rôle que doit jouer le sport dans la protection de la santé, la nécessité de coordonner la coopération internationale en vue d'éliminer le dopage, la mise en péril des principes éthiques et des valeurs éducatives par la pratique du dopage. La Convention contre le dopage est un instrument de droit international public à l'origine des politiques nationales antidopage et de la coopération intergouvernementale en la matière.

Précisant la portée de la Convention, son article premier indique qu'elle est là pour promouvoir la prévention du dopage dans le sport et la lutte contre ce phénomène en vue d'y mettre un terme. L'article 2 de la Convention de l'UNESCO a clairement précisé que les définitions données s'entendaient dans le contexte du Code mondial antidopage. Selon, le chiffre 3 lit. c de l'article 2 de la Convention de l'UNESCO, le fait de se soustraire sans justification valable à un prélèvement d'échantillons, après notification conforme aux règles antidopage en vigueur, ou encore le fait d'éviter par tout autre moyen un tel prélèvement, correspond à une "violation des règles antidopage".

Parmi les définitions en lien avec le présent appel, il faut encore relever qu'il est donné la définition du "contrôle inopiné" (art. 2 ch. 14 de la Convention de l'UNESCO) comme étant un contrôle de dopage qui a lieu sans avertissement préalable du sportif, alors que par le terme de contrôle antidopage "hors compétition", il faut entendre tout contrôle du dopage n'ayant pas lieu dans le cadre d'une compétition (art. 2 ch. 16 de la Convention de l'UNESCO).

À noter encore que le "Code mondial antidopage" adopté par l'AMA est joint à l'appendice I de la Convention de l'UNESCO.

De ces éléments, on doit en tirer la conclusion que la lutte contre le dopage relève bien de l'intérêt public, preuve en sont les conventions signées par la Suisse et la mise en œuvre des buts poursuivis par les conventions susmentionnées dans le cadre de la LGS.

Force est dès lors de constater que si l'intrusion dans sa vie privée et familiale que pourrait constituer l'obligation pour l'athlète de signaler durant tous les trimestres sa localisation, elle relève cependant d'un intérêt public prépondérant qui est celui de la lutte contre le dopage, notamment la préservation de la santé et de l'équité sportive. Aussi, une éventuelle atteinte aux principes constitutionnels susmentionnés est justifiée par une base légale largement suffisante et un intérêt public prépondérant, comme le relève également la doctrine (Cf. Christian Flueckiger "Dopage, santé des sportifs professionnels et protection des données médicales", 2008, notes 953 et ss, page 251, avec les références citées). L'arrêt du Conseil d'État français du 4 février 1011(Cf. http://www.juricaf.org/arret/France-CONSEILDE-TAT-20110224-340122), cité par l'appelante, est aussi arrivé à la conclusion que les dispositions en matière de contrôle antidopage hors compétition ne portent pas atteinte au droit au respect de la vie privée et familiale garanti par l'article 8 CEDH, la lutte contre le dopage permettant, au demeurant, des atteintes nécessaires et proportionnées à certaines libertés fondamentales et à la liberté individuelle, compte tenu des objectifs d'intérêt général que constituent la garantie de l'équité et l'éthique des compétitions sportives et la préservation de la santé des sportifs.

En outre, le grief soulevé par l'intimé, selon lequel l'atteinte au droit personnel serait disproportionnée du fait de l'absence, selon lui, de résultats significatifs dans le cadre des contrôles hors compétition effectués, ne résiste pas non plus à l'examen.

En effet, tout d'abord les bases légales susmentionnées, à savoir tant les conventions internationales signées par la Suisse que la LGS, obligent les associations sportives à pratiquer des contrôles hors compétition, de sorte que l'admission du caractère disproportionné des contrôles hors compétition tel que le soutient l'intimé reviendrait à rendre impossible ces contrôles exigés par la loi. Déjà pour cette raison-là, ils ne peuvent être considérés comme disproportionnés.

En outre, indépendamment du caractère non exhaustif de l'analyse produite par l'intimé pour prétendre que les contrôles hors compétition ne servent à rien et, par conséquent, impliqueraient des atteintes disproportionnées aux droits fondamentaux des athlètes, il oublie que précisément le fait de procéder à de tels contrôles hors compétition permet d'éviter

que les athlètes, ne se sachant plus contrôlés, puissent profiter de ces périodes pour pratiquer un dopage systématique et programmé de manière telle qu'il ne subsiste plus de traces au moment des compétitions. Il est donc sans importance de savoir si ces contrôles produisent plus ou moins de découvertes de cas de dopage que ceux effectués en compétition.

Enfin, comme le soulève avec raison l'appelante dans sa prise de position du 25 septembre [recte: octobre] 2011, ces contrôles hors compétition trouvent également leur utilité dans le cadre de l'établissement des passeports biologiques, instruments de la lutte antidopage.

Pour ces raisons-là également, il est tout simplement faux de prétendre que ces contrôles seraient disproportionnés, de sorte que ces griefs doivent être rejetés.

Arbitration CAS 2011/A/2647
Serhii Berezka v. Football Federation of Ukraine (FFU) & Football Federation of Kyiv (FFK)
30 August 2012

Football; Exclusion from a list of referees; CAS jurisdiction to rule in appeal in case of lack of first-instance decision

Panel:

Mr Lars Halgreen (Denmark), President
Mr Aliaksandr Danilevich (Belarus)
Mr Bernhard Welten (Switzerland)

Relevant facts

Mr Serhii Berezka ("Berezka" or "the Appellant") is a Ukrainian citizen and a football referee in Ukraine. He is a former referee of FIFA, and the Deputy Head of Panel of Football Referees and Inspectors in Kyiv (Ukraine).

The Football Federation of Ukraine (FFU or the "Respondent 1") is the organisation responsible for organizing football in Ukraine. FFU is an affiliate member of FIFA and UEFA.

The Football Federation of Kyiv (FFK or "Respondent 2") is the organisation responsible for organising football in Kyiv. Respondent 2 is an affiliate member of Respondent 1.

FFU and FFK are hereinafter jointly referred to as "the Respondents".

This case concerns the allegedly unlawful decisions taken by the Respondents, which led to the exclusion or non-admission of the Appellant from/to the list of referees recommended for services at Ukrainian Premier League football matches. These decisions and the generally unfair treatment that the Appellant believes that he has received, have triggered the Appellant to make claims of alleged violation of fundamental principles of UEFA ("Respect"), conducted personally by the FFU President, Mr H. Surkis, and the FFK President, Mr I. Kochetov, towards him.

From the Appellant's point of view, the present dispute between the parties had its origins in an incident that happened during the 2007/2008 season, where the Appellant refereed a match in the Ukrainian Premier League between FC Worskla against FC Dnipro. After the match, the Appellant was criticized by the visiting team, FC Dnipro, for not having awarded a penalty kick, when the ball hit the hand of a defender from the opposite team. The Control and Disciplinary Committee of the FFU decided, on its own initiative, to reconsider a decision made by the expert committee of the FFU, which had exonerated the Appellant, on the basis of television recordings of the match. As a result thereof, the expert committee reassembled and decided that the Appellant was to blame for not having appointed a penalty kick, and subsequently, the Appellant was suspended from refereeing matches of the Premier League Championship in Ukraine for two months.

It is the Appellant's submission that the incident, which led to the official two months' suspension from refereeing Premier League matches, has de facto resulted in an unofficial indefinite ban on him refereeing matches in the Premier League, due to an allegedly personal grudge held by the FFU President, Mr H. Surkis, against him as a result of the incident. The Appellant has made a reference to a video recorded speech by Mr H. Surkis, where he allegedly said: "*As long as I'm the head of the Football Federation of Ukraine, Berezka won't judge*". The Appellant has not refereed matches in the Premier League since then, but has in the following three seasons refereed in the first league (second highest league of Ukrainian football), in which period he has headed the ranking of the first league referees, but received no promotion to referee games of the Premier League. The Appellant alleges that the antagonism from leading representatives of the Respondents against his person is the real reason behind this lack of promotion, and also the reason why the respective deciding bodies of the Respondents have ruled against him.

The facts of the latest case, the one at stake in the present proceedings, which led to a number of

subsequent sanctions of the Appellant in 2011 by various sanctioning bodies of the Respondents, shall be summarized as follows. During a championship match in Kyiv for children born in 2000, played on 2 June 2011 between FC Kyiv and FC Lokomotiv, the Appellant accompanied his son, who was playing for FC Kyiv. The Appellant, who was present in his capacity as a father and not as an official, approached the referee, when a number of parents of players from the FC Lokomotiv team complained about two allegedly ineligible players, who had participated in the football match on the FC Kyiv team. The conflict escalated somewhat in the following course of events and a complaint was launched to the FFK. On 15 June 2011, the Appellant was called as a witness at a session held by the Control and Disciplinary Committee of the FFK dealing with the official protest initiated by FC Lokomotiv.

On 22 June 2011, the Control and Disciplinary Committee of the FFK reconvened, and the following was decided with respect to the Appellant:

"*… At the Panel meeting to consider the question of S.M. Berezka, the deputy head of the panel of football referees and inspectors in Kyiv and national category referee, who was present at the match between FC Kyiv and Lomotiv Olympic Reserve Sports School for Children and Youth as the father of one of the FC Kyiv players, …. failed to assist the management of the conflict between FC Kyiv's coach, the referee, the representatives of ORSSCY Lokomotiv and the player's parent, who accused FC Kyiv of having a player out of the team entry form, and referees non-fulfilment of the obligations concerning these claims. Besides, he introduced himself as a representative of the Football Federation of Kyiv and acted for the benefit of FC Kyiv, whose player is his son. By these actions he failed to promote fair play and fulfilment of regulations for the football competitions in Kyiv. Being present at the meeting of the Football Federation of Kyiv, CDC on 15 June 2011 as a witness he misinformed the CDC members, which influenced it's primary non-legal decision".*

On the same day, 22 June 2011, the Control and Disciplinary Committee of the FFK made a supplementary decision regarding the Appellant's conduct, in which the following was decided:

"… The actions of S.M. Berezka, Panel of Football Referees and Inspectors in Kyiv, Deputy Head and National Category referee, after the match between FC Kyiv and ORSSCY Lokomotiv … shall be considered misconduct, particularly his failure to assist the management of the conflict between FC Kyiv's coach, the referee, the representative of ORSSCY Lokomotiv and the player's parents, by which he violated the competition provisions defined by the regulations of the Football Competitions, as well as he failed to point out the absence of the information on fans misconduct, player's substitute for the player absent in the team entry …, the demands of the ORSSCY Lokomotiv coach to surrender FC Kyiv player … for verification etc. to the referee of the match. Such action led to the violation of the Regulations of the Football Competition provisions in what concerns the competition documentation (Article 5 of Chapter 3 of the Disciplinary Codex of the Football Federation of Kyiv);

The actions of S.M. Berezka, … shall be considered as those, which contradict to the Federation official representative conduct, particularly his witnessing at the Control and Disciplinary Committee meeting on 15 June (2011) …, which made objective and fair decision of this case difficult for all intents and purpose;

S.M. Berezka …, shall be reprimanded and warned about similar misconduct in future;

By July 4, 2011, the Panel of Football Referees and Inspectors in Kyiv administration shall be obliged to hold a general meeting of its members and to consider the misconduct of S.M. Berezka … after the match between FC Kyiv and ORSSCY Lokomotiv … as well as during the FFK CDC meeting of June 2, 2011. The Record of the meeting shall be sent to FFK administration and CDC by July 11, 2011;

The Football Federation of Kyiv administration shall be obliged to inform all interested parties in a three day term about its decision;

This decision can be appealed at Football Federation of Kyiv Appeals Commission in a 10 day term".

On 7 July 2011, the Appellant filed a Petition of Appeal against the decision of the FFK Control and Disciplinary Committee's decision of 22 June 2011 to the Appeal Committee of the Football Federation of Kyiv. In his appeal, the Appellant requested that the Appeals Committee cancel the decision of the FFK Control and Disciplinary Committee "*as wrongful with frequent violation of the rules of substantive and procedural law as based on incomplete and biased investigation of circumstances*".

On 8 August 2011, the Curator of the Refereeing System in the Professional Football of Ukraine, the Italian former FIFA referee, Mr Pierluigi Collina, informed the Appellant of the following:

"By this letter we would like to inform you that as a preventive measure, your appointment for the first league matches has been suspended as the result of the Kyiv CDC decision.

As soon as we get information clarifying the situation the following decision or the decision on the appeal – we will immediately inform you about the decision concerning this case".

On 12 August 2011, a meeting was held in the Executive Committee of the Panel of Football Referees and Inspectors in Kyiv, during which the Appellant was reprimanded again for his lack of help in the management of the conflict and the report compilation by the referee Mr Kutsenko.

After the Appellant's request for an immediate hearing on 17 August 2011, the FFK Appeals Committee made its decision on 23 August 2011. The FFK Appeals Committee denied the Appellant's Petition of Appeal and confirmed the FFK Control and Disciplinary Committee's decision of 22 June 2011. On the same day, the Appellant wrote to the Referees Committee of the FFU with reference to the said suspension letter signed by Mr Collina and requested a copy of the FFU Referees Committee's decision based on which he was suspended from refereeing at the matches in the first league.

In an unsigned letter responding to the Appellant's letter of 24 August 2011, Mr Collina replied that "*taking into consideration the significance of what you were accused of, the Refereeing System Supervisor in Professional Football of Ukraine and at that time the head of FFU RC decided to suspend your appointment as a preventive action for Ukrainian football competitions up to the moment of deciding the question concerning your appeal that you gave to the Appeal Committee of Football Federation of Kyiv*". The letter further stated: "*For the reason of above mentioned, the FFU RC keeps a close watch on your situation, wait for the decision of the Appeal Committee of Football Federation of Kyiv, and hopes that your situation will soon clear-up. In the case, the Appeal Committee of Football Federation of Kyiv confirms the decision taken by the first instance, the RC reserves the right to examine the materials with the aim of estimation of possible violation of the FFU Disciplinary Regulations*".

On 13 September 2011, the Appellant wrote to the Executive Committee of the FFK, requesting a decision in a written form including an explanation for not calling him to the meeting of the FFK Executive Committee, so that he could launch an appeal on an informed basis.

On 22 September 2011, FFK informed the Appellant in essence of the following:

"On September 9, 2011, the meeting of members of the Executive Committee of Football Federation of Kyiv was held. One of the questions in agenda was approving of referees list that were recommended for city football competitions. While discussing this question, taking into consideration the event occurring during and after the match between FC Kyiv and Lokomotiv … and also taking into account the decision of the Control and Disciplinary Committee (of June 22, 2011) and the Appeal Committee of Football Federation of Kyiv of August 23, 2011, members of the Executive Committee decided not to nominate you for referee activities in Kyiv city football…".

The abstracts of Record Protocol No. 7 show that out of the Executive Committee's 32 members, 20 members voted for not approving the Appellant for refereeing at Kyiv football competition. Nobody voted against, and 10 abstained from voting.

On 29 September 2011, the Appellant sent a complaint to the Control and Disciplinary Committee of the FFU about the FFK Executive Committee's decision of 9 September 2011. In his complaint, he requested among other things that the decision not to recommend his candidacy for refereeing at Kyiv City Football Competitions be cancelled as having been taken by an incompetent body and as one that violated the constitution of Ukraine and FFK Articles of Association.

On 3 October 2011, the Control and Disciplinary Committee of the FFU dismissed the Appellant's complaint about the FFK Executive Committee's decision of 9 September 2011. In the resolution the following was established:

1) *On September 29, 2011 the referee S.M. Berezka sent a complaint to the FFU Control and Disciplinary Committee for the decision of the Executive Committee of Football Federation of Kyiv of September 9, 2011 (Protocol No. 7) concerning approval of referee lists that were recommended for Kyiv city football competitions.*

2) *The complaint contained materials that confirmed the circumstances mentioned in the complaint.*

3) *The decision of the FFK Executive Committee of September 9, 2011 (Protocol No. 7) does not presuppose disciplinary measures and bears recommendation character.*

4) *The claim to FFU DCD does not contain sufficient reasonable references to violation of rights and interests of the complaint by the appealed decision.*

5) *The decision of FFK DCD that was attached to the complaint was taken on June 22, 2011. The decision of FFK AC for the complaint of FFK DCD of June 22, 2011 was taken on August 23, 2011.*

6) *The claimant did not adhere to the period of appeal from decisions of legal entities, determined in part 3, Article 82 of the FFU Disciplinary rules and rules of claiming to a football arbitration body, determined in part 8, Article 64 of FFU Disciplinary Rules".*

On 3 October 2011, the Appellant filed a new complaint to the Appeals Committee of the FFU about the resolution of the FFU Control and Disciplinary Committee's decision of 9 September 2011. On the same day, the Control and Disciplinary Committee of the FFU made a supplementary decision in order to correct a number of formal errors, which had been pointed out about its decision before the FFU Appeals Committee. The corrected errors of the decision, which mainly were of procedural nature, did not change the Committee's decision to dismiss the case for the stated reasons in its decision of 3 October 2011.

On 19 October 2011, the Appeals Committee of the FFU made a resolution "*on elimination of draw-backs in the complaint*". The Appeals Committee relying on Article 63 of the FFU Disciplinary Rules resolved the following:

"1. To postpone a decision of the case proceedings of Panel of Football Referees and Inspectors in Kyiv Deputy Head S.M. Berezka's petition of appeal, giving him the possibility to specify his position in the respect of the FFU CDC Supplementary Resolution as well as in order to eliminate drawbacks from the above mentioned complaint.

2. In order to eliminate the drawbacks of the complaint to propose the claimant to present FFU AC the references to particular Constitution of Ukraine and FFK Articles of Association provisions, which in his opinion prove the illegitimate character of section 1 of the FFK Executive Committee decision of September 9, 2011 by October 27, 2011, given grounds for its cancellation or change.

3. To explain the Claimant that provided duly fulfilment of section 2 of this resolution, the FFU AC will make a decision concerning the beginning of the case proceedings of his complaint".

On 25 October 2011, the Appellant filed another supplement to his complaint to the Appeals Committee of the FFU for the resolution of the decision of the FFU Control and Disciplinary Committee of 9 September 2011.

On 31 October 2011, the Appeals Committee of the FFU dismissed the Appellant's appeal with the following reasoning:

"The FFU Appeals Committee has considered the matter of the complaint for the resolution of the FFU CDC Head of 10 October 2011.

The Appellant disputes the legitimacy of the decision by the Football Federation of Kyiv (FFK) Executive Committee of 9 September 2011 approving the list of referees recommended for officiating at the Kyiv City matches football competitions (Protocol 7).

In FFU AC's opinion, the above mentioned dispute as such is within the jurisdiction of the football Arbitration bodies.

At the same time a separate legal person (FFK) Executive Body decision is the matter of consideration, that's why it should be pointed out that the football arbitration bodies have to follow the FFK regulative documents, particularly, its Articles of Association. Incidentally, the Appellant's legal position is rightfully based on the FFK Articles of Association provisions.

Thus, the FFU Appeals Committee has no right to ignore Article 44 of the FFK Articles of Association, according to which the Appellant's problem is to be decided within FFK, particularly, by the football arbitration bodies of FFK.

According to Article 60 of the FFU Disciplinary Rules, the competence of the FFU Appeals Committee covers the consideration of the petitions of appeal from the FFU CDC decision. In its turn, the FFU CDC, according to part 2 of Article 58 of the FFU Disciplinary Rules, controls football officials following the provisions of the statutory and regulative documents as well as considers any protests arising from legal persons, bodies' decisions.

Considering the above mentioned provisions of part 2, Article 58, as well as "the Definition of Terms", Chapter of FFU Disciplinary Rules, the FFU CDC, firstly, has no right to ignore the provisions of Article 44 of the FFK Articles of Association, and secondly, in this case, it can consider the protest against the FFK football arbitration bodies' decision.

Thus, the competence of both the FFU CDC and FFU AC is limited by the possibility of the revision of the FFK football arbitration bodies' decisions of Mr S.M. Berezka's case in this situation.

Mr S.M. Berezka has to follow the procedure of his problem consideration at the FFK football arbitration bodies, and only then, in case his disagrees with their decision, he can file a petition of appeal at the FFU CDC and AC.

Otherwise, both the FFU CDC and AC cannot be considered as such whose competence covers the consideration of Mr S.M. Berezka's problem.

Considering the above mentioned, relying on part 2, Article 58, Article 60, part 8, Article 63 of the FFU Disciplinary Rules, Article 44 of the FFK Articles of Association, the FFU Appeals Committee Head passes the resolution to dismiss any case proceedings of the received complaint due to its filing to an unauthorized body".

On the 8 December 2011, the Curator of the Refereeing System in the Professional Football of Ukraine, Mr

Collina, having received a copy of the Appellant's complaint with the CAS from the FFU, informed the Appellant that the Referees Committee of the FFU had cancelled his suspension and confirmed that the Appellant's name would appear on the list of referees of the first league for the season 2011/2012. On the same day, the Executive Committee of the FFK also decided to cancel the previous resolution of 9 September 2011.

On 19 November 2011, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (hereinafter also referred to as the "CAS"). The appeal was directed against the decision of the Appeals Committee of the FFU of 31 October 2011 and the decision of the Executive Committee of the FFK of 9 September 2011.

The Appellant's requests for relief, as stated in the Appeal Brief are as follows:

"My requirements are: 1) To take and consider my claim; 2) To oblige the Executive Committee of the Football Federation of Ukraine to include me in the list of referees recommended for service at all Ukranian football competitions of any level; 3) to recognize the behaviour of the FFU President H. Surkis and the President of the Football federation of Kyiv I. Kochitov towards me as the one that is not consistent with fundamental principles of UEFA – "respect"; 4) To transfer all the costs of the proceedings related with the work of CAS, as well as my personal expenses (flight, accomodation, meals) and expenses of those people, who will represent me, to the Football Federation of Ukraine and the Football Federation of Kyiv in equal parts".

On 18 May 2012, Mr Kliuchkovskyi, attorney-at-law in Kyiv, Ukraine, informed the CAS Office that he had been engaged to represent the Appellant as legal counsel. The Appellant's counsel subsequently changed the second request for relief in the CAS proceedings as follows:

"*To include name of S. Berezka in the list of referees of the Premier League for the further appointment to the matches between the clubs of the Premier League*".

In their preliminary answer dated 14 December 2011, the Respondents requested the CAS to dismiss all of the Appellant's requests for relief for lack of CAS jurisdiction.

On 16 January 2012, the Respondents filed a joint statement of defence, in which they repeated their claim of dismissal of the case on the ground of lack of jurisdiction of the CAS, and submitted additional written evidence.

A hearing was held on 21 May 2012 at the CAS headquarters in Lausanne, Switzerland.

Extracts from the legal findings

A. Jurisdiction

Before the Panel may assess the merits of this case, it has to decide whether it has jurisdiction to decide the present dispute between the parties.

The jurisdiction of CAS has been disputed by the Respondents, and therefore the Panel shall decide on the jurisdiction issue with respect to the following two requests for relief from the Appellant:

1. To include the name of S. Berezka in the list of referees of the Premier League for the further appointment to the matches between the clubs of the Premier League;

2. To recognize the behaviour of the FFU President H. Surkis and the President of the Football Federation of Kyiv, I. Kochetov towards the Appellant as one that is not consistent with fundamental principles of UEFA – "respect".

1. CAS jurisdiction as to the Appellant's first request for relief:

According to article R47.1 of the Code:

"*An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded as specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body*".

Due to the change of the Appellant's plea, the Panel interprets the Appellant's revised request of relief as an acknowledgement that the members of the Executive Committee of the FFK at its meeting on 8 December 2011 have in fact cancelled the previous resolution from 9 September 2011 and that the Referee Committee of the FFU has confirmed that his name is again included in the list of referees of the first league for the 2011/2012 season.

Neither during the course of the hearing, nor in any of the submitted documents the Panel has found evidence that the Appellant should not have been fully reinstated as a referee in the first league in the season 2011 – 2012 or in the matches of Kyiv City football competitions. In fact, the Panel feels confident that this conclusion can be the only logical one drawn from the letter signed by Mr Collina on

8 December 2011, and the resolution of the FFK of the same day.

Moreover, and based on the evidence at hand, in particular the witness statement of Mr Luciano Luci, the Panel must come to the conclusion that no decision has been made either by the Referees Committee of the FFU or any other governing body of Ukrainian football to *exclude* the Appellant from the list of referees of the Premier League for the further appointment to the matches between the clubs of the Premier League. The Panel has taken notice in this respect of how the selection criteria are promulgated in the procedural regulations governing the refereeing activities as well as the selection, evaluation and rotation procedure for the FFU referees, and sees no formal or legal problems in having such criteria in the selection of referees in Ukraine.

As far as the Panel may assess the situation at present, no formal *requests* have in fact been made by the Appellant to be included in the list of the Premier League after the decision of the Referees Committee of the FFU and the Executive Committee's decision of the FFK was made on 8 December 2011. Since no request has been made, and subsequently no decision as regards the possibility of the Appellant to become a referee for the Premier League has been announced, the Panel has reached the decision that CAS does not have jurisdiction in this respect, simply because no decision as regards the question to include the Appellant in the list of referees of the Premier League has ever been made by any relevant governing body in Ukrainian football.

Thus, the Panel dismisses the Appellant's first request for relief as the CAS has no jurisdiction.

2. CAS jurisdiction as to the Appellant's second request for relief:

Although the Panel from the written submissions of the Appellant has understood that it is his conviction that the decisions that had been taken against him in the disciplinary proceedings following the children's football match between FC Kyiv and FC Lokomotiv and the subsequent decision to suspend him from refereeing matches in the Ukrainian first league has been caused by the undue influence of Mr H. Surkis, President of the FFU, and/or Mr I. Kochetov, President of the FFK, this Panel finds no evidence to substantiate such allegations.

Thus, the Panel has interpreted this request for relief as being a plea for a more general recognition by this Panel that the allegedly undue – but unsubstantiated – behaviour of Mr Surkis and Mr Kochetov against the Appellant would be inconsistent with fundamental principles of UEFA – "respect".

From the submitted evidence before and during the hearing, the Panel has found no official complaint filed by the Appellant with Ukrainian football authorities against either the President of the FFU or the President of the FFK stipulating that they would have influenced the outcome of the proceedings against the Appellant or acted against the Appellant in general inconsistently with fundamental principles of UEFA. Nor has the Panel been informed of any complaint that the Appellant may have filed against these individuals directly at UEFA.

Thus, this Panel subsequently has to reach the conclusion that no decision has been made according to which an appeal may be launched to the CAS.

Finally, the Panel notes for the avoidance of doubt that even though such a decision may be construed to have been made, the Appellant has not exhausted any of the domestic remedies available according to Ukrainian football by-laws at the national level, which inevitably would lead to the same result, namely that this Panel has no jurisdiction under article R47 of the Code to decide on the Appellant's second request of relief.

Therefore, the Panel finds that the CAS has no jurisdiction for the second plea, resulting in the final conclusion that the case is dismissed altogether due to lack of CAS jurisdiction.

B. Conclusion

In light of the foregoing, the Panel holds that the Appellant's appeal against the FFU and the FFK is altogether dismissed following the lack of CAS jurisdiction.

Arbitrage TAS 2011/A/2684
Union Cycliste Internationale (UCI) c. Pasquale Muto & Comitato Olimpico Nazionale Italiano (CONI)

14 septembre 2012

Cyclisme; Dopage (EPO, éphédrine); Légitimation passive du CONI; Première ou seconde infraction; Circonstances aggravantes; Durée de la suspension; Admissibilité d'une sanction financière en sus de la suspension; Calcul du montant de l'amende

Formation:
M. Bernard Foucher (France), Président
M. Patrick Lafranchi (Suisse)
Prof. Guido Valori (Italie)

Faits pertinents

L'Union Cycliste Internationale (UCI; Appelante), organisation à but non lucratif fondée le 14 avril 1900, est l'association des fédérations nationales de cyclisme. Son siège se trouve à Aigle, en Suisse.

Pasquale Muto (Coureur), né le 24 mai 1980, est un coureur cycliste de la catégorie élite et titulaire d'une licence délivrée par la fédération italienne de cyclisme.

Le Comitato Olimpico Italiano (CONI) est le comité olympique national italien. Son *Tribunale Nazionale Antidoping* (TNA) est l'instance suprême du CONI concernant les affaires de dopage en Italie et agit comme instance au sens du Règlement antidopage de l'UCI (RAD).

M. Muto a participé à la course cycliste sur route *"Settimana Internazionale Coppi e Bartali"*, inscrite au calendrier international de l'UCI, du 22 au 26 mars 2011 en Italie.

A l'issue de l'étape du 25 mars 2011, le Coureur fut soumis à un contrôle anti-dopage effectué et initié par l'UCI. Sur le formulaire de contrôle, le coureur s'est déclaré d'accord avec la procédure de prélèvement de l'échantillon d'urine et a confirmé sa régularité.

Sous la rubrique médicament dudit formulaire, M. Muto a déclaré avoir pris les médicaments suivants:
- Actigrip;
- Triamcinalone (Kenacort 40mg) 18/03/2011.

Le rapport d'analyse établi le 21 avril 2011 par le laboratoire de contrôle du dopage d'Athènes (Grèce), accrédité par l'Agence Mondiale Antidopage (AMA), a révélé la présence dans les urines du Coureur, de la substance prohibée: éphédrine, dans une concentration supérieure à 20 mg/ml. Il s'agit d'un résultat analytique anormal lorsque la concentration d'éphédrine dépasse les 10 mg/ml.

Par courrier et email du 3 mai 2011, l'UCI a informé le Coureur du résultat positif. Le Coureur fut également informé dudit résultat par notification de l'Ufficio di Procura du CONI (UPA-CONI) en date du 12 mai 2011.

M. Muto n'a pas demandé de contre-analyse de l'échantillon A.

A l'issue de la course cycliste sur route *"Giro dell'Appennino"* qui s'est déroulée en date du 10 avril 2011, M. Muto a été soumis à un contrôle antidopage réalisé par le CONI. Cette course est inscrite au calendrier international de l'UCI.

Sous la rubrique *"médicaments"* du formulaire de contrôle, le Coureur a indiqué la prise de *"protéine"*.

Il résulte du rapport d'analyse du 29 avril 2011 de l'échantillon d'urine A analysé par le laboratoire de contrôle du dopage de Rome, accrédité par l'AMA, la présence de la substance interdite: érythropoïétine (EPO) recombinante, soit un résultat analytique anormal.

Par courrier du 3 mai 2011, le CONI a notifié le résultat d'analyse anormal au Coureur. Le même jour, M. Muto a été suspendu de toute activité sportive.

Le 17 mai 2011, M. Muto, accompagné de son avocate, a assisté à l'analyse de l'échantillon B. La contre-analyse de cet échantillon a confirmé le résultat de l'échantillon A.

Par télégramme du 23 mai 2011, l'UPA-CONI a notifié les deux infractions du règlement antidopage,

respectivement pour la présence d'éphédrine et d'EPO recombinante, au Coureur.

Par décision du 29 juillet 2011 (Décision), le TNA-CONI a jugé que les deux violations susmentionnées, qui ont été traitées dans une seule procédure, devaient être considérées comme une seule violation au titre de l'article 10.7.4 du Code Mondial Antidopage (CMA). La sanction devait au surplus être imposée en fonction de la violation passible de la sanction la plus lourde.

Le TNA-CONI a conclu que M. Muto avait commis une violation des règles antidopage et a retenu l'existence de circonstances aggravantes conformément à l'article 10.7.4 du CMA. Les sanctions suivantes furent prononcées à l'encontre de M. Muto:

- Suspension de 2 ans et 6 mois à partir du 3 mai 2011;

- Annulation des résultats individuels obtenus par M. Muto à la course cycliste sur route *"Giro dell' Appennino"*;

- Annulation des résultats individuels obtenus par M. Muto dans la 4ème étape de la course cycliste sur route *"Settimana Internazionale Coppi e Bartali"*;

- Paiement des frais de procédure fixée à 900.- Euros.

En date du 28 décembre 2011, l'UCI a soumis une déclaration d'appel auprès du Tribunal Arbitral du Sport (TAS) à l'encontre de la Décision. L'UCI a dirigé son appel contre M. Muto et le CONI.

Par courrier du 16 janvier 2012, le CONI a informé le Greffe du TAS qu'il ne participerait pas activement à la présente procédure s'agissant d'un litige économique entre l'UCI et le Coureur. Le CONI déclara, entre autres, dans le même courrier ce qui suit:

"En ce qui concerne les règles appliquées, étant donné la coexistence des violations, le TNA n'a appliqué ni les Règles Sportives Antidopage de l'UCI, ni les Règles Sportives Antidopage du CONI, ni le Règlement Antidopage de l'UCI mais les susdites règles du Code WADA. A cet effet, veuillez noter d'ailleurs que l'UCI – se conduisant d'une manière différente que dans des circonstances analogues – n'a jamais envoyé au CONI une communication demandant et précisant le montant d'une sanction économique".

En date du 27 février 2012, l'UCI a déposé son mémoire d'appel. Elle a formulé les conclusions suivantes:

" 1) de réformer la décision du TNA-CONI;

2) de condamner M. Muto à une suspension jusqu'à 4 ans, conformément aux articles 293 et 305 RAD;

3) de condamner M. Muto au paiement d'une amende de 19'250.- Euros;

4) de prononcer la disqualification de M. Muto des courses cyclistes "Giro dell'Appennino" et "Settimana Internazionale Coppi e Bartali" 2011 et annuler tous ses résultats obtenus à partir du 25 mars 2011 (article 313 RAD);

5) de condamner M. Muto à payer à l'UCI un montant de CHF 2'500.- à titre de frais de frais de gestion des résultats (art. 275.2 RAD);

6) de condamner M. Muto à rembourser à l'UCI l'émolument de CHF 1'000.- et à tous les autres frais, y compris une contribution aux frais de l'UCI".

Par courrier du 28 mars 2012, le Greffe du TAS a pris note qu'aucune réponse de la part des intimés n'était parvenue au TAS dans le délai imparti.

En date du 15 juin 2012, la Formation a soumis aux parties une ordonnance de procédure. Cette dernière prévoyait que la Formation statue exclusivement sur la base du dossier, sans tenir d'audience.

Extraits des considérants

A. Position juridique du TNA-CONI dans la présente instance

En premier lieu, le CONI a estimé avoir un "rôle passif" dans la présente procédure le conduisant à ne pas devoir produire un mémoire en défense et à ne pas devoir signer l'ordonnance de procédure. Il se considère ainsi, comme n'étant pas redevable d'obligations envers l'Appelante et doit être regardé comme remettant en cause sa légitimation passive.

Ainsi qu'il a déjà été relevé dans un précédent dossier impliquant de manière similaire le CONI (TAS 2010/A/2288), la jurisprudence retient en droit suisse, que *"sur le plan des principes, il sied de faire clairement la distinction entre la notion de légitimation active ou passive (appelée aussi qualité pour agir ou pour défendre; Aktiv- oder Passivlegitimation), d'une part, et celle de capacité d'être partie (Parteifähigkeit), d'autre part"* (ATF 128 II 50, 55). En outre, *"la légitimation active ou passive dans un procès civil relève du fondement matériel de l'action; elle appartient au sujet (actif ou passif) du droit invoqué en justice et son absence entraîne, non pas l'irrecevabilité de la demande, mais son rejet"* (Arrêt du Tribunal fédéral du 29 avril 2010,

dans la cause X. c. Y. SA, 4A_79/2010, extrait publié *in*: SJ 2010 I p. 459). C'est la raison pour laquelle cette question relève du fond du litige.

Une telle définition de la légitimation (en particulier passive) est d'ailleurs également retenue par la jurisprudence du TAS (voir p. ex. CAS 2007/A/1329 & 1330; CAS 2008/A/1639).

Le CONI ne conteste pas sa propre capacité d'être partie, qui est définie par le nouveau Code de procédure civile suisse et par la doctrine comme étant *"la faculté d'être titulaire des droits et des obligations qui résultent de l'instance"*. Cette capacité requiert en principe la jouissance des droits civils, dont elle est un aspect (Art. 66 CPC; voir aussi Lukic S. (éd.), Le Projet de Code de procédure civile fédérale, Publication CEDIDAC, Lausanne 2008, p. 6893). En l'espèce, le CONI n'a pas remis en cause sa faculté d'être titulaire de droits et d'obligations, mais a contesté devoir être impliqué dans le fond du litige.

La Formation doit par conséquent déterminer si le CONI peut être intimé dans un appel dirigé par l'UCI contre une décision du TNA et s'il a des obligations, dont l'UCI pourrait réclamer l'exécution dans un appel.

Or, le droit d'appel que l'art. 330 du RAD confère à l'UCI est, en application de l'art. 331 RAD, *"(…) déposé contre le licencié et contre la fédération nationale qui a pris la décision contestée et/ou l'instance qui a agi pour son compte. La fédération nationale ou l'instance concernée prend en charge les frais si l'instance d'audition qui a pris la décision contre laquelle l'appel a été formé a appliqué les règlements de manière incorrecte"*.

Ainsi, le RAD prévoit expressément que l'appel de l'UCI contre une décision au sens de l'art. 329.1 RAD doit être dirigé non seulement contre le licencié, mais également contre sa fédération et/ou contre l'instance qui a tranché sur délégation de cette dernière.

En l'espèce, l'UCI a donc dirigé son appel à juste titre contre l'athlète, de même que contre l'instance qui a tranché en première instance, le CONI. En effet, le TNA est un tribunal institué par le CONI sur délégation de la FCI.

Enfin, si la Formation venait à constater que le TNA du CONI a appliqué les règlements de manière incorrecte, il lui reviendrait de condamner soit la FCI, soit le CONI au paiement des frais d'appel, en vertu de l'art. 331 *in fine* RAD. La FCI ou le CONI sont donc susceptibles d'être redevables d'obligations envers l'UCI et celle-ci doit pouvoir faire valoir ses droits à ce titre, comme il l'a fait en l'espèce à l'égard du seul CONI.

Le CONI a donc bien la légitimation passive et est partie à la présente procédure, en qualité d'intimé.

B. Bien fondé de la décision contestée

1. En ce qui concerne la violation des règles antidopage par le Coureur

Le TNA-CONI, en se fondant sur les règles du Code Mondial Antidopage (CMA) et non d'ailleurs, sur celles du RAD de l'UCI, a estimé que le Coureur s'était rendu coupable de deux violations: une violation des dispositions de l'article 10.2 CMA en raison de la détection dans son organisme, à la suite du contrôle du 10 avril 2011, d'une substance interdite, en l'occurrence de l'EPO (violation passible, lorsqu'elle est commise pour la première fois, d'une suspension de deux ans) et une violation des dispositions de l'article 10.4 CMA en raison de la détection dans son organisme, à la suite du contrôle du 25 mars 2011, d'une substance spécifiée, en l'occurrence de l'éphédrine (violation passible d'une sanction pouvant aller de la simple réprimande à une suspension de deux ans, toute annulation ou réduction de suspension étant soumise à la condition que le sportif puisse établir comment cette substance s'est retrouvée dans son organisme et que cette substance ne visait pas à améliorer ses performances ni à masquer l'usage d'une substance améliorant la performance).

La Formation ne peut que confirmer que M. Muto s'est bien rendu coupable de cette double violation.

D'une part, devant le TNA-CONI, il n'a pas mis en cause la régularité des contrôles opérés les 25 mars et 10 avril 2011. Le premier contrôle a bien révélé la présence d'une substance spécifiée, l'éphédrine, alors qu'il n'a pas contesté ces résultats, ni sollicité une contre-expertise, ni apporté la moindre explication quant aux conditions de la présence de cette substance dans son organisme et quant à ses conséquences. Le second contrôle a bien révélé la présence d'une substance totalement interdite, l'EPO. S'il a réclamé une contre-analyse, il n'en a nullement contesté les résultats confirmatifs et n'a pas plus apporté d'explications sur la présence de cette substance.

D'autre part, l'absence de tout mémoire en défense de sa part, dans la présente procédure devant le TAS ne permet pas de discuter de la réalité de ces faits qui s'évince par ailleurs, des pièces produites au dossier.

La violation par l'athlète des règles antidopage est par conséquent établie.

La Formation relève toutefois que cette violation doit d'abord être établie sur le fondement des règles du RAD. Certes, les dispositions de l'article 10.2 CMA relatives aux substances interdites et aux sanctions applicables sont quasi identiques à celles de l'article 293 RAD et il en est de même pour les dispositions de l'article 10.4 CMA que l'on retrouve là aussi, presqu'à l'identique à l'article 295 RAD. L'application des règles du CMA ou du RAD aurait donc conduit aux mêmes résultats quant à la détermination des violations que des sanctions. Mais la qualité de licencié de M. Muto auprès de la FCI, elle-même affiliée à l'UCI et sa participation à une épreuve inscrite au calendrier de l'UCI, imposent l'application prioritaire du RAD et une substitution de base légale, en ce sens, conformément notamment aux dispositions de l'article 5 du règlement UCI du sport cycliste: *"La participation à une épreuve cycliste, à quel titre que ce soit, vaut acceptation de toutes les dispositions réglementaires qui y trouvent application"* (au nombre desquelles figure le RAD).

2. En ce qui concerne la sanction applicable

2.1 S'agissant de la suspension

Le TNA-CONI en se fondant sur l'article 10.7.4 CMA a estimé que la double infraction commise par M. Muto devait être considéré comme une unique et première violation, tout en retenant que cette double infraction était constitutive de circonstances aggravantes, au sens des dispositions de l'article 10.6 CMA qui permettent alors, d'augmenter la période de suspension à un maximum de quatre ans. Elle a alors infligé au coureur une suspension de 2 ans et 6 mois.

La Formation adhère au raisonnement suivi par le TNA-CONI en ce qui concerne la qualification d'unique et première violation, assortie de circonstances aggravantes, tout en soulignant à nouveau qu'une substitution de base légale à partir des dispositions du RAD s'impose.

Si M. Muto a fait l'objet d'un contrôle positif à l'éphédrine le 25 mars 2011 et d'un contrôle positif à l'EPO le 10 avril 2011, la notification du premier contrôle lui a été adressée le 3 mai 2011. Or, l'article 309 RAD qui reprend sur ce point, les dispositions de l'article 10.7.4 CMA, dispose que *"(…) une violation des règles antidopage ne sera considérée comme une deuxième violation que s'il est établi que le licencié a commis la deuxième violation des règles antidopage après avoir reçu une notification conformément au chapitre VII (gestion des résultats), ou après que l'UCI ou la fédération nationale a déployé des efforts raisonnables pour la notification de la première violation des règles antidopage. Si l'UCI ou la fédération nationale ne peut le démontrer, les violations sont considérées ensemble, comme une seule et première violation, et la sanction sera imposée en fonction de la violation passible de la sanction la plus lourde. Toutefois, le fait de commettre des violations multiples peut être considéré comme un facteur de circonstances aggravantes (article 305)".*

M. Muto n'ayant reçu notification de sa première infraction que le 11 mai 2001, bien après avoir commis sa deuxième infraction, le 10 avril 2011, c'est donc à bon droit qu'il ne lui a été reproché qu'une seule et première violation.

C'est également à juste titre, qu'il a été fait application de la notion de circonstances aggravantes. L'article 305 RAD analogue à l'article 10.6 CMA dispose que *"Si dans un cas individuel impliquant une violation des règles antidopage (…) la présence de circonstances aggravantes justifiant l'imposition d'une période de suspension supérieure à la sanction standard est établie, la période de suspension normalement applicable sera augmentée jusqu'à concurrence maximale de quatre ans sauf si le licencié peut prouver à la pleine satisfaction de l'instance d'audition qu'il n'avait pas commis sciemment la violation des règles antidopage".*

Si en effet, l'application de contraintes procédurales, tout à fait compréhensible par ailleurs, peut aboutir à ne pouvoir opposer à un coureur la qualification de deuxième violation et l'existence d'une récidive, alors que la réalité de cette double infraction n'est pas contestable, cette situation de fait est bien constitutive de circonstances aggravantes et justifie l'application de l'article 305 RAD. La jurisprudence du TAS a d'ailleurs validé le recours aux circonstances aggravantes dans une telle hypothèse (CAS 2008/A/1577*;* CAS 2008/A/1572-1632-1659*;* CAS 2009/A/1983).

La Formation s'écarte en revanche de la solution retenue par le TNA-CONI; en ce qui concerne le quantum de la durée de suspension fixée à 2 ans et 6 mois pour la porter à trois ans.

Au regard de l'article 309 RAD (comme de l'article 10.7.4 CMA) lorsque les violations sont considérées ensemble comme une seule et première violation, *"la sanction sera imposée en fonction de la violation passible de la sanction la plus lourde".*

En l'espèce les deux infractions dont s'est rendu coupable M. Muto sont chacune sanctionnés d'une suspension maximum de deux ans: la présence d'une substance interdite dans l'organisme (l'EPO en l'espèce) est, en application de l'article 293 RAD punie de deux ans de suspension pour une première violation; la présence d'une substance spécifiée (l'éphédrine en l'espèce) est, en application de l'article 295 RAD, passible d'une durée maximum de deux ans de suspension, à défaut pour l'athlète d'apporter les

preuves exigées pour bénéficier d'une élimination ou réduction de cette suspension.

L'UCI dans ses conclusions en appel, estime qu'une suspension de 4 ans est justifiée, sans toutefois le formaliser de manière aussi nette dans ses conclusions: *"condamner M. Muto à une suspension jusqu'à 4 ans, conformément aux articles 293 et 305 RAD".*

Lorsque la durée de la suspension peut être modulée, il convient de la déterminer, dans le respect des textes applicables et du principe de proportionnalité, en fonction du cas d'espèce.

Or, la Formation estime que dans le cas présent, une suspension d'une durée de trois ans est plus adéquate. D'une part, les violations commises par M. Muto sont lourdes: deux contrôles positifs successifs en l'espace de 15 jours, présence d'une substance, l'EPO, qui cible un dopage intentionnel. Si un athlète a été testé positif à deux reprises en l'espace d'un laps de temps de quinze jours avec deux substances prohibées différentes, une étant l'EPO, il est fort probable que l'athlète a commis les violations d'une manière systématique; à cela s'ajoute toute absence d'explication sérieuse devant le TNA-CONI, et même toute tentative d'explication dans la présente procédure, à défaut de production d'un mémoire en défense. Mais, d'autre part, les contrôles ont révélé la présence d'une substance interdite et d'une substance spécifiée. Et même si M. Muto ne s'est guère attaché à apporter les éléments justificatifs qui auraient pu expliquer la présence de cette substance spécifiée, la distinction ne peut être gommée et permet de ne pas retenir la durée maximum d'une suspension de 4 ans, qui aurait constitué la même peine pour sanctionner les deux fois, la présence de substances interdites.

2.2 S'agissant de l'amende

L'UCI réclame le prononcé d'une amende en application de l'art. 326 al. 1 let. a) RAD. Cette disposition prévoit clairement le principe d'une sanction financière: *"Outre les sanctions prévues aux articles 293 à 313, les violations des règles antidopage sont passibles d'une amende conformément aux dispositions ci-après: (…) Lorsqu'une suspension de deux ans ou plus est imposée au membre d'une équipe enregistrée auprès de l'UCI, le montant de l'amende est égal au revenu annuel net provenant du cyclisme auquel le licencié avait normalement droit pour l'ensemble de l'année où la violation des règles antidopage a été commise. Le montant de ce revenu sera évalué par l'UCI, étant entendu que le revenu net sera établi à 70% du revenu brut correspondant. Il incombe au licencié concerné d'apporter la preuve du contraire. Aux fins de l'application du présent article, l'UCI aura le droit de recevoir une copie de tous les contrats du licencié de la part du réviseur désigné par l'UCI. Si la situation financière du licencié concerné le justifie, l'amende imposée en vertu du présent alinéa pourra être réduite, mais pas de plus de la moitié".*

Faute de toute production en défense ni M. Muto, ni le CONI n'ont contesté ni le principe, ni les modalités d'application de cette sanction financière.

Le TAS a déjà eu l'occasion de se prononcer à plusieurs reprises sur le bien fondé de cette sanction financière qui s'ajoute à la sanction de suspension, et sur ses modalités d'application.

Il a en admis la légalité, à condition toutefois qu'elle respecte, dans son application, les droits de l'homme et les principes généraux du droit, en particulier celui de la proportionnalité (ainsi que le rappelle d'ailleurs l'article 286 RAD à propos de toutes les sanctions en matière de dopage).

La jurisprudence du TAS (TAS 2010/A/2063; TAS 2010/A/2101; TAS 2010/A/2203 & 2214; TAS 2011/A/2349; TAS 2011/A/2616) a alors estimé que les fédérations internationales pouvaient ajouter une sanction financière à la sanction de suspension dès lors que la sanction dans sa *globalité* respecte le principe de proportionnalité, c'est-à-dire en vérifiant que l'addition de la suspension au regard de sa durée et de l'amende au regard de son montant reste bien proportionnée, adéquate au cas d'espèce.

Dans le cas présent, il ressort des pièces du dossier que les conditions d'application de l'article 326 RAD susvisé sont remplies. M. Muto exerçait une activité professionnelle ainsi qu'il résulte du contrat qu'il avait conclu avec Middex Sport Limited, produit au dossier, et il fait l'objet d'une suspension de deux ans ou plus.

Selon les dispositions de ce contrat, son revenu annuel brut est de 27'500 euros, et son revenu net peut être établi, par application de l'article, à 70% de cette somme, soit 19'500 euros.

L'UCI soutient dans son mémoire d'appel que pour l'évaluation de la sanction financière, il y a lieu de prendre en compte l'ensemble de la carrière de M. Muto et non uniquement les revenus perçus lors de l'année où l'infraction a été commise. Elle demande en conséquence au TAS d'ordonner à M. Muto la production des contrats de travail et d'image qu'il a signés avec l'équipe Miche depuis 2005 jusqu'à 2011.

Mais d'une part, il convient de souligner que les dispositions de l'article 326 RAD susvisé ne retiennent comme assiette du calcul de l'amende que le revenu annuel et que d'autre part, et surtout, l'UCI se limite dans ses conclusions à demander *"de condamner M. Muto au paiement d'une amende financière de 19'250 euros".*

Toute autre conclusion sur ce point doit donc être rejetée.

Ainsi donc qu'il résulte du texte même de l'article 326 RAD, cette amende doit bien être calculée à partir du revenu annuel net auquel le coureur avait normalement droit pour l'ensemble de l'année et non pas le montant réellement perçu, ce que plusieurs Formations du TAS ont d'ailleurs confirmé (TAS 2010/A/2063; TAS 2010/A/2101; TAS 2010/A/2203 & 2214). Cette interprétation résulte notamment de l'utilisation du terme *"normalement"*, du fait que la disposition ne prévoit pas de calcul de l'amende *prorata temporis*, et enfin du contexte dans lequel l'art. 326 al. 1 let. a) RAD a été adopté et de l'objectif recherché par cette mesure (TAS 2010/A/2063, ch. 77 ss).

La Formation considère, au regard du cas d'espèce, que M. Muto doit être condamné au paiement d'une amende financière de 19'250 euros.

D'une part, M. Muto, par son silence dans la procédure devant le TAS, n'a pas sollicité le bénéfice des dispositions de l'article 326 permettant de faire état de sa situation financière pour obtenir une réduction. En l'absence donc de toute demande en ce sens, et du moindre élément au dossier pouvant faire présumer d'une situation financière particulièrement délicate de l'intéressé, la Formation ne peut que faire application des dispositions en cause et fixer l'amende au montant de 19'250 Euros.

D'autre part, le cumul d'une sanction financière de 19'250 euros et d'une suspension de trois ans n'apparaît pas à la Formation comme disproportionnée. En effet il faut relever ainsi qu'il a déjà été fait, que la violation commise est grave et non sérieusement contestée. M. Muto a été sanctionné pour une double infraction, dont l'une consiste en la prise volontaire d'EPO, ce qui rend le cas particulièrement grave sous l'angle de la faute du coureur qui dispose pourtant d'une carrière significative pour être suffisamment averti. En outre, M. Muto ne débute pas une carrière de cycliste. Cette situation lui a permis de disposer depuis quelques années, de ressources financières. L'impact de l'amende financière considérée doit donc s'apprécier par rapport à ce contexte qui, par exemple, ne serait pas le même pour un coureur en tout début de carrière professionnelle. Enfin, la Formation ne peut totalement gommer la position de M. Muto qui faute de toute production de sa part, ne peut que s'en tenir aux pièces du dossier.

En conclusion, la Formation estime qu'une sanction financière s'élevant à 19'250 euros, soit au 70% du revenu annuel brut que M. Muto devait réaliser durant l'année 2011, et s'ajoutant à la sanction sportive de suspension de trois ans n'est pas disproportionnée dans le cas d'espèce.

Elle réforme par conséquent la Décision et prononce à l'encontre de M. Muto une sanction financière de 19'250 euros et une suspension de trois ans.

Arbitration CAS 2012/A/2725
International Cycling Union (UCI) v. Vladimir Koev & Bulgarian Cycling Union (BCU)
23 July 2012

Cycling; Doping (heptaminol); Duty to establish how the specified substance entered the athlete's body; Absence of intent to enhance sport performance; Starting date of the ineligibility period

Panel:
Judge James Robert Reid QC (United Kingdom), Sole Arbitrator

Relevant facts

On this appeal the UCI challenges the decision of the committee of the BCU made on 28 December 2011 (the Decision). By that Decision the committee of the BCU determined that Mr Koev was not guilty of a breach of the UCI anti-doping rules and held *"Vladimir Koev should not be punished or reprimanded. Whereas, in the next similar case, regardless of the situation, the punishment will be maximum"*.

The UCI appeals to CAS against that decision, seeking a sanction of ineligibility against Mr Koev, his disqualification from the 2010 Tour of Romania, a fine and an award of costs against both BCU and Mr Koev.

The anti-doping rules of the UCI (UCI ADR) relevant to this appeal are those in force as at 7 June 2010, subject only to the *lex mitior* in respect of any subsequent amendments to those rules.

In 2010 Mr Koev was employed by the Hemus 1896-Vivelo team. By his employment contract Mr Koev was entitled to a gross annual salary for the year 2010 of EUR 1,660 (a net amount of EUR 1,162).

Mr Koev participated in and won the 2010 Tour of Romania, a stage race on UCI's international calendar, which was held from 5 June to 12 June 2010. Doping controls were initiated and conducted by UCI during the race.

Mr Koev was required by UCI to undergo doping controls in accordance with the UCI ADR on 7, 9 and 11 June 2010. On each occasion he confirmed that the samples had been taken in accordance with the regulations. He did not declare any medication or supplements taken over the previous seven days on the doping control forms.

His urine samples were analysed at the World Anti Doping Agency (WADA)-accredited anti-doping laboratory in Bucharest, Romania. The certificates of analysis, dated respectively 21 and 24 June 2010, stated that the samples provided by Mr Koev on 7, 9 and 11 June 2010 contained Heptaminol.

Heptaminol is a Prohibited Substance classified under section S.6.b (Specified Stimulant) of the WADA prohibited list. Mr Koev was notified by letter of the adverse findings on 15 September 2011.

On 27 September 2011 he requested the analysis of his three B samples. He also asked to have the documentation packages for his A samples. The B sample analyses were conducted on 27 October 2011, when Mr Koev attended, and confirmed the presence of Heptaminol in the three samples. On 1 December 2011 Mr Koev was notified by letter of the results of the B sample analyses.

Pursuant to Article 234 of the UCI ADR by letter, also dated 1 December 2011, UCI requested the BCU to initiate disciplinary proceedings against Mr Koev. In its letter the UCI notified the BCU that Mr Koev had a previous anti-doping rule violation for which in 2006 he had been sanctioned with the standard penalty of two years ineligibility from 5 July 2006 to 5 July 2008 and that this had to be taken into account when determining the sanction of the offences alleged. Mr Koev had been sanctioned having provided a sample which contained a prohibited non-specified substance, stanozolol metabolites (an anabolic steroid listed on the WADA list of Prohibited Substances) which had been detected during an anti-doping control on the 2006 Tour of Serbia.

A hearing was scheduled by BCU to take place on

23 December 2011 but owing to Mr Koev's ill-health (for which a medical certificate was provided) it was postponed to 28 December. At that hearing Mr Koev accepted that Heptaminol had been found in his urine in both the A and B samples. He gave his explanation in these terms:

" I am primarily engaged in road cycling and I compete in daily and multi-day races. I find that in this case I have a guilt which I want to explain. I have haemorrhoids that cause internal and external bleeding. They cause me discomfort in my training and competition process. For this reason I was forced to seek medical care. My doctor prescribed me the necessary preparations to help for my treatment. My mistake was first that I did not know that the drug prescribed by my doctor contained also the substance heptaminol. Out of shame and embarrassment I did not tell about my treatment with these medications for haemorrhoids".

Before the Committee Mr Koev was assisted by Mr Todor Kolev who was the manager both of Mr Koev's 2010 team (Hemus 1896-Vivelo) and his 2011 team (Konya Torku Seker Spor Vivelo). He produced as evidence outpatient list no. 10/31.05.2010, a medical certificate dated 31 May 2010 by which Dr Nikolay Nanev gave a case history of *"pain and irritation in the anal area, sometimes of availability of blood in the faeces. He has tried self-treatment, without much effect"*. On examination by rectal touch Dr Nanev recited that he had found *"thrombosis external and internal haemorrhoids"*. He prescribed *"Ginkor Fort 2x2 for the first 3 days, then 2x2 daily for one month. Pilex crème"*. Mr Koev told the Committee that he did not reveal his treatment with the medication for haemorrhoids out of shame and embarrassment. He pointed out he had always readily given samples, he had attended the B sample testing and had appeared before the Committee. He said he thought he had made a mistake in not telling about the haemorrhoids. Having *"taken to heart a good lesson from several years ago"* he would not even think about banned substances.

In addition to his own testimony the Committee heard from Mr Kolev. Mr Kolev's evidence was that Mr Koev had always responded to calls for him to give samples for testing. He knew that Mr Koev was treating himself for haemorrhoids and was surprised that the medicine contained the substance. He thought that the athlete had been taking it to alleviate his pain and to feel comfortable in training and competition.

The Committee gave its decision pursuant to Article 272 UCI ADR *et seq*. in these terms:

"From the hearing and the provided medical documents, and after the check made it is evident that for a period of 1 month the athlete Vladimir Koev received a treatment with a diagnosis of thrombosis haemorrhoids. To him a rectal touch examination was made- thrombosis of external and internal haemorrhoids. For the treatment (therapy) he has used the following medications: Zinat 3x500mg, Gentamicin 2x80mg; Expektorans; bed rest and diet friendly feeding, without being aware they contained the substance Heptaminol.

The athlete said that out of shame and embarrassment he had not declared the treatment with these medications for haemorrhoids. When called, he regularly appeared in the laboratory in Bucharest which shows that Vladimir Koev had not run away from responsibility.

The Bulgarian Cycling Union has always been uncompromising to athletes alleged, of the use of banned stimulants. Not in vain, in recent years we have always required during the International Cycling Tour of Bulgaria, class 2.2 doping control to be conducted. Also during the year we make doping control during our internal competitions.

In the case of Vladimir Koev, we believe he is not guilty and the substance which was found in the samples had not been aimed at enhancing his sports form.

Our solution is: Vladimir Koev should not be punished or reprimanded. Whereas, in the next similar case, regardless of the situation, the punishment will be maximum".

UCI was notified of the decision by e-mail on 12 January 2012. On 13 February 2012 UCI lodged its appeal with CAS and lodged its appeal brief on 27 February 2012.

On 19 March 2012 Mr Koev lodged a letter by way of answer.

By letter dated 2 April 2012 BCU sought permission to file an answer out of time.

By letter dated 18 April 2012 the Sole Arbitrator granted to the Respondents (subject to any objection from UCI) an extension of time of 10 days from receipt of the letter to lodge, respectively, a Supplemental Answer or an Answer. By letter dated 19 April 2012 UCI stated it had no objection to the extension of time.

Mr Koev lodged a Supplemental Answer bearing date 25 April 2012 and received by CAS on 9 May 2012. BCU lodged an answer bearing date 25 April 2012 and received by CAS on 9 May 2012. Pursuant to Art R44.3 of the Code the Sole Arbitrator decided to admit the additional submissions notwithstanding that they were served out of time.

By letters dated respectively 9 May 2012 (UCI), 14 May 2012 (BCU) and 14 May 2012 (Mr Koev) each of the parties agreed that the appeal should be decided

on written submissions without an oral hearing.

By its appeal UCI sought that Mr Koev should not be granted "no fault or negligence" and that he must bear the full responsibility for his second anti-doping violation. It asked that if the Panel found for the application of Article 295 UCI ADR, Mr Koev should be sanctioned with four years of ineligibility; that if the Panel found that Mr Koev did not meet his evidential thresholds set by Article 295 UCI ADR Mr Koev shall be sanctioned at the minimum with eight years of ineligibility and at the maximum a lifetime ban. In addition UCI requested that pursuant to Article 291.1 UCI ADR Mr Koev should be disqualified from the 2010 Tour of Romania; that pursuant to Article 313 UCI ADR, and all competitive results obtained subsequently to the 2010 Tour of Romania should be disqualified. Under Article 326 UCI ADR, UCI sought a financial sanction equivalent to the net annual income to which Mr Koev was entitled in the year in which the anti-doping rule violation occurred. In addition pursuant to Article 275 UCI ADR UCI sought the costs of the result management i.e. CHF 2'500; the cost of the B-Sample analysis, i.e. EUR 850 and the costs of the A-Sample laboratory documentation package, i.e. EUR 735.

The two Respondents sought the dismissal of the appeal.

Extracts from the legal findings

It is undisputed that Heptaminol is a Specified Substance being classified under S.6.b (Specified Stimulant) of the WADA Prohibited List and that it was found in the three samples which Mr Koev gave on 7, 9 and 11 June 2010 during the Tour of Romania. It is also undisputed that Mr Koev did not declare (as he should have done) that he was taking Ginkor Fort at the time he gave the three samples, that he did not have the benefit of a TUE, and that he did not apply for a retrospective TUE in respect of the medication he was taking.

Although UCI did not concede that the reason for the positive tests was the Ginkor Fort which Mr Koev admitted taking, it did not suggest any other possible source for the substances found in the tests. Indeed UCI submitted a variety of other cases in which athletes had been penalised for having tested positive for Heptaminol as a result of taking Ginkor Fort and referred to Ginkor Fort's own published material which referred to the possibility of positive tests from taking the substance. In the circumstances, where there is a known and admitted possible source of the substance and no alternative possible source has been suggested, Mr Koev has established to the comfortable satisfaction of the Sole Arbitrator how the specified substance entered his body.

As to Mr Koev's intentions when taking the substance, he asserts that he had no intent to enhance sport performance. He receives support for this from the evidence that he was prescribed the substance by a medical practitioner for a condition (haemorrhoids) from which he was suffering. That he was suffering from this condition was established by Dr Nanev's certificate of 31 May 2010 which in its turn was supported by the certificate of Dr Matev of 23 April 2012. There is (contrary to the suggestion of UCI) no significance in the absence of further medical evidence. That which has been provided is sufficient.

It is surprising that, according to Mr Koev (though there is no direct evidence of this from Dr Nanev), Dr Nanev was unaware of, and did not warn Mr Koev about, the possible consequences of Mr Koev taking Ginkor Fort. This is despite the fact that the possibility of the substance resulting in an athlete testing positive was something of which the manufacturers were well aware and which they took steps to notify potential users or prescribers.

It is still more surprising that Mr Koev, who had already undergone a two year period of ineligibility as a result of a previous doping offence and who claimed to have taken the lesson to heart, made no inquiry of the doctor or of anyone else to satisfy himself that the medication was one which he could safely take. Mr Koev is a mature sportsman. It would be unlikely in the extreme that he was not aware of his personal duty to ensure that no Prohibited Substance entered his body, of the warning that he must refrain from using any substance of which he did not know the composition and that medical treatment is no excuse for using Prohibited Substances except where the rules governing Therapeutic Use Exemptions are complied with.

Mr Koev asserts that it was out of shame that when he was tested he did not (as he was obliged to do) reveal that he was taking the medication. It is very difficult to accept this assertion at face value. Haemorrhoids are a common enough condition in the population at large, and (according to UCI) are a common condition amongst cyclists.

The scheme of the UCI ADR is that an anti-doping rule violation is established by the proof of the banned substance in the relevant sample or samples. Once that is established the athlete is liable to a standard sanction of ineligibility unless the athlete can bring himself within either the rules as to

therapeutic use exemptions (TUEs) or he falls within one of the special cases which may (depending on the circumstances) result in an elimination or reduction of the period of ineligibility or an enhanced penalty.

Where the athlete seeks to argue that the period of ineligibility should be eliminated or reduced it is for him to establish the basis upon which he is entitled to avoid the standard penalty.

In the present case the Committee appears to have decided that Mr Koev bore no fault or negligence and that the applicable period of ineligibility should therefore be eliminated. Although the decision of the Committee does not specify the provision in the UCI ADR upon which it based its decision that Mr Koev was not guilty and that he should not be punished or reprimanded, it appears that its decision was based upon Article 296 UCI ADR ("No Fault or Negligence"). If its decision had been based on Article 295 UCI ADR ("Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances") it would have been required to impose at a minimum a reprimand.

In order for the athlete to be able to take advantage of Article 296 UCI ADR he must establish (as Mr Koev has done) how the Prohibited Substance entered his body. He must also establish that this was through no fault or negligence of his own. On the facts set out above it is clear that Mr Koev has not done this. On his own account he was guilty of considerable negligence. He took a substance prescribed for him without making any inquiry as to its content. If he had done so there can be no real doubt that he would have established that the product contained a prohibited substance. As someone with particular reason to take care over what entered his body, following his previous period of ineligibility, he cannot assert that his failure to take any precaution at all demonstrated that he bore no fault or negligence.

The question then is whether he can take advantage of the provisions of Article 295 UCI ADR. In order to do so, having established how the Specified Substance (in this case Heptaminol) entered his body, he must, in the circumstances of this case, produce corroborating evidence in addition to his word, to establish to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance.

So far as corroborative evidence was concerned, Mr Koev produced only the documentation from the two doctors which established that he did indeed suffer from haemorrhoids and from one of the doctors that the Ginkor Fort was prescribed to alleviate this condition. There was no evidence from the doctor which explained why this substance rather than some other was the appropriate treatment or as to his appreciation or lack of appreciation that the substance might result in a positive test. In its case UCI pointed to the availability of other remedies at least in Switzerland which would not have resulted in positive tests, but provided no evidence either that those remedies were available in Bulgaria or that they would have been equally efficacious in the treatment of Mr Koev's particular condition.

The contemporaneous medical record is a factor which militates against the substance having been taken to enhance sport performance, but (as is indicated in the Comment to Article 10.4 of the WADA Code) for a hearing panel to be comfortably satisfied that there was no intention to enhance sport performance, there would generally need to be a combination of objective circumstances. One such circumstance might be the open use or the disclosure of use of the substance. In the present case there is no evidence of open use or of disclosure. To the contrary, Mr Koev deliberately failed to declare his use of the substance, asserting only that he was embarrassed about the condition.

It was suggested that there was corroboration of his position in the facts that he did not seek to avoid the three tests which proved positive, that there was nothing to suggest that he had tried to avoid tests in the past and that he requested (and attended at) the testing of the B samples. These factors are however only of the very slightest assistance. He was in no position to avoid the three tests which proved positive and the fact that he elected to have the B samples tested and to be present at the tests does not go to his intention in taking the Specified Substance.

A factor which weighs against Mr Koev is his apparent complete disregard for any of the precautions which he would be expected to have taken before using a new medicine. His absence of any inquiry or any research on his own behalf, particularly against the background of his earlier period of ineligibility, is something which required, but did not receive, any explanation.

The onus on Mr Koev is to establish to the comfortable satisfaction of the Sole Arbitrator that there was no intent to enhance sport performance. That onus of proof is greater than an onus of proof merely on the balance of probabilities, but is not so high as an onus of proof to the criminal standard. It is an onus which he has failed to discharge.

It follows that the appeal must be allowed and that he must be subject to the standard period of ineligibility applicable to a second anti-doping rule violation.

Under Article 306 UCI ADR that is a period to be fixed between a period of 8 years and lifetime ineligibility. In the circumstances of this case, which cannot be regarded as being one of the most serious, the appropriate period is one of eight years.

By Articles 314 and 315 UCI ADR the period of that ineligibility will start on the date of the hearing panel decision providing for ineligibility but 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 may start the period of ineligibility at an earlier date commencing as early as the date of sample collection. In this case although the certificates of analysis of the A samples were dated respectively 21 and 24 June 2010 Mr Koev was not notified of the adverse findings until 15 September 2011. No explanation for this substantial delay has been proffered, but there has been no suggestion that it was through any fault on the part of Mr Koev. In these circumstances and pursuant to Article 315 UCI ADR, the Sole Arbitrator finds it appropriate that the period of ineligibility will run from the date of the last sample collection, 11 June 2010.

In addition pursuant to Article 291.1 UCI ADR Mr Koev is disqualified from the 2010 Tour of Romania and pursuant to Article 313 UCI ADR all competitive results obtained subsequently to the 2010 Tour of Romania are disqualified.

Apart from the period of ineligibility, in accordance with the provisions of Article 326 UCI ADR Mr Koev shall pay a fine of EUR 1,162 being the net amount of his salary for the year 2010.

Mr Koev must in addition pay the sums of EUR 850, being the cost of the B sample analysis and EUR 735 being the cost of the A sample laboratory documentation package in accordance with Article 275 UCI ADR.

So far as the costs of the result management sought, pursuant to Article 275 UCI ADR, the UCI seeks the sum of CHF 2,500. This is the amount specified in Article 275 UCI ADR as amended on 1 February 2011. In the UCI ADR as they stood at 7 June 2010 the amount was fixed at CHF 1,000 *"unless a higher amount is claimed by the UCI and determined by the hearing body"*. Although the UCI has claimed a higher amount no justification for the higher figure has been put forward and the amount which Mr Koev is required to pay for the result management is therefore fixed at CHF 1,000.

Arbitration CAS 2012/A/2750
Shakhtar Donetsk v. Fédération Internationale de Football Association (FIFA) & Real Zaragoza S.A.D.

15 October 2012

Football; Closing of disciplinary proceedings as a consequence of the initiation of insolvency proceedings; Applicable law; Definition of "decision"; Decision subject to appeal; Amendments of requests in the appeal brief; Discretion of FIFA to close disciplinary proceedings when a club is bankrupt

Panel:
Mr Hendrik Willem Kesler (The Netherlands), President
Mr Stuart McInnes (United Kingdom)
Mr José Juan Pintó (Spain)

Relevant facts

FC Shakhtar Donetsk (hereinafter: the "Appellant" or "Shakhtar Donetsk") is a football club with its registered office in Donetsk, Ukraine.

Real Zaragoza S.A.D. (hereinafter the "Second Respondent" or "Real Zaragoza") is a football club with its registered office in Zaragoza, Spain. Real Zaragoza is registered with the Royal Spanish Football Federation (*Real Federación Española de Fútbol* – hereinafter: the "RFEF"), which in turn is affiliated to the Fédération Internationale de Football Association (hereinafter: the "First Respondent" or "FIFA").

In June 2004, Mr Matuzalem Francelino da Silva (hereinafter: the "Player"), a professional football player of Brazilian nationality, signed an employment contract with Shakhtar Donetsk for a fixed-term of five years, effective from 1 July 2004 until 1 July 2009.

On 2 July 2007, the Player notified Shakhtar Donetsk in writing of the fact that he was putting an end to their contractual engagement with immediate effect. It is undisputed that the Player unilaterally and prematurely terminated his employment contract without just cause or sporting just cause and, on 19 July 2007, signed a new employment contract with Real Zaragoza.

On 25 July 2007, Shakhtar Donetsk submitted a claim with the FIFA Dispute Resolution Chamber (hereinafter: the "FIFA DRC") requesting it to order the Player to pay damages to Shakhtar Donetsk for terminating his employment contract with Shakhtar Donetsk without just cause and to hold Real Zaragoza jointly and severally liable for the payment of such compensation. On 2 November 2007, the FIFA DRC decided, *inter alia*, that:

"[the Player] had to pay to [Shakhtar Donetsk] the amount of EUR 6,800,000 within 30 days as from the date of notification of the decision. Furthermore, the decision stipulated that an interest rate of 5% p.a. would apply as of expiry of the 30 days' time limit. Finally, the decision stated that [Real Zaragoza] was jointly and severally liable for the aforementioned payment".

All three involved parties, Shakhtar Donetsk, the Player and Real Zaragoza, filed appeals against the FIFA DRC decision of 2 November 2007 with the Court of Arbitration for Sport. By decision of 19 May 2009 (hereinafter: the "2009 CAS Award"), CAS decided, *inter alia*, that:

"the relevant decision of the FIFA DRC was partially reformed in the sense that the [Player] had to pay to [Shakhtar Donetsk] the amount of EUR 11,858,934 plus 5% of interest p.a. starting on 5 July 2007 until the effective date of payment. Furthermore, the decision stated that [Real Zaragoza] was jointly and severally liable for the payment of the above-mentioned amount".

On 18 June 2009, the Player and Real Zaragoza filed appeals against the 2009 CAS Award with the Swiss Federal Supreme Court. On 2 June 2010, the Swiss Federal Supreme Court dismissed the appeals filed by the Player and Real Zaragoza.

On 14 July 2010, as the aforementioned amounts remained unpaid, the secretariat to the FIFA Disciplinary Committee opened disciplinary proceedings against both the Player and Real Zaragoza for failing to comply with the 2009 CAS Award and thereby acting contrary to article 64 FIFA Disciplinary Code. On 31 August 2010, the FIFA Disciplinary Committee rendered "Decision 100233 PST BRA ZH" (hereinafter: the "FIFA Disciplinary Committee Decision") regarding *"failure to comply with*

a decision passed by a FIFA body or CAS (Art. 64 of the FIFA Disciplinary Code)" and held the following:

"1. The [Player] and [Real Zaragoza] are pronounced guilty of failing to comply with a decision of CAS in accordance with art. 64 of the FDC.

2. The [Player] and [Real Zaragoza] are jointly ordered to pay a fine to the amount of CHF 30,000. The fine is to be paid within 30 days of notification of the decision. (…)

3. The [Player] and [Real Zaragoza] are granted a final period of grace for 90 days as from notification of this decision in which to settle their debt to Shakhtar Donetsk.

4. If payment is not made by this deadline, Shakhtar Donetsk may demand in writing from FIFA that a ban on taking part in any football related activity be imposed on the [Player] and/or six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship. Once Shakhtar Donetsk has filed this/these request(s), the ban on taking part in any football-related activity will be imposed on the [Player] and/or the points will be deducted automatically from the first team of [Real Zaragoza] without further formal decisions having to be taken by the FIFA Disciplinary Committee. (…).

5. If [Real Zaragoza] still fails to pay the amount due even after deduction of the points in accordance with point III./4 above, the FIFA Disciplinary Committee will decide on a possible relegation of the first team of [Real Zaragoza] to the next lower division.

6. In regard to its affiliated [Real Zaragoza], the [RFEF], as a member of FIFA, is reminded of its duty to implement this decision and, if so requested, provide FIFA with proof that the points have been deducted. (…).

(…)".

Both the Player and Real Zaragoza filed an appeal with the CAS against the FIFA Disciplinary Committee Decision. On 16 June 2011, during the course of the proceedings at CAS, but after the hearing had already taken place on 26 April 2011, Real Zaragoza provided a copy of a decision of the *Juzgado de lo Mercantil No. 2 de Zaragoza* (hereinafter: the "Zaragoza Commercial Court") by which, according to Real Zaragoza, *"the voluntary bankruptcy request by the club is admitted and, therefore, [Real Zaragoza] is officially involved in a bankruptcy proceeding and subject to Bankruptcy Legal Administration"*. On 23 June 2011, the CAS Panel decided not to accept the new documents since it was of the opinion that *"the exceptional circumstances required under article R56 of the CAS Code are not met in the present case"*. By decision of 29 June 2011 (hereinafter: the "2011 CAS Award"), the CAS decided, *inter alia*, that:

"1. The appeal filed by [Real Zaragoza] against the decision issued on 31 August 2010 by the FIFA Disciplinary Committee is dismissed.

2. The appeal filed by [the Player] against the decision issued on 31 August 2010 by the FIFA Disciplinary Committee is dismissed".

Although the Player filed an Appeal against the 2011 CAS Award with the Swiss Federal Supreme Court, Real Zaragoza abstained from filing any appeal against the 2011 CAS Award with the Swiss Federal Supreme Court. The 2011 CAS Award therefore became final and binding in respect of Real Zaragoza.

On 13 July 2011, Shakhtar Donetsk requested the FIFA Disciplinary Committee to enforce the Disciplinary Committee Decision, as Real Zaragoza had not fulfilled its obligation of payment towards Shakhtar. As no answer was received from FIFA to its correspondence of 13 July 2011, by letters dated 27 July and 15 September 2011 respectively, Shakhtar Donetsk urged the FIFA Disciplinary Committee and the FIFA President to act urgently in accordance with the 2011 CAS Award and the FIFA Disciplinary Committee Decision.

On 27 September 2011, the secretariat to the FIFA Disciplinary Committee issued a letter (hereinafter: the "FIFA Disciplinary Committee Order") to the RFEF with the following content:

"We have been informed that your affiliated club [Real Zaragoza] did not comply with the decision taken by the FIFA Disciplinary Committee on 31 August 2010 confirmed by the Court of Arbitrations for Sport on 29 June 2011. Consequently, we ask your association to immediately execute the decision and to send us proof that the six (6) points have been deducted from the club's first team.
(…)".

By letters dated 11 and 25 October 2011, Shakhtar Donetsk informed FIFA that the RFEF had not abided the FIFA Disciplinary Committee Order concerning the deduction of six (6) points from Real Zaragoza's first team and urged FIFA to act immediately in this regard.

On 19 October 2011, the RFEF informed the secretariat to the FIFA Disciplinary Committee about the instructions given by the Zaragoza Commercial Court in respect of proceedings regarding Real Zaragoza. Enclosed with this correspondence of 19 October 2011 was a copy of the decision of the Zaragoza Commercial Court, dated 13 June 2011, deciding, *inter alia*, the following:

"1. Declare [Real Zaragoza] (…) in insolvency proceedings, given that its current state of insolvency has been substantiated. (…)

3. Consider the insolvency proceedings to be voluntary. (…)

19. This ruling will take effect immediately and will be enforceable even if the decision is not final. (…)

20. With respect to the interim measure requested, it is not necessary; nevertheless, if any sanction of any kind derived from internal regulations or the regulations of the bodies of which the insolvent is a member is imposed, this will be notified to this court for appropriate action. The declaration of insolvency proceedings is to be expressly communicated to the SPANISH FOOTBALL ASSOCIATION and THE NATIONAL PROFESSIONAL FOOTBALL LEAGUE. (…)".

Also enclosed with RFEF's correspondence of 19 October 2011 was a copy of the decision of the Zaragoza Commercial Court dated 7 July 2011, with the following operative part:

"It is agreed to admit the request formulated by the insolvent, [Real Zaragoza] and the insolvency administrators, ordering the [RFEF] to abstain from enforcing any sanction derived from possible non-payment of sums by [Real Zaragoza] to [Shakhtar Donetsk] or in general, as a consequence of the [FIFA Disciplinary Committee Decision] or the [2011 CAS Award] or any other ruling implementing or fulfilling any of the above, so that in future, and until [Real Zaragoza's] insolvency proceedings have concluded, it abstains from adopting any decision or imposing or enforcing any sanction of any kind derived from its internal regulations or the regulations of the bodies of which it is a member, including FIFA, in respect of the insolvent or its players as a consequence of the insolvency debt of this sporting body towards its players. (…)".

On 18 November 2011, the Deputy Secretary to the FIFA Disciplinary Committee acknowledged receipt of RFEF's correspondence of 19 October 2011. By this letter FIFA also invited the RFEF to *"present us your position in the context of the Spanish legislation regarding the executions of decisions taken by the FIFA Disciplinary Committee against clubs that are under "administración concursal", and any other information which you can find useful in this respect"*. A copy of this letter was also sent to Shakhtar Donetsk.

On 17 January 2012, the RFEF submitted its answer to the Deputy Secretary to the FIFA Disciplinary Committee's request of 18 November 2011. The substance of RFEF's answer is set out below:

"(…). As FIFA is aware, the application of Spanish insolvency legislation, specifically Act 22/2003, in our sport establishes a number of particular features in respect of the claims arrangements of football clubs.

Furthermore, in most cases, and Real Zaragoza SAD is no exception, the [RFEF] *receives specific instructions from the Commercial Courts before which the insolvency proceedings are conducted to abstain from adopting any measures or imposing sanctions as a result of the non-payment of amounts owed, including those derived from the application of the regulations of the international organisations of which the RFEF is a member.*

Specifically, in a ruling of 22 July 2011 (attached as Annexe 1), [the Zaragoza Commercial Court] *established the following:*

"… orders the [RFEF] and the Professional Football League to abstain from adopting any decision or imposing or implementing any sanction against Real Zaragoza SAD as a result of non-payment to the players of the amounts that may be owing (…) abstain from adopting any new decision or imposing or implementing any sanction or any kind arising from its internal regulations or the regulations of those bodies of which it is a member, including FIFA, as a result of the insolvency debts that this sporting body may have towards its players, other clubs or sports companies or its training staff (…) all in compliance with article 43.1 of the Insolvency Act with respect to the conservation and management of the assets of the insolvent as well as the continuation of its activity as per article 44 of the same act".

Notwithstanding the foregoing, which in our view might not undermine the application of the FIFA regulations to the RFEF, at least in terms of the private relations between both organisations, it is standard practice for the FIFA Disciplinary Committee to close and archive the disciplinary files in respect of insolvent Spanish clubs and to invite the creditor clubs to contact the [RFEF] for directions and to preserve their right within the insolvency procedure itself.

(…)

On the basis of the above, the [RFEF] believes, with all due respect, that when taking a final decision on this case, the FIFA Disciplinary Committee should take account of the applicable legal framework as well as the continued and reiterated conduct of the FIFA bodies themselves in cases that are substantially the same as this one".

On 24 February 2012, the Deputy Secretary to the Disciplinary Committee issued a letter (hereinafter: the "Appealed Decision") to Shakhtar Donetsk, the Football Federation of Ukraine, the RFEF and the Player, determining the following about the present matter:

"(…). Regarding [Real Zaragoza], FIFA requested on 27 September 2011 the deduction of points decided by the FIFA Disciplinary Committee and confirmed by the Court of Arbitration for Sport on 29 June 2011.

[Real Zaragoza] initiated insolvency proceedings and in the context of these proceedings, the [Zaragoza Commercial Court] ordered the [RFEF] to abstain itself to execute any decision of FIFA, CAS or to take any sanction against [Real Zaragoza] in respect of the specific case of the debt with [Shakhtar Donetsk].

Upon request of the secretariat to the Disciplinary Committee, the [RFEF] replied on 17 January 2012 and confirmed that the [Zaragoza Commercial Court] ordered the [RFEF] to abstain itself to execute any decision of FIFA, CAS or to take any sanction against [Real Zaragoza] as a consequence of outstanding amounts.

Taking into account all the above mentioned circumstances and in view of the legal situation of [Real Zaragoza], we are not in a position to request to the [RFEF] to execute the [FIFA Disciplinary Committee Decision] against [Real Zaragoza] and we declare the present proceedings, in respect to [Real Zaragoza], closed.

Finally, for the sake of good order, we kindly invite [Shakhtar Donetsk] to contact the [RFEF] so as to receive indication with regard to the competent authorities to address in Spain in order to have its rights preserved".

On 15 March 2012, Shakhtar Donetsk filed a statement of appeal with the CAS. On 26 March 2012, the Appellant filed its appeal brief, challenging the "decision" taken by FIFA on 24 February 2012.

On 27 March 2012, Real Zaragoza filed a request for intervention in the context of the present proceedings.

On 28 March 2012, the CAS Court Office, in accordance with Articles R41.3 and R41.4 of the CAS Code of Sports-Related Arbitration (hereinafter: the "CAS Code"), invited the Parties to file their positions on such request for intervention. The Parties were informed that in case a party would object such request, it would be for the Panel, once constituted, to decide on this issue.

On 3 April 2012, the Appellant objected to Real Zaragoza's request for intervention. Accordingly, the CAS Court Office informed the Parties that it would be for the Panel, once constituted, to decide on this issue.

On 30 April 2012, the First Respondent filed its answer.

On 30 May 2012, the Panel decided that Real Zaragoza should be joined as a party in these proceedings, both for legal reasons and *"because it is in the interest of all the parties and in particular of the Appellant that these proceedings advance as quickly and diligently as possible towards the Panel's resolution of the question on appeal of whether FIFA has the competence or not to entertain the claim made by the Appellant against [Real Zaragoza]"*. In reaching this conclusion, the Panel found it relevant that Real Zaragoza *"is the defending party in the claim filed by the Appellant in front of FIFA and also that the Appellant, [Real Zaragoza] and FIFA are all subject to the FIFA Regulations providing that claims of such nature shall be resolved in the last instance in arbitration proceedings in front of the CAS"*. The Panel considered that – for reasons of efficiency of this proceeding – Real Zaragoza was only authorized to file submissions limited to the question under appeal.

On 8 June 2012, Real Zaragoza submitted its position in respect of the question under appeal.

A hearing was held on 12 July 2012 in Lausanne, Switzerland.

Extracts from the legal findings

A. Admissibility

FIFA objects the admissibility of the appeal because it is of the opinion that FIFA's correspondence of 24 February 2012 was only a letter sent by the FIFA administration informing Shakhtar Donetsk that FIFA is not in a position to further proceed with the requested measure of execution due to the legal situation of Real Zaragoza. FIFA merely informed Shakhtar Donetsk of the fact that the proceedings against Real Zaragoza became baseless as the club entered into administration. Such letter cannot be considered a final decision passed by one of FIFA's legal bodies as is required by article R47 CAS Code and article 63(1) FIFA Statutes.

Article R47 CAS Code stipulates the following: *"An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sport-related body. (…)"*.

Article 63 FIFA Statutes determines that:

"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 the other internal channels have been exhausted".*

The Panel noted that the Swiss Federal Supreme Court established the following definition of a "decision": *"[T]he decision is an act of individual sovereignty to an individual, by which a relation of concrete administrative law, forming or stating a legal situation, is resolved in an obligatory and constraining manner. The effects must be directly binding both with respect to the authority as to the party who receives the decision"* (cf. ATF 101 Ia 73).

According to CAS jurisprudence, a decision is a unilateral act sent to one or more determined recipients and is intended to produce legal effects (CAS 2004/A/659, para. 10). Or in other words, *"an appealable decision of a sport association is normally a communication of the association directed to a party and based on an "animus decidendi", i.e. an intention of a body of the association to decide on the matter, being also only the mere decision on its competence (or non-competence)"* (CAS 2008/A/1633, para. 11; see also: Bernasconi M., When is a "decision" an appealable decision?, in: Rigozzi/Bernasconi (eds.), The Proceedings before the Court of Arbitration for Sport, Bern 2007, p. 273).

In addition, it is constant CAS jurisprudence that *"the form of a communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal"* (CAS 2005/A/899, para. 14; CAS 2007/A/1251, para. 4).

The Panel considered the wording used by the secretariat to the FIFA Disciplinary Committee in its letter of 24 February 2012, in particular the statement that *"[t]aking into account all the above mentioned circumstances and in view of the legal situation of [Real Zaragoza], we are not in a position to request to the [RFEF] to execute the decision taken by the FIFA Disciplinary Committee on 31 August 2010 against [Real Zaragoza] and we declare the present proceedings, in respect to [Real Zaragoza], closed".*

FIFA alleged in its submission that it was entitled to close the proceedings against Real Zaragoza on the basis of article 107(b) FIFA Disciplinary Code. As will be set out below together with the legal merits of the case, the Panel is of the opinion that FIFA has certain discretion to close proceedings if a party has entered into insolvency proceedings, but no obligation to do so. FIFA's letter of 24 February 2011 not only informed the Appellant of the consequences of the fact that Real Zaragoza was in insolvency proceedings, but was indeed a decision in light of the discretion given to it.

Hence, FIFA intended to close the disciplinary proceedings against Real Zaragoza, which were opened on the request of Shakhtar Donetsk; FIFA thereby affected the legal situation of Real Zaragoza and Shakhtar Donetsk. The correspondence of the secretariat to the FIFA Disciplinary Committee of 24 February 2011 was directly binding on FIFA, Shakhtar Donetsk and Real Zaragoza, while there were no remaining internal remedies left for Shakhtar Donetsk against such decision.

Finally, as was held by another CAS Panel in CAS 2007/A/1251 in respect of the FIFA Dispute Resolution Chamber and/or the FIFA Players' Status Committee, the Panel finds that any FIFA decision which is intended to be made on behalf of the FIFA Disciplinary Committee and which is formulated as a final decision must be deemed subject to an appeal in front of CAS. For the avoidance of doubt, this conclusion is without derogation to the question as to whether the secretariat had competence to close the proceedings on behalf of the FIFA Disciplinary Committee.

Consequently, since all the preconditions of article R47 CAS Code and article 63 FIFA Statutes have been complied with, the Panel finds that FIFA's correspondence of 24 February 2012 is a final decision susceptible to an appeal to CAS. The appeal is therefore admissible.

B. Amendment of requests for relief in Appeal Brief

FIFA alleged in its answer that Shakhtar Donetsk's requests for relief in the appeal brief vary significantly from the requests for relief in the statement of appeal. According to FIFA, pursuant to article R48.1 CAS Code, an appellant shall submit its requests for relief in the statement of appeal. The requests for relief in the appeal brief, insofar as they vary from the requests for relief in the statement of appeal, should therefore be disregarded.

During the hearing, the Appellant referred the Panel to article R56 of the CAS Code and contended that the wording of such provision speaks for itself.

The Panel noted that indeed article R48.1 CAS Code determines that an appellant shall file its requests for relief in the statement of appeal and considered the wording of article R56 CAS Code.

The Panel is of the opinion that since article R56 CAS Code determines that parties are not authorized to amend their requests **after** the submission of the

appeal brief, this implies that parties are authorized to amend their requests for relief in the appeal brief.

The Panel feels itself comforted by and adheres to a previous CAS Award, where the Panel held that:

"The Panel observes that the CAS Code does not prohibit the amendment in the appeal brief of the relief requested in the statement of appeal. Such a significant procedural limitation could be enforced only if it had been expressly foreseen by the CAS Code as it is the case, for instance, with regard to the submission of new arguments which are explicitly not allowed after the filing of the appeal brief and of the answer, except when agreed to by all parties (see article R56 of the CAS Code). Amendments to the original claims are very common in international arbitrations, as long as they are submitted within the time limit provided by the applicable regulations (see for instance articles 18 ff of the ICC Rules of Arbitration). Likewise, article R51 of the CAS Code allows the specification in the appeal brief of requests for evidentiary measures not contemplated in the statement of appeal" (CAS 2007/A/1434-1435, para. 79).

The Panel furthermore noted that based on article R56 of the 2012 CAS Code this is even more so if this provision is compared to article R56 of the 2004 CAS Code which was applied in the above CAS Award. The provision in the 2012 CAS Code specifically determines that the amendment of requests is not authorized after the submission of the appeal brief, thereby leaving open the possibility to do so in the appeal brief, whereas the provision in the 2004 CAS Code does not specifically refer to amendment of requests.

Consequently, the Panel finds that the Appellant is not prevented by the CAS Code from amending its requests in the appeal brief and will accordingly consider the requests for relief as specified in the appeal brief.

C. Is the FIFA Disciplinary Committee in general entitled to declare disciplinary proceedings closed if a party enters into voluntary insolvency proceedings?

The Panel notes that article 64(1) FIFA Disciplinary Code determines that sanctions will be imposed on: *"Anyone who fails to pay another person (such as a player, a coach or a club) or FIFA a sum of money in full or part, even though instructed to do so by a body, a committee or an instance of FIFA or a subsequent CAS appeal decision (financial decision), or anyone who fails to comply with another decision (non- financial decision) passed by a body, a committee or an instance of FIFA, or by CAS (subsequent appeal decision)".*

Article 107(b) FIFA Disciplinary Code reads as follows:

"Proceedings may be closed if:

a) the parties reach an agreement;
b) a party declares bankruptcy;
c) they become baseless".

The Panel adheres to the position of FIFA that article 107(b) is to be considered as an exception to the general application of article 64 FIFA Disciplinary Code. Based on article 107(b) FIFA Disciplinary Code, the FIFA Disciplinary Committee is in general entitled to close proceedings before it, if one of the involved parties enters into insolvency proceedings.

In this respect, orders of national courts can be relevant for FIFA in order to determine the exact status of an alleged insolvent club. The Panel therefore finds the position of Shakhtar Donetsk incorrect insofar as it contends that national orders/ judgments cannot be taken into account by the FIFA Disciplinary Committee in deciding to close proceedings.

The Panel finds the jurisprudence cited by the Appellant not relevant as the present matter concerns disciplinary measures, whereas the cited decision concerned selection criteria to participate in a competition. As observed by FIFA, contrary to insolvency proceedings, selection criteria are solely regulated in the regulations of a sports governing body and are fully independent from any national legal system.

Although the Panel thus finds that FIFA is in general entitled to close disciplinary proceedings if a club is involved in insolvency proceedings, the Panel finds that the word "may" in article 107(b) FIFA Disciplinary Code, implies that the FIFA Disciplinary Committee has a discretion to close proceedings, but no obligation to do so. If this were the intention of FIFA by adopting article 107(b) in the FIFA Disciplinary Code, the wording of such provision would have to have been formulated in more restrictive terms. The fact that a party has been declared subject to insolvency proceedings by a national court does therefore not necessarily imply that proceedings must be closed. Accordingly, other factors must also be taken into account in deciding whether or not to close the proceedings.

The Panel finds that it is indeed important, as maintained by FIFA, to have a consistent approach towards parties involved in insolvency proceedings and that similar situations have to be treated equally. However, because article 107(b) FIFA Disciplinary

Code leaves a discretion to the FIFA Disciplinary Committee, the particular circumstances of a case have to be taken into account in deciding whether or not to close the proceedings in a particular case. Similar cases have to be treated similar, but dissimilar cases could be treated differently.

In light of the above, the Panel will proceed to resolve whether the FIFA Disciplinary Committee was entitled to close the proceedings against Real Zaragoza on a definitive basis under the circumstances of this specific case and whether it had the obligation to order the RFEF to deduct six points from Real Zaragoza's first team.

D. Was the FIFA Disciplinary Committee in this specific case entitled to declare the disciplinary proceedings against Real Zaragoza closed?

Before answering this question, the Panel finds it important to clearly separate the proceedings before the "sporting authorities" (FIFA DRC, FIFA Disciplinary Committee and CAS) from the proceedings before the "national authority" (Zaragoza Commercial Court).

1. The status of the FIFA disciplinary proceedings against Real Zaragoza before the proceedings were closed by letter of 24 February 2012

On 31 August 2010, the FIFA Disciplinary Committee rendered its decision (the FIFA Disciplinary Committee Decision) regarding Real Zaragoza's alleged *"failure to comply with a decision passed by a FIFA body or CAS (Art. 64 of the FIFA Disciplinary Code)"* and held, *inter alia*, that Real Zaragoza was *"pronounced guilty of failing to comply with a decision of CAS in accordance with art. 64 of the FDC"* and that if the payment was not made within a period of 90 days *"Shakhtar Donetsk may demand in writing from FIFA that (…) six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship. Once Shakhtar Donetsk has filed [this request] (…) the points will be deducted automatically from the first team of [Real Zaragoza] without further formal decisions having to be taken by the FIFA Disciplinary Committee. (…) The order to implement the points deduction will be issued on the association concerned by the secretariat to the FIFA Disciplinary Committee"*.

On 29 June 2011, CAS confirmed the FIFA Disciplinary Committee Decision in appeal (the 2011 CAS Award).

The Panel noted that no appeal was filed with the Swiss Federal Supreme Court by Real Zaragoza against the 2011 CAS Award, the FIFA Disciplinary Committee Decision therefore became final and binding in respect of Real Zaragoza.

By virtue of the FIFA Disciplinary Committee Decision, Real Zaragoza was granted a period of grace of 90 days to pay the due amounts. Because all involved parties appealed the FIFA Disciplinary Committee Decision with CAS, this period of 90 days was suspended during the proceedings before CAS. Consequently, the period of 90 days granted to Real Zaragoza in the FIFA Disciplinary Committee Decision only commenced on the date the 2011 CAS Award was rendered, *i.e.* 29 June 2011.

On 27 September 2011 (after Shakhtar Donetsk assumed the period of grace of 90 days had elapsed), the secretariat to the FIFA Disciplinary Committee, following a request of Shakhtar Donetsk, asked the RFEF to execute the FIFA Disciplinary Committee Decision and to send proof that the six points had been deducted from Real Zaragoza's first team.

2. The status of the decisions rendered by the Zaragoza Commercial Court

2.1 The suspensive effect of the Zaragoza Commercial Court decisions in respect of the deduction of six points of Real Zaragoza's first team

On 13 June 2011, the Zaragoza Commercial Court declared Real Zaragoza to be in voluntary insolvency proceedings. In §20 of the operative part of the decision it is determined that *"if any sanction of any kind derived from internal regulations or the regulations of the bodies of which the insolvent is a member is imposed, this will be notified to this court for appropriate action"*.

The Panel finds that the wording of this first decision of the Zaragoza Commercial Court does not strictly forbid the RFEF to impose sanctions on Real Zaragoza; it merely orders that if a sanction is imposed on Real Zaragoza this must be notified to the Zaragoza Commercial Court. This decision does therefore not prevent the RFEF to impose sanctions on Real Zaragoza during or after the insolvency proceedings.

The second decision of the Zaragoza Commercial Court dated 7 July 2011 ordered the RFEF *"to abstain from enforcing any sanction derived from possible non-payment of sums by [Real Zaragoza] to [Shakhtar Donetsk] or in general, as a consequence of the [FIFA Disciplinary Committee Decision] or the [2011 CAS Award] or any other ruling implementing or fulfilling any of the above, so that in future, and until [Real Zaragoza's] insolvency proceedings have concluded, it abstains from adopting any decision or*

imposing or enforcing any sanction of any kind derived from its internal regulations or the regulations of the bodies of which it is a member, including FIFA, in respect of the insolvent or its players as a consequence of the insolvency debt of this sporting body towards its players".

The Panel understands that when confronted with this decision of the Zaragoza Commercial Court, the RFEF was in some kind of dilemma. On the one side FIFA ordered the RFEF to deduct six points of Real Zaragoza's first team; however, on the other side the Zaragoza Commercial Court ordered the RFEF not to impose any sanction.

On 19 October 2011, the RFEF informed the secretariat to the FIFA Disciplinary Committee of the instructions received from the Zaragoza Commercial Court and that it was prevented from imposing any sanction on Real Zaragoza. The RFEF was thus apparently of the opinion that the order of the Zaragoza Commercial Court was to prevail over the instructions from FIFA. FIFA accepted this point of view and closed the proceedings on 24 February 2012.

The dispute between the Parties thus narrows down to the question whether FIFA, for the reasons set out above, was right in closing the proceedings on a permanent basis in the given circumstances and not to order the RFEF to deduct six points of Real Zaragoza's first team.

The Panel is of the opinion that based on the exact wording of the decision of the Zaragoza Commercial Court, the RFEF is ordered to abstain from imposing any sanction *"(…) until* [Real Zaragoza's] *insolvency proceedings have concluded (…)".* Thus, the ruling does not order the RFEF to abstain from imposing any sanction permanently; the order is limited in time. In other words, the decision of the Zaragoza Commercial Court is without prejudice to the enforceability of disciplinary measures after the insolvency proceedings have concluded.

The Panel finds that based on the second decision of the Zaragoza Commercial Court, the RFEF was at that moment not in a position to deduct six points from Real Zaragoza's first team as was ordered by FIFA. Accordingly, FIFA was correct in not insisting on the deduction of the six points from Real Zaragoza's first team, as this would indeed violate the mandatory order of the Zaragoza Commercial Court that in the present case prevails over the FIFA Disciplinary Committee Decision. However, the order of the Zaragoza Commercial Court did not prevent the RFEF from imposing any disciplinary measures on Real Zaragoza once the insolvency proceedings are concluded and it is therefore to be examined whether FIFA was right in closing the proceedings on a permanent basis when in reality the enforcement of the FIFA Disciplinary Committee Decision was only temporarily impossible for the RFEF.

The Panel noted that the FIFA Disciplinary Committee Decision became final and binding and that it was determined in such decision that *"the points will be deducted automatically from the first team of [Real Zaragoza] without further formal decisions having to be taken by the FIFA Disciplinary Committee".*

Based on this final and binding FIFA Disciplinary Committee Decision, no discretion was left to FIFA to deduct six points or not, the decision merely summoned FIFA to order the RFEF to deduct six points once two conditions were fulfilled; (1) when Shakhtar Donetsk makes such demand in writing (which it did); and (2) when Real Zaragoza did not pay within a period of grace of 90 days (which will be assessed below).

Assuming both conditions are fulfilled, the six points would normally have to be deducted. However, the temporary inability of the RFEF to impose such sanction based on the decisions of the Zaragoza Commercial Court prevents the enforcement of the FIFA Disciplinary Decision. As this is without derogation to the possible imposition of the disciplinary measures after the insolvency proceedings of Real Zaragoza have concluded, the Panel finds that the FIFA Disciplinary Committee was not in a position to permanently close the proceedings against Real Zaragoza in these specific circumstances.

As set out above, in applying article 107(b) FIFA Disciplinary Code, all circumstances of the case have to be taken into account in deciding to close the proceedings or not. The fact that FIFA apparently issued a similar letter as the Appealed Decision in respect of an alleged similar case, neither excludes the possibility that the facts of that case might have been different, nor was the Panel provided with the facts of that case.

Consequently, the Panel concludes that even if the period of grace of 90 days would have elapsed and the disciplinary measures stipulated in the FIFA Disciplinary Committee Decision should normally have been imposed, because of the voluntary insolvency of Real Zaragoza, these measures could not be enforced as long as Real Zaragoza was under voluntary insolvency proceedings. The Appellant's request to order FIFA *"to honour the request of the*

Appellant dated 27 September 2011 for the deduction of points from Real Zaragoza" must therefore be dismissed as no points could be deducted or other disciplinary measures could be taken by the RFEF at that time.

Subsequently, also the Appellant's requests for relief insofar as the Panel is requested to order FIFA to impose disciplinary measures on the RFEF must be dismissed. Not only because of the reason mentioned above but also because the RFEF is not a party to these proceedings before CAS.

Finally, since the Panel decided that FIFA could not permanently close the disciplinary proceedings against Real Zaragoza in the given circumstances, the Appealed Decision shall be overturned. The Appellant's arguments in respect of the competence of the secretariat to the FIFA Disciplinary Committee as opposed to the FIFA Disciplinary Committee itself to close proceedings no longer needs to be resolved by this Panel.

However, as mentioned above, one of the criteria for deduction of six points from Real Zaragoza's first team is the passing of the period of grace of 90 days. Whether such period had indeed elapsed will be assessed in the following paragraph.

2.2 The suspensive effect of the Zaragoza Commercial Court decisions in respect of the period of grace of 90 days

On 13 June 2011, before the 2011 CAS Award was rendered (29 June 2011) and before FIFA ordered the RFEF to deduct six points from Real Zaragoza's first team (27 September 2011), the Zaragoza Commercial Court declared Real Zaragoza to be in voluntary insolvency proceedings.

On 16 June 2011, during the course of the proceedings leading to the 2011 CAS Award, Real Zaragoza informed CAS that Real Zaragoza was declared to be in insolvency proceedings by the Zaragoza Commercial Court. These documents, that were filed after the hearing in the CAS proceedings had already taken place (26 April 2011), were not admitted to the file since the requirements for filing new exhibits after the submission of the appeal brief and of the answer of article R56 CAS Code, were not met. These documents were therefore not taken into account in the 2011 CAS Award.

On 29 June 2011, the CAS rendered the 2011 CAS Award, confirming the FIFA Disciplinary Committee Decision. The 90 days period of grace for Real Zaragoza to pay the due amounts to Shakhtar Donetsk would therefore normally commence from this date as the period of grace was suspended pending determination of the proceedings.

Since Real Zaragoza entered into insolvency proceedings and because Real Zaragoza's debt towards Shakhtar Donetsk dates from before the declaration of insolvency, the debt was integrated into the insolvent club's liabilities. From the moment Real Zaragoza entered in insolvency proceedings, it was no longer in a position to fully comply with the FIFA Disciplinary Committee Decision and to pay the due amounts within the period of 90 days granted to it in such decision. In voluntary insolvency proceedings, as correctly mentioned in FIFA's and Real Zaragoza's submissions, a "company" cannot pay without the authorization of an administrator nominated by the court. In the opinion of the Panel, the period of grace of 90 days for Real Zaragoza to pay the due amounts was therefore suspended from the moment it entered into voluntary insolvency proceedings, *i.e.* before the period of grace of 90 days even commenced.

On 27 September 2011, although FIFA was aware that Real Zaragoza was involved in insolvency proceedings (Real Zaragoza's correspondence of 16 June 2011 was also forwarded to FIFA, a fact that was confirmed in FIFA's submission in the present proceedings), FIFA found itself obliged by the 2011 CAS Award to proceed with the deduction of six points from Real Zaragoza's first team.

In doing so, FIFA did however not take into account the fact that Real Zaragoza was prevented by the Zaragoza Commercial Court to pay the amounts due because of the insolvency proceedings. As determined above, during insolvency proceedings a "company" is not in charge of its own finances. Since Real Zaragoza was not in a position to pay the amounts due, the period of grace of 90 days should therefore have been considered as suspended until Real Zaragoza's insolvency proceedings were concluded.

Although not directly disputed by the Parties, in the opinion of the Panel, FIFA erred in neglecting the insolvency proceedings of Real Zaragoza by requesting the RFEF on 27 September 2011 to execute the FIFA Disciplinary Decision and to send proof that the six points have been deducted from Real Zaragoza's first team, while being aware that Real Zaragoza was involved in voluntary insolvency proceedings.

It appears from the facts of the case that the second decision of the Zaragoza Commercial Court dated 7 July 2011 was only notified to FIFA by the RFEF on 19 October 2011. This decision could therefore not have been taken into account by the secretariat

to the FIFA Disciplinary Committee in its request of 27 September 2011 to the RFEF. It was however this second decision of the Zaragoza Commercial Court that finally led the secretariat to the FIFA Disciplinary Committee to close the proceedings.

In the opinion of the Panel, this second decision of the Zaragoza Commercial Court does not influence the fact that Real Zaragoza was involved in insolvency proceedings and that the period of grace of 90 days to pay the due amounts was to be regarded as suspended from the day Real Zaragoza entered into insolvency proceedings.

Consequently, since the period of grace for Real Zaragoza to pay the due amounts was to be regarded as suspended, Shakhtar Donetsk was not yet entitled to *"demand in writing from FIFA that (…) six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship"*. Subsequently, the secretariat to the FIFA Disciplinary Committee should not have requested the RFEF to deduct six points from Real Zaragoza's team.

As a supplementary request for relief, the Appellant requests the Panel to decide that the secretariat to the FIFA Disciplinary Committee should not have closed the proceedings against Real Zaragoza, but that it should have suspended the proceedings and is obliged to continue the proceedings once the voluntary insolvency proceedings of Real Zaragoza have concluded. The Panel will therefore continue to adjudicate this remaining issue below.

E. Should the FIFA Disciplinary Committee have suspended the disciplinary proceedings against Real Zaragoza?

As concluded above, the Panel is not in a position to order FIFA to request the RFEF to deduct six points from Real Zaragoza's first team as requested by Shakhtar Donetsk and the Panel has decided that FIFA was wrong in closing the disciplinary proceedings against Real Zaragoza on a permanent basis.

The Panel finds that the principles applicable in insolvency proceedings would not be harmed had FIFA suspended the enforcement of the FIFA Disciplinary Committee Decision until the insolvency proceedings had concluded. The allegation of FIFA that it is of the utmost importance to avoid contradictory decisions and that therefore the disciplinary proceedings should be closed is not upheld. Since the proceedings were to be suspended, there was no risk of contradictory decisions during this period.

Real Zaragoza's argument that in case the Panel decided to order FIFA to proceed with the disciplinary proceedings against Real Zaragoza, such decision would not be enforceable based on the bilateral International Treaty between Spain and Switzerland or the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter: the "New York Convention"), does not hold. The Panel does not order FIFA to proceed with the enforcement of disciplinary measures in contradiction with the decisions of the Zaragoza Commercial Court, but orders FIFA to continue the disciplinary proceedings once the insolvency proceedings of Real Zaragoza have terminated. The Panel does not see why such decision would not be enforceable under the bilateral International Treaty between Spain and Switzerland or the New York Convention and neither does Real Zaragoza contend why this would be the case. In any event, this is not a matter to be adjudicated by this Panel.

Further the Panel is of the view that FIFA's argument that it cannot enforce disciplinary measures if the proceedings became baseless does not hold. The 2011 CAS Award made the FIFA Disciplinary Committee Decision final and binding and pursuant to that decision FIFA has no further discretion to decide whether or not to order the RFEF to deduct the six points from Real Zaragoza's first team once the two factual conditions for such disciplinary measure are complied with.

This does not mean that FIFA should automatically order the RFEF to deduct six points from Real Zaragoza's first team once the insolvency proceedings of Real Zaragoza have terminated. Instead, it means that the enforcement of the FIFA Disciplinary Committee Decision remains suspended until the insolvency proceedings of Real Zaragoza have been concluded and that such decision revives thereafter. Thus, the deduction of six points should only follow automatically *"without further formal decisions having to be taken by the FIFA Disciplinary Committee"* if the full amounts pronounced in the 2009 CAS Award due to Shakhtar Donetsk have not been paid within the final period of grace of 90 days, which period commences the day after the insolvency proceedings of Real Zaragoza have concluded.

Real Zaragoza submitted in its answer that on 9 May 2012 a settlement agreement was concluded with its creditors. A necessary majority of 53,33% of the creditors agreed with the settlement and accordingly the Zaragoza Commercial Court ratified such creditors' agreement. The judge of the Zaragoza Commercial Court ruled *"[t]hat I had to agree and therefore I agree to APPROVE the Agreement Proposal*

submitted by the insolvent [Real Zaragoza] which content is considered as reproduced [sic: ratified], *suspending all effects of the Insolvency decree, without prejudice of the general obligations established for the debtor in Art. 42. It is considered finished the common stage of the Insolvency".*

The Panel understands that all the suspensive effects of the insolvency proceedings are therefore lifted by the decision of the Zaragoza Commercial Court dated 9 May 2012 and that the 90 day period of grace commenced on that day.

Whether the deduction of six points from Real Zaragoza's first team or the other possible sanctions set out in the FIFA Disciplinary Committee Decision are finally to be imposed on Real Zaragoza are mere factual observations which cannot be adjudicated at the present stage by this Panel. As determined in the FIFA Disciplinary Committee Decision, *"[i]f payment is not made by this deadline. Shakhtar Donetsk may demand in writing from FIFA that (…) six (6) points be deducted from the first team of [Real Zaragoza] in the domestic championship".*

F. Conclusion

Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

1. The secretariat to the FIFA Disciplinary Committee was not entitled to declare the disciplinary proceedings against Real Zaragoza closed.

2. The secretariat to the FIFA Disciplinary Committee should have suspended the disciplinary proceedings against Real Zaragoza until the insolvency proceedings of Real Zaragoza concluded.

Arbitration CAS 2012/A/2773
International Association of Athletics Federations (IAAF) v. Hellenic Amateur Athletic Association (SEGAS) and Irini Kokkinariou
30 November 2012

Athletics (3000m steeplechase); Doping; Blood manipulation detected through the Athlete's Biological Passport (ABP); Aggravating circumstances; Range of penalties under aggravating substances; Standard of proof applicable to aggravating circumstances

Panel:
Mr. Romano Subiotto QC (Belgium and United Kingdom), Sole arbitrator

Relevant facts

The International Association of Athletics Federations ("IAAF"), the Appellant, is the international governing body for track and field athletes. The membership of the IAAF primarily comprises national and regional athletics federations (the "Members"). It has its headquarters in Monaco.

The Hellenic Amateur Athletic Association ("SEGAS") is the national governing body for the sport of athletics in Greece. SEGAS has its registered seat in Athens and is a member of the IAAF.

Ms. Irini Kokkinariou is an International-Level Athlete under the rules of the IAAF specializing in the 3000m steeplechase event. The IAAF, SEGAS, and Ms. Kokkinariou are collectively referred to as the "Parties".

Athletes who compete in any tournament organized by the IAAF or by one of its Member federations ("Athletes") must adhere to the IAAF Competition Rules (the "IAAF Rules"). As a member of the World Anti-Doping Agency ("WADA"), the IAAF is required to incorporate into its regulations the World Anti-Doping Code ("WADA Code"). The IAAF Rules represent the IAAF's implementation of the WADA Code. The IAAF Rules provide for the IAAF Medical and Anti-Doping Commission (the "IAAF Anti-Doping Commission"), which has the responsibility of supplementing the IAAF Rules through issuing regulations to be amended annually (the "IAAF Anti-Doping Regulations").

Under the IAAF Rule 32, an Athlete must ensure that any substance prohibited by WADA ("Prohibited Substance") does not enter her system. Similarly, an Athlete must not engage in a practice disallowed by WADA ("Prohibited Method"). IAAF Rule 32(b) provides:

"Athletes or other Persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included on the Prohibited List. The following constitute anti-doping rule violations:

(b) Use or Attempted Use by an Athlete of a Prohibited Substance or a Prohibited Method.

(i) it is each Athlete's personal duty to ensure that no Prohibited Substance enters his body. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an antidoping rule violation for Use of a Prohibited Substance or a Prohibited Method.

(ii) the success or failure of the Use or Attempted Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used, or Attempted to be Used, for an antidoping rule violation to be committed."

WADA publishes a list of Prohibited Substances and Prohibited Methods on a yearly basis. IAAF Rule 35 provides that all Athletes must submit to in-competition testing and out-of-competition testing at any time or any place by either the IAAF itself or the relevant Member (depending on the competition).

An Athlete who is found to have violated IAAF Rule 32 shall be ineligible to compete in any IAAF or Member competition for a period of two years ("Ineligibility Period"). Additionally, pursuant to IAAF Rule 40.8, all competitive results obtained from the date the positive sample was collected shall be disqualified. Under Rule 40, the Ineligibility Period can be increased (up to a maximum of a lifetime ban) if there were aggravated circumstances in the context

of the violation (described below), or if the Athlete was previously found to have violated the IAAF Rules. Conversely, if the Athlete can demonstrate, for example, that she violated IAAF Rule 32 through no fault or negligence, or no significant fault or negligence, the period of ineligibility can be eliminated or reduced respectively.

This appeal primarily concerns IAAF Rule 40.6, which provides that where aggravating circumstances surrounded the violation in question, the Ineligibility Period may be increased from two years to four years. It should be noted that an Athlete can avoid the application of this rule by admitting the anti-doping rule violation as asserted promptly after being confronted. IAAF Rule 40.6 provides:

"If it is established in an individual case involving an anti-doping rule violation other than violations under Rule 32.2(g) (Trafficking or Attempted Trafficking) and Rule 32.2(h) (Administration or Attempted Administration) that aggravating circumstances are present which justify the imposition of a period of Ineligibility greater than the standard sanction, then the period of Ineligibility otherwise applicable shall be increased up to a maximum of four (4) years unless the Athlete or other Person can prove to the comfortable satisfaction of the hearing panel that he did not knowingly commit the anti-doping rule violation.

(a) Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions; a normal individual would be likely to enjoy performance-enhancing effects of the antidoping rule violation(s) beyond the otherwise applicable period of Ineligibility; the Athlete or other Person engaged in deceptive or obstructing conduct to avoid the detection or adjudication of an anti-doping rule violation. For the avoidance of doubt, the examples of aggravating circumstances referred to above are not exclusive and other aggravating factors may also justify the imposition of a longer period of Ineligibility.

(b) An Athlete or other Person can avoid the application of this Rule by admitting the anti-doping rule violation as asserted promptly after being confronted with the anti-doping rule violation (which means no later than the date of the deadline given to provide a written explanation in accordance with Rule 37.4(c) and, in all events, before the Athlete competes again)".

Prohibited Substances and Methods can be detected directly (*i.e.*, the chemical signature of a substance is isolated in a sample) or indirectly through analysis of the effects (or "biomarkers") that they have on the body. Detection of biomarkers of Prohibited Substances or Prohibited Methods involves the development of longitudinal biological profiles for Athletes. In this way, an Athlete's normal biological parameters can be estimated and used to isolate abnormalities. These profiles are referred to as Athlete Biological Profiles ("ABPs").

In the period from 2006 to 2009, Ms. Kokkinariou was subject to blood testing by the IAAF on four occasions for the measurement of hematological parameters. All samples were collected and analyzed in accordance with the IAAF Blood Testing Protocol in force at the relevant time.

In mid-2009, the IAAF started its official ABP program and, based on Ms. Kokkinariou's previous blood results on file, the IAAF elected to add her to the Registered Testing Pool for inclusion in the IAAF's ABP program. In the period from July 2009 to August 2011, Ms. Kokkinariou was subject to blood testing on a further nine occasions. These nine samples comprise Ms. Kokkinariou's official ABP. However, the IAAF includes hematological parameters measured from the four samples taken between 2006 and 2009 as evidence for this appeal.

On August 23, 2011, the IAAF initiated an investigation into a potential anti-doping rule violation by Ms. Kokkinariou after her ABP, through application of the Adaptive Model, was identified as abnormal with a probability of more than 99%.

In accordance with the IAAF Anti-Doping Regulations, Ms. Kokkinariou's blood profile was submitted to an Expert Panel for review.

Upon reviewing Ms. Kokkinariou's ABP, the three Experts unanimously concluded that, in the absence of a satisfactory explanation, it was highly likely that she had used a Prohibited Substance or a Prohibited Method.

Ms. Kokkinariou provided the IAAF with an explanation on September 23, 2011 in which she explained that the abnormal values and variations observed in her profile could be due to a combination of extreme fatigue, health problems, the use of a hypoxic device, training at altitude, as well possible analytical problems with some of the blood samples on her ABP.

Ms. Kokkinariou's explanation was submitted to the Expert Panel. After reviewing Ms. Kokkinariou's explanation, the Experts remained of the unanimous opinion that there was no reasonable explanation for Ms. Kokkinariou's blood profile other than the use of a Prohibited Substance or a Prohibited Method. Ms. Kokkinariou's explanation was therefore rejected and she was provisionally suspended by the IAAF pending the outcome of her disciplinary case on October 27, 2011.

Ms. Kokkinariou was notified (through the SEGAS) of her provisional suspension and further of her right to request a hearing. In its letter to the SEGAS of October 27, 2011, the IAAF also expressly indicated that, in light of the evidence on file suggesting the repeated use of a Prohibited Substance or Prohibited Method, it considered that there were aggravated circumstances in Ms. Kokkinariou's case and that a 4-year sanction should be applied in accordance with IAAF Rule 40.6.

The SEGAS confirmed to the IAAF by e-mail dated November 7, 2011 that Ms. Kokkanariou had been advised of the IAAF charge, including "*that a 4 year sanction will be sought against her (unless she admits the violation and accepts a two-year sanction).*" Ms. Kokkanariou declined the opportunity to avoid the possibility of a 4-year sanction by failing to admit to her violation in a timely manner in accordance with IAAF Rule 40.6(b). Ms. Kokkinariou denied the IAAF charge and sought a hearing before the relevant SEGAS tribunal.

Ms. Kokkinariou's hearing was subsequently held on December 15, 2011 before the SEGAS Disciplinary Committee and, in its decision (the "SEGAS Decision") of January 20, 2012, the SEGAS Disciplinary Committee found Ms. Kokkinariou guilty of an anti-doping rule violation under IAAF Rule 32.2(b) and imposed a 2-year sanction on her in accordance with IAAF Rule 40.2. Following receipt of the Decision, the IAAF informed Ms. Kokkinariou's legal advisor on February 14, 2012, that any appeal by Ms. Kokkinariou against the SEGAS Decision should be filed with the CAS in accordance with IAAF Rule 42. No such appeal to the CAS was filed.

On April 16, 2012, the IAAF filed its Statement of Appeal with respect to the Decision.

On April 27, 2012, the SEGAS informed the CAS that it would not be present to support the decision in front of the CAS and would leave the case at the disposal of the IAAF and the CAS.

On May 2, 2012, the IAAF submitted its Appeal Brief to the CAS.

On June 11, 2012, the CAS informed the Parties that as the SEGAS informed the CAS it had no objection to the appointment of a Sole Arbitrator, and as Ms. Kokkinariou had not lodged an objection within the time limit set by the CAS, the Division President or his Deputy could now determine the number of arbitrators pursuant to Article R53 of the CAS Code.

On July 11, 2012, the CAS informed the Parties that neither the SEGAS nor Ms. Kokkinariou had filed an Answer within the time limit prescribed in Article R55 of the CAS Code, and that the Panel/Sole Arbitrator could nevertheless proceed with the arbitration and deliver an award. Furthermore, in accordance with Article R56 of the CAS Code, unless the Parties agreed otherwise or the Division President ordered otherwise on the basis of exceptional circumstances, the Parties were not authorized to supplement or amend their requests or the argument, nor to produce new exhibits, nor to specify further evidence on which they would intend to rely after the submission of the Appeal Brief and of the Answer.

On July 11, 2012, the IAAF informed the CAS of its preference for the appeal to be decided on the basis of written submissions only.

On July 30, the Parties were informed that Romano Subiotto QC, Solicitor-Advocate, Brussels, Belgium, and London, United Kingdom, had been appointed Sole Arbitrator. Attached to this letter was the Notice of Formation of a Panel and a copy of the Sole Arbitrator's Statement of Independence.

Extracts from the legal findings

This appeal calls for an examination of two questions: (1) whether IAAF Rule 40.6 covers blood manipulation as detected through analysis of ABPs; and (2) whether Ms. Kokkinariou did in fact repeatedly engage in blood doping.

A. The Scope of IAAF Rule 40.6

The full text of IAAF Rule 40.6 is provided above and contains the same wording as Rule 10.6 of the WADA Code.

IAAF Rule 40.6 (a) provides that "*Examples of aggravating circumstances which may justify the imposition of a period of Ineligibility greater than the standard sanction are: the Athlete or other Person committed the anti-doping rule violation as part of a doping plan or scheme, either individually or involving a conspiracy or common enterprise to commit anti-*

doping rule violations; the Athlete or other Person used or possessed multiple Prohibited Substances or Prohibited Methods or used or possessed a Prohibited Substance or Prohibited Method on multiple occasions" [emphasis added].

1. The Use of ABP Evidence in Relation To IAAF Rule 40.6

The SEGAS Disciplinary Committee held that the application of IAAF Rule 40.6 for multiple use of a Prohibited Substance or Prohibited Method cannot apply to an "*abnormal variance in a hematological profile*" as "*[t]he formation of the hematologic profile presupposes a long term or repeated use and in this meaning the above violation would lead in any case to the imposition of a graver penalty of up to four (4) years term, a fact that if the writer of regulation and protocol would wish to apply, should have expressly provided for.*" The SEGAS Disciplinary Committee appears to conclude that blood doping or other use of Prohibited Substances and/or Prohibited Methods cannot be amenable to IAAF Rule 40.6 when detected through analysis of an ABP, as ABPs "*presuppose a long term or repeated use.*"

The Sole Arbitrator can find no basis for the claim that "*the formation of the hematologic profile presupposes a long term or repeated use.*" ABPs may reveal doping on a single or several occasion(s) – a longitudinal hematological profile need not contain multiple irregular figures in order to be used effectively. As Mr. Niggli, states, "*[t]he Athlete passport was not mentioned expressly by name in [A]rticle 10.6 but nor was there need for it to be. The haematological module of the passport is simply a tool that allows for the extrapolation of an individual's blood data over time to assist in determining an anti-doping rule violation in the form of the use of a prohibited substance or method.*" IAAF Rule 40.6 does not contain any specific requirements on how aggravating circumstances are to be detected, and absent such requirements, it must be presumed that the IAAF's ABP progam, a system of detection detailed in the IAAF Anti-Doping Regulations and IAAF Blood Testing Protocol, can ground claims under IAAF Rule 40.6, in much the same way as it can ground claims under IAAF Rule 32.

In light of the above, the Sole Arbitrator finds that the Disciplinary Committee of SEGAS erred in its interpretation of the scope of IAAF Rule 40.6, and repeated use of rh-EPO or other ESA as detected though analysis of an ABP can qualify as "*aggravating circumstances*" under the Rule.

2. The Range of Penalties under IAAF Rule 40.6

IAAF Rule 40.6 provides that its application will result in an increase of the 2-year Ineligibility Period "*up to a maximum of four (4)*" [emphasis added]. Accordingly, IAAF Rule 40.6 allows for a range of penalties – a 4-year ineligibility period is not automatically applied wherever aggravating circumstances in the context of anti-doping violation are identified (a lesser penalty may be imposed, *e.g.* an increase to a three year suspension). It appears to be at the discretion of the IAAF or "*relevant body of the member*" what factors would justify the imposition of the maximum 4-year penalty. Neither the comments on Article 10.6 of the WADA Code (which IAAF Rule 40.6 replicates), nor the statement of Mr. Niggli regarding the scope of Article 10.6 of the WADA Code give more detail regarding considerations relevant to scale of penalty under IAAF Rule 40.6.

The IAAF does not make any specific argument in its Appeal Brief to the effect that conduct which represents more than one of the examples of aggravating circumstances listed in IAAF Rule 40.6 justifies imposition of the maximum penalty under that rule. However, as noted above, the IAAF does argue that Ms. Kokkinariou's violation of IAAF Rule 32 was committed under three of the "types" of aggravating circumstances listed in IAAF Rule 40.6, and follows this by stating that "*Ms. Kokkinariou's case is the clearest possible example of aggravating circumstances under Rule 40.6.*" It would appear that in the view of the IAAF, multiple triggering of IAAF Rule 40.6 justifies its harshest application.

The Sole Arbitrator finds it would be entirely reasonable to base imposition of a 4-year Ineligibility Period under IAAF Rule 40.6 on multiple examples of aggravating circumstances being identified in the case of an Athlete's anti-doping violation. Multiple examples of aggravating circumstances will generally correspond to the commission of a more serious offence, which warrants the imposition of a higher penalty. However, as noted above, imposition of an increased Ineligibility Period is at the discretion of the relevant body – a single example of aggravating circumstances may warrant the maximum period, while multiple examples may call only for a lesser penalty.

B. The application of IAAF Rule 40.6 to Ms. Kokkinariou's Case

The question examined in this section is, given ABP evidence can be used to ground a claim under IAAF Rule 40.6, whether Ms. Kokkinariou's ABP reveals the presence of one or more kinds of aggravating circumstances around her violation of IAAF Rule 32. The IAAF submits that Ms. Kokkinariou's actions constitute three kinds of aggravating circumstances listed in IAAF Rule 40.6: (1) use of Prohibited Substance or Prohibited Method on multiple

occasions; (2) engaging in a doping plan or scheme; and (3) engaging in deceptive or obstructing conduct to avoid detection or adjudication of an anti-doping violation. The Sole Arbitrator will examine each kind of aggravating circumstances in turn.

Ms. Kokkinariou's ABP comprises 9 blood tests taken over a period between July 2, 2009, and August 22, 2011. As explained above, Ms. Kokkinariou was also tested under the IAAF Blood Testing Protocol on four occasions between August 15, 2006, and June 19 2009. The IAAF attaches to its Appeal Brief the opinions of three hematology experts who were tasked with analyzing Ms. Kokkinariou's ABP pursuant to the IAAF Blood Testing Protocol. Three sets of opinions of the Expert Panel were submitted (1) the initial reviews of Ms. Kokkinariou's ABP; (2) the reviews of Ms. Kokkinariou's explanations of the irregular values present in her ABP; and (3) statements in relation to this appeal. These opinions represent the core evidence for the IAAF's claim that IAAF Rule 40.6 applies to Ms. Kokkinariou's case.

IAAF Rule 33.1 provides that:

"The IAAF [...] shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the IAAF [...] has established an anti-doping rule violation to the comfortable satisfaction of the relevant hearing panel, bearing in mind the seriousness of the allegation which is made".

IAAF Rule 33.2 provides that:

"Where these Anti-Doping Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping 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 Rules […] 40.6 (aggravating circumstances) where the Athlete must satisfy a higher burden of proof".

The rules do not specify this "*higher*" burden of proof, although the Sole Arbitrator considers that it is unlikely to be higher than the standard that applies to the IAAF pursuant to IAAF Rule 33.1, given that the standard of proof on athletes to rebut an allegation of an anti-doping rule violation is generally lower than that of the alleging authority. As a result, the Sole Arbitrator shall apply the standard of comfortable satisfaction on both sides.

1. Application of Article 40.6 to Ms. Kokkinariou's case for use of Prohibited Substance or Prohibited Method on Multiple Occasions

The Sole Arbitrator examined in detail the opinions of each member of the Expert Panel to determine whether Ms. Kokkinariou had used a Prohibited Substance or Prohibited Method on more than one occasion.

1.1 Initial review by the Expert Panel of Ms. Kokkinariou's ABP

On August 22, 2011, each of the Expert Panel received a request from the IAAF to review Ms. Kokkinariou's ABP coded G111JL7. On September 5, 2011, each member of the Expert Panel provided an analysis of the ABP, and each concluded that absent satisfactory explanation from Ms. Kokkinariou, the ABP was the result of the use of a prohibited substance or a prohibited method on multiple occasions.

Prof. Schumacher stated in reference to Ms. Kokkinariou's ABP that it was "*typical to have this kind of profile assuming blood manipulation with erythropoetic stimulants…[t]here is intact regulation of Hemoglobin concentration and reticulocytes, with high Hemoglobin paired with very low reticulytes on several occasions, which suggests the use and discontinuation of an eruythopoietic stimulant such as erythropoietin*" [emphasis added]. Prof. Schumacher concluded that it was "*very unlikely that any kind of disease of blood cell disorder might have caused the picture seen in this profile, as the red cell indices are within the normal range*".

Dr. d'Onofrio stated that "*Hemoglobin values are abnormally high (167 to 175 g/l) in the first three samples collected in July and August 2009, as well as in sample no 8 collected on 17-6-2011.*" Dr. d'Onofrio also noted abnormally low hemoglobin in the samples taken on November 25, 2009 (11.7 d/l), March 3, 2010 (13.4 d/l), and a striking increase in hemoglobin in the sample of June 18, 2010 (15.6 d/l), which was "*impossible to explain on the basis of physiology during the full competition season.*" Dr. d'Onofrio concluded that the "*[c]lustering of the highest hemoglobin and OFF values in a specific season is an abnormality which cannot be explained by physiology alone, and suggests the action of external factors, such as blood doping…this is very likely a case of ESA*".

Prof. Audran, in assessing the sequence of the OFF-score concluded that with a probability of the 99.9%, three values within the ABP were out of the normal range two above (the sample of July 2, 2009 and June 17 2006); and one below (the sample of November 25, 2009). Prof. Audran found that for the period of July to August 2009, Ms. Kokkinariou's ABP showed high values of hemoglobin and low RET% values which were *characteristic of a treatment with and ESA.*" Prof. Audran noted that "*blood transfusions could also be another explanation to the values, but the effect of a blood transfusion doesn't last one month.*" Prof. Audran also found that the sample of June 17, 2011 showed an

abnormally high hemoglobin value (17.2 g/dl) with a very low RET% (0.19%), which suggested treatment with ESAs (erythropoetic stimulating agent).

All three Experts concluded in their initial review that the Athlete had engaged in a Prohibited Method or used a Prohibited Substance, on at least two occasions (July- August 2009, and June 2011),

1.2 The Expert Panels' review of Ms. Kokkinariou's explanations of the irregular values present in her ABP

Ms Kokkinariou provided the IAAF with a letter on September 23, 2011 in which she explained the abnormal values and variations observed in her profile. This letter contained three main arguments to explain the large variations in hemoglobin, Reticulocytes, and OFF-score:

- Ms. Kokkinariou underwent a period of extreme tiredness and overtraining due to military training from the end of 2009 until early 2010.

- Ms. Kokkinariou was intermittently using hypoxic devices and engaging in altitude training in Kenya and Lidoriki, Greece.

- The testing equipment used for certain of the samples suffered from analytical issues.

1.2.1 Extreme fatigue and overtraining

Prof. Schumacher found that the arguments of Ms. Kokkinariou with respect to overtraining were consistent with the values in the samples of August 12, 2009, and November 25, 2009. Dr. d'Onofrio found that "*the striking inversion to a mild anemic condition in November 2009 (with decrease of 33.1% in hemoglobin) cannot simply be explained by overtraining and subjective symptoms.*" The Sole Arbitrator finds that despite possible irregularities with the samples of August 12, 2009, and November 25, 2009, Ms. Kokkinariou's explanation with respect to them is not of relevance to this appeal, as these values were not targeted by the Experts as evidencing use of a Prohibited Substance.

1.2.2 Altitude training and use of hypoxic devices

In relation to Ms. Kokkinariou's claim regarding hypoxic devices and altitude training, Prof. Schumacher explained in his review that "*the hypoxia of altitude will stimulate the erythropoietic system to increase red cell product. It is now common knowledge that at least 14-18 days of altitudes at 2500m or more are necessary to reach a measurable and (regarding performance) worthwhile increase in red cell mass (and performance) using either natural (high mountains) or artificial hypoxia (altitude facilities). Based on the available documentation, the athlete never sojourned at such altitudes in close timely connection with the blood variables in question [samples of July 2, 2009, July 9, 2009, August 12, 2009, and June 17, 2011]. On the doping control forms, the question regarding altitude is answered positively for the samples of July 9, 2009, August 12, 2009, June 18, 2010, July 26, 2010, and June 17, 2011, but unfortunately, the details are illegible. The use of any hypoxic device was negated for all samples, where a DCF was available. In contrast, the only exposures to altitudes higher documented in the whereabouts in the letter of the athlete at locations higher than 1000m are a 2 month sojourn in Kenya at the end of 2010-2011 (duration unknown, no whereabouts available for that period)…and 14 days in Lidoriki (June 1, 2010 to June 13, 2010), which is situated at altitudes between 1200m and 1800m.*" Prof. Schumacher found that Ms Kokkinariou's stay in Kenya, assuming it involved several weeks above 2400m, was consistent with the values taken on November 25, 2009, and March 3, 2010, "*but off by a large margin from the values obtained in summer prior to the major races in 2009.*" In relation to Lidoriki, Prof. Schumacher found that the altitudes at that location were "*not sufficient to trigger a hematological response of the magnitude such as that observed in the profile.*" Prof. Schumacher concluded that "*natural or artificial hypoxia cannot explain the blood values and their variation observed in the profile G111J17*".

Dr. d'Onofrio reached the same conclusions at Prof. Schumacher in relation to hypoxia, noting that "*the training period in Kenya that the Athlete describes in December 2010 and January 2011 paradoxically caused a decrease in hematocrit. Unfortunately there is no mention of that period in the whereabouts information available to me. However, hematocrit and hemoglobin were again at their top after a few months, in the summer competition period*".

1.2.3 Analytical problems with blood samples

Ms. Kokkinariou contested analytical rigor of several samples, mainly that taken on June 26, 2010. None of the experts found that any of the samples which constitute Ms. Kokkinariou's ABP were analytically faulty. Prof. Schumacher found that "*careful scrutiny of the documentation packages of the sample mainly contested by the athlete (sample of June 26, 2010) reveals no major analytical or preanalytical flaws that might have influenced the result to the disadvantage of the athlete*".

It is clear from the responses of the Experts to Ms. Kokkinariou's letter of September 23, 2011 that she did not put forward any argument which could put the initial findings of the Expert Panel into doubt. The Experts stressed that no explanation whatsoever was put forward for the "*most suspicious period, i.e. the blood tests obtained in summer 2009*". The responses

of the Experts serve to buttress their conclusions reached in the initial reviews that Ms. Kokkinariou used a prohibited substance, likely ESA, on at least two distinct occasions – summer 2009 and summer 2011.

1.3 The expert's statements in relation to this Appeal

On April 20, 2012, the IAAF sent letters to each of the Experts seeking their opinions on the following questions to serve as evidence for this appeal.

"1. Is Ms. Kokkinariou's profile for the period of 2.07.09 – 22.08.11 indicative of the repeated use of a prohibited substance or prohibited method (or a combination of both) and/or the employment of a doping scheme or plan? ("Question 1")

2. Is Ms. Kokkinariou's profile for the period of 15.09.06 – 16.09.09 indicative of the use or repeated use of a prohibited substance or prohibited method? Is the athlete's profile in this period consistent with the profile you considered for the purpose of the ABP review process? ("Question 2")

3. Did you consider the ferritin level measured in the sample provided by Ms. Kokkinariou at the 2011 World Championships in Daegu to be abnormal by comparison to the normal reference values? If so, what conclusions, if any, are you able to draw from the level of ferritin found in the athlete's system at the IAAF World Championships in Daegu? ("Question 3")

4. From your review of the athlete's blood profile 2.07.09 – 22.08.11, when do you consider that the athlete first started using a prohibited substance or a prohibited method?" ("Question 4")"

1.3.1 Question 1

All three Experts concluded that Ms. Kokkinariou's ABP is indicative of repeated use of a prohibited method or a combination of both. Prof. Schumacher noted that "*there seem to be different periods in the profile: periods of manipulation which involve samples of [July 2009-August 2009, and June 2011] and periods with more normal values [samples of November 2010, March 2011, and August 2011]. Possible manipulation techniques include the abuse of an erythropoietic stimulant, such as recombinant human erythropoietin. Such substances have to be administered repeatedly (every few days, depending on the substance) over a period of weeks to have a boosting effect on the red cell production of the bone marrow and increase hemoglobin concentration*".

Dr. d'Onofrio stated in response to Question 1 that "*the sequence of results included in the ABP Athlete's blood profile (2.07.09 – 22.08.11) provides clear evidence of the repeated use of a prohibited substance and/or method. In particular the use of an erythropoietic stimulating agent (ESA) like erythropoietin or analogues is almost certain.*" Dr d'Onofrio based his conclusion on "*a) the repeated finding of exceptionally high values of hemoglobin…b) the interposition, between such high values, of much lower values…c) the speed and the entity of such repeated variation…[and] d) the low values of reticulocyte counts in association with high hemoglobin, and the consistently high OFF scores.*" In relation to point d), Dr. d'Onofrio explained that "*association of high hemoglobin with low reticulocytes is a strong evidence of artificial inhibition of reticulocyte formation caused by the suspension of an ESA (or, less likely, by reinfusion of multiple blood bags). It is an indicator of the so-called OFF phase, which is seen when an ESA has been suspended on to three weeks before, such as is observed in doped athletes before important competitions. When the ESA is stopped, hemoglobin remains high for at least two to three weeks, depending on the dosage, while reticulocytes are reduced because the high hemoglobin inhibits endogenous EPO production".*

Prof. Audran concurred with Prof. Schumacher and Dr. d'Onofrio, stating that "*the hematological profile G111JL7 (Ms Kokkinariou) for the period 2/07/09 – 22/08/11 is indicative of repeated use of a prohibited substance or a prohibited method (or a combination of both) in two situations at least: July and August 2009 (samples 1, 2, 3), [and] June 2011 (sample 8)*".

1.3.2 Questions 2-4

The Experts responses to questions 2-4 support their shared conclusion set out in their responses to Question 1 that Ms. Kokkinariou had engaged in a Prohibited Method or used a Prohibited Substance on multiple occasions.

In relation to Question 2, all Experts found that Ms. Kokkinariou's profile for the period between August 15, 2006, and June 16, 2009, was indicative of the repeated use of a Prohibited Substance or Prohibited Method. Prof. Schumacher concluded that "*as the profile of Ms. Kokkinariou from 2006 to 2009 shows very similar patterns compared to the profile from 2009 until present (ABP process), it is highly likely that the profile is indicative of the repeated (yearly) use of a prohibited substance or prohibited method by the athlete.*" Dr. d'Onofrio noted that "*a 27.5% increase [in hemoglobin between 2006 and 2007] – as well as the 30.1% decrease in 2009 – is definitely abnormal and cannot be explained by chance or physiology, but only by [a] very unusual, severe and documented disease or by blood doping with ESA.*" Prof. Audran concluded "*that for the period 15/09/06 – 16/06/09, the passport is indicative of the use of a prohibited substance and/or a prohibited method each year in June*".

All three Experts noted, in response to Question

3 that Ms. Kokkinariou's ferritin level as measured at the 2011 IAAF World Championships (which took place in Daegu, South Korea, from August 27, 2011 – September 4, 2011) was highly irregular. Prof. Schumacher explained that "*[i]n the sample of Ms. Kokkinariou, a [f]erritin value of 1454 ng/ml was measured. The normal range indicated by the measuring facility for the analytical kit utilized for the analysis (Immulite) is 6-159 ng/ml for adult females...the data of Ms. Kokkinariou is therefore highly abnormal and represents severe iron overload, which can be caused by excessive intravenous (i.v.) or intramuscular (i.m.) iron substitution, or by a medical condition called "hemochromatosis."...[I]ron is usually given to patients under therapy with erythropoeitic stimulants such as EPO, as these substances only deploy their full effects if the iron supply is sufficient.*" Prof. Schumacher went on to conclude that "*it is unlikely that the cause for [Ms. Kokkinariou's] ferritin levels is primary hemochromatosis. It is more likely that the levels have been induced by repeated, uncontrolled iron application.*" Dr. d'Onofrio stated that "*in the absence of a very unlikely form of hemochromatosis, the value of ferritin of 1454 ng/mL is strongly abnormal and necessarily reflects intravenous administration of high doses of an iron preparation...the finding of high ferritin in an athlete is an indirect clue which supports the suspect of a doping program based on ESA intake.*" Prof. Audran stressed that "*that the use of erythropoietic stimulants, such as recombinant erytropoietin (rhEPO), increases the need for iron so much that it exceeds the physiological occurring reserves in storage tissue. Furthermore, increasing body iron levels before or during rhEPO administration improves the resulting erytropoiesis, mostly by parenteral access".*

For the period between July 2, 2009 and August 22, 2011, the Experts agreed that Ms. Kokkinariou first began using a Prohibited Substance shortly before the sample taken on July 2, 2009.

1.4 Dr. Sottas' Submission

In addition to the opinions of the Experts, the IAAF attaches to its Appeal Brief a statement by Dr. Sottas of WADA. Dr. Sottas was asked by the IAAF to provide his expert opinion on the ABP of Ms. Kokkinariou, and whether he agreed with the conclusions reached by the Expert Panel in respect of her case. In his statement, Dr. Sottas made reference to the Abnormal Blood Profile Scores that were computed from Ms. Kokkinariou's ABP. The Abnormal Blood Profile Scores do not form part of an ABP *per se*, but are produced by the ABP software used by the IAAF to aid analysis of ABPs.

Ms. Irini Kokkinariou Abnormal Blood Profile Scores

Date	02.07.09	09.07.09	12.08.09	25.11.09
ABPS	3.94	2.88	3.69	-1.85

03.03.10	18.06.10	26.07.10	17.06.11	22.08.11
-1.09	1.20	1.60	4.43	-0.54

Dr. Sottas explained that *"falling between 0.0 and 1.0 indicates a suspicion of doping",* and that *"superior to 1.0 indicates that is more likely to obtain a hematological progile assuming blood doping than assuming a normal physiological condition."* Dr. Sottas explained that 6 of the 9 samples which formed Ms. Kokkinariou's ABP had an Abnormal Blood Profile Score of above 1.0, and that *"these results confirm the evaluation made by the experts that we have at least two doping regiments, one in summer 2009 and one from June 2010 to June 2011".*

1.5 Conclusion on the experts' statments

All three Experts as well as Dr. Sottas concluded unequivocally that Ms. Kokkinariou used a Prohibited Substance or engaged in a Prohibited Method on multiple occasions. These findings are not contested by any of the Respondents. The arguments of the Experts are thoughtfully constructed and well grounded, and no evidence has been presented to or found by the Sole Arbitrator that places the conclusions of any of the Experts in doubt. Accordingly, the Sole Arbitrator finds that the opinions of the Experts, taken together, indicate to his comfortable satisfaction that Ms. Kokkinariou used a Prohibited Substance or engaged in a Prohibited Method on more than one occasion.

The Sole Arbitrator concludes, it being clear from the evidence set out above, that Ms. Kokkinariou both breached IAAF Rule 32, and that in light of her repeated use of a prohibited substance (rh-EPO), aggravating circumstances were present in the context of the violation pursuant to IAAF Rule 40.6.

C. Application of Article 40.6 to Ms. Kokkinariou for Engaging in a Doping Plan or Scheme and Deceptive Conduct

As explained above, the IAAF argues not only that Ms. Kokkinariou's repeated use of rhEPO triggers IAAF Rule 40.6, but that her actions represent two further examples of aggravating circumstances, namely: (1) a doping plan or scheme; and (2) deceptive conduct designed to avoid detection and/or adjudication of a doping violation.

1. Ms Kokkinariou's Violation as Part of Doping Plan or Scheme

The IAAF submits that the Experts concluded that Ms. Kokkinariou was engaged in a doping plan or scheme. Prof. Schumacher unambiguously stated that "*The profile is the result of a doping scheme aimed at increasing performance at certain competitions and timed to avoid positive testing in conventional doping tests during such events*".

Neither Dr. d'Onofrio nor Prof. Audran explicitly state that Ms. Kokkinariou was engaged in a doping plan or scheme. However, all three Experts' opinions indicate that Ms. Kokkinariou's ABP taken together with her blood test results from the 2006-2009 period reveal a consistent pattern of rhEPO/ESA doping. Similar hemoglobin and reticulocyute values appear at around the same time of year every year between 2006 and 2011 except 2010. As noted by Prof. Schumacher in relation to the 2006-2009 period, "*it is highly likely that the profile is indicative of the repeated (yearly) use of a prohibited substance or prohibited method by the athlete*". Dr. Sottas stated in relation to the same period that Ms. Kokkinariou "*consistently presents abnormal values in the summer period (June to mid-August) and normal values between end of August and May*". The Sole Arbitrator views that the consistency of irregularity in Ms. Kokkinariou's ABP and prior blood screens as evidencing her engaging in a yearly doping scheme. It should be noted, as did Dr. Sottas, that "*no test was performed during the end of July 2010 and middle of June 2011 in which the athlete may have stopped doping (typical doping regimes to rEPO do not last more than three months)*". Accordingly, the Sole Arbitrator cannot hold that Ms. Kokkinariou used an ESA during 2010, although is inclined to support Dr. Sottas opinion that "*a plausible scenario is that the athlete blood doped during the summer sport season in 2009, 2010, and 2011*". Regardless of whether Ms. Kokkinariou did in fact halt her use of rhEPO in 2010, her use prior and subsequent to that time was highly consistent, strongly indicating the presence of a well organized doping scheme.

Additional evidence of the presence of a doping scheme is provided by Ms. Kokkinariou's ferritin level measured at the IAAF World Championships, 2011. All three Experts as well as Dr. Sottas agree that Ms. Kokkinariou's ferritin level was highly irregular, and was likely the result of iron supplements taken to boost the efficacy of an ESA regimen. Prof. Schumacher concluded "*it is unlikely that the cause for* [Ms. Kokkinariou's] *ferritin levels is primary hemochromatosis. It is more likely that the levels have been induced by repeated, uncontrolled iron application*". Dr. d'Onofrio stated "*the finding of high ferritin in an athlete is an indirect clue which supports the suspect of a doping program based on ESA intake*". Dr. d'Onofrio stated that Ms. Kokkinariou's high ferretin value in August 2011 is "*consistent with former use of ESA, almost certainly demonstrated by her blood picture on 17 June 2011*". The Sole Arbitrator finds that the opinions of the Experts and Dr. Sottas are sufficient proof that Ms. Kokkinariou used ferritin in concert with rh-EPO or another ESA in June 2011. The use of an additional substance to enhance the effects of a Prohibited Substance demonstrates a considerable degree of forethought, and as such Ms. Kokkinariou's use of ferretin forms an additional element of planning to an already methodical and drawn-out doping scheme.

The Sole Arbitrator agrees with the conclusion of Prof. Schumacher that Ms. Kokkinariou's profile is the result of a long-running doping scheme "*the result of a doping scheme*". The statements of the Experts regarding Ms. Kokkinariou's ABP and ferritin levels (measured in 2011) show to the Sole Arbitrator's comfortable satisfaction that Ms. Kokkinariou used a Prohibited Substance as part of structured regimen between 2006 and 2009, and once again in 2011. The Sole Arbitrator finds this clearly qualifies as planned activity under IAAF Rule 40.6.

2. Ms Kokkinariou Engaged in Deceptive Conduct Designed to Avoid Detection and/or Adjudication of a Doping Violation

The final claim of the IAAF in relation to Ms. Kokkinariou's actions constituting aggravating circumstances under IAAF Rule 40.6 is that she engaged in deceptive conduct to conceal detection of her violation of IAAF Rule 32. In support of this claim, the IAAF noted that Prof. Schumacher concluded that Ms Kokkinariou's profile is the result of a doping that was "*timed to avoid positive testing in conventional doping tests during such events*".

The Sole Arbitrator notes that most, if not all, doping practices are timed to avoid detection. As a result, an aggravating circumstance is likely to require a further element of deception. However, since IAAF Rule 40.6 is already engaged, this point may be left open in this case.

3. Conclusion on Application of IAAF Rule 40.6

For the reasons outlined above, the Sole Arbitrator finds that Ms. Kokkinariou committed a violation of IAAF Rule 32 under two separate categories of aggravating circumstances pursuant to IAAF Rule 40.6. Ms. Kokkinariou has been found to have repeatedly used a Prohibited Substance over a protracted period as part of a doping scheme, and on the basis of this multiple triggering of IAAF Rule 40.6, the Sole Arbitrator finds that Ms. Kokkinariou's

Ineligibility Period should be extended to the maximum permitted period of four years.

Pursuant to IAAF Rule 40.10, the Ineligibility Period shall begin on the date of this award, and shall be reduced by any period of Provisional Suspension. The IAAF provisionally suspended Ms. Kokkinariou on October 27, 2011. As a result, the Ineligibility Period shall be reduced by the period between October 27, 2011 and the date of this award.

Pursuant to IAAF Rule 40.8, all competitive results obtained by Ms. Kokkinariou from the date of the first anti-doping violation to the start of the Provisional Suspension shall be disqualified. The IAAF submits that all Experts agree that Ms. Kokkinariou committed an anti-doping violation from at the latest the period immediately prior to the sample collected on July 2, 2009. As a result, all of Ms. Kokkinariou's results shall be disqualified from July 2, 2009 through to the commencement of her provisional suspension on October 27, 2011, in accordance with IAAF Rule 40.8.

Arbitration CAS 2012/A/2818
Rudolf Urban v. FC Györi ETO kft.
14 September 2012

Football; Breach of contract without just cause; Responsibility for agreeing to contractual terms in writing without understanding them; Burden of proof according to Swiss law; Interpretation of a contractual clause according to Swiss law; Calculation of the compensation due to breach of contract; Sporting sanction according to Article 17 FIFA Regulations

Panel:
Prof. Petros C. Mavroidis (Greece), Sole arbitrator

Relevant facts

Mr Rudolf Urban (hereinafter the "Player") is a professional football player. He was born on 1 March 1980 and is of Slovak nationality. He currently plays for the Polish club Piast Gliwice.

FC Györi ETO kft. is a football club with its registered office in Györ, Hungary (hereinafter the "Respondent"). It is a member of the Hungarian Football Federation, itself affiliated to the Fédération Internationale de Football Association (FIFA) since 1907.

On 24 August 2007, the Player signed with the Respondent, represented by its managing director, Mr Tibor Klement, a first employment contract (hereinafter "First Contract"). This document contains the description of each party's respective obligations. It is a fix-term agreement for three years, effective from 24 August 2007 until 30 June 2010 and its main characteristics can be summarised as follows (all the quotations are taken from the English version of the contract, filed on behalf of the Player and not disputed by the other party):

- The Respondent agreed to pay to the Player a monthly salary of 200,000 Hungarian Forint (HUF) (corresponding approximately to EUR 700 at the current exchange rate), "*due until the 15th day following the current month*".

- According to article VIII (entitled "Responsibility matters"), paragraph 2 of the First Contract, the Player "*is obliged to pay compensation in an amount equal to his one-and-half month wage in case of causing damage in a careless way*".

- Article IX (entitled "Discontinuation and termination of the legal relations"), paragraph 3 of the First Contract, states that "*Delayed payment on the part of the employer regarding the acknowledged and due remuneration to the employee is considered to be a major breach of duty if the delay in payment is over 60 days.*"

- Article X (entitled "Miscellaneous") reads as follows:

  "*1. The parties will mutually endeavour to settle their disputed matters amicably, by way of negotiations.*

  2. In all matters not regulated in the present contract, Act I. of 2004 on Sport, as well as the provisions of Act on Labour Code and the regulations of the professional associations are to be applied.

  (…)

  5. In case the parties are not able to settle their disputed issues with each other, they are obliged to turn first of all to the organisations written in the rules of MLSZ for deciding the legal issue. In case the dispute still will come to court, then the parties accept the sole competence of the Permanent Court of Arbitration for Sport.

  6. The parties agree to re-negotiate the financial issues of the contract before 30st June of each year with the stipulation that the offer of the employer cannot be worse than the conditions of the previous championship year.

  7. The present contract was made by the contribution of the player's agent Judr. Josef Tokos.

  8. The present contract was transleted in words into Slovakian languages through an interpreter.

(…)

The parties have been approved the present contract with their signatures – after reading, interpreting and understanding – as a document reflecting their will in every respect".

On 24 August 2007, the Player signed an "Agreement on the transfer of image" with the company ETO Kft., also represented by Mr Tibor Klement (hereinafter the "Image Contract"). This document gave ETO Kft. the right to use the Player's image and name for a monthly remuneration of EUR 2,000. The Image Contract was "*concluded for a definite period of time, from 24 August 2007 to 30 June 2010*" and stipulates that "*The Sportsman, based on this Agreement, transfers all authorisations in relation with the determination of the remuneration under this provision to* [ETO Kft.] *and also accepts the fact, that* [ETO Kft.] *will pay nothing to him after the football match, if he evaluates that the activity of the Sportsman – as an advertising medium – as worthless*". The Image Contract was governed by "*provision 35, section 3-6 of the Act on Sport No. 1/2004. The other matters are governed by the relevant provisions of the Civil Code*".

In his appeal brief filed with the Court of Arbitration for Sport, the Player confirmed that the First Contract and the Image Contract "*fulfil previously orally stipulated and agreed conditions (…), were in Hungarian language, and formally contain formulation, that were translated in words into Slovakian language through interpreter, so the player in good faith signed both contracts with no notice that he is concluding contract with two different entities*".

In relation with the Player's employment, the Respondent contends that it incurred agent fees of EUR 25,000 paid to Mr Jozef Tokos.

On 27 February 2008, the Player received a letter from ETO Kft. putting an end to the Image Contract with effect from 31 December 2007. Mr Tibor Klement explained that the contract was terminated as the implementation of *"this contract became unfeasible on 31.12.2007, because from that time Mr. Rudolf Urban already was not a member of first class team's squad. In the mentioned image-transfer contract (…) contracting parties recorded that the meaning of this contract that ETO Kft. as a user has exploitation entitlement to develop the advertising surface of the first class football team of Györi ETO FC Kft. From the time when [the Player] already was not member of first class football team, he was not able to implement the image-transfer contract, so the contract became unfeasible".*

In the present proceedings and in support of his submissions, the Player produced the written statement of Mr Németh Jenö, according to which a) at the Player's request, Mr Jenö arranged a meeting on 31 March 2008 with Mr Tibor Klement, b) he accompanied the Player as an interpreter, c) *"During the meeting Urban Rudolf said that he would like to play in his hometown Kosice (Kassa), but the transfer was possible only if his current contract was terminated and went home as an amateur player"*, d) Mr Tibor Klement accepted the Player's request and prepared a *"termination of the professional contract"* as well as a new employment contract, e) both agreements were in Hungarian but were translated to the Player, who signed them before receiving a copy of each. Mr Jenö also stated that *"the Parties agreed one more thing: Urban Rudolf asked when he would receive his two months' salary. Mr. Klement suggested – it was at about 9 p.m. – that the Player should spend the night there and he could collect his dues next day at the counter. The Player answered that he should go home that night, but he would come back later and personally collect his dues".*

In line with Mr Jenö's statement, it is thus clear that the Parties signed:

- an agreement, dated 31 March 2008, whereby they terminated with immediate effect the First Contract. In particular they confirmed that *"they have no further obligation of 30 June 2010 timing, and they have finished all settlements with each other now".*

- a second employment contract, dated 1 April 2008 (hereinafter "Second Contract"), containing the exact same terms as those included in the First Contract except for the fact that a) it was effective from 1 July 2008 until 30 June 2010, and b) there is no mention regarding the possible involvement of the agent, Mr Jozef Tokos. No new image contract was signed by the Parties.

It is further undisputed that:

- the Player joined the Slovakian club MFK Košice as an amateur;

- on 1 July 2008, the Player received the instruction to immediately return to the Respondent;

- by means of a letter dated 6 June 2008, the Player terminated the employment contract based on the fact that he had not been paid two monthly salaries corresponding to February and March 2008;

- the Player never went back to Györ, Hungary.

On 16 December 2008, the Respondent initiated proceedings with the FIFA Dispute Resolution Chamber (hereinafter "DRC") to order the Player to pay compensation as a result of his breach of his contractual obligations contained in the

Second Contract. The Respondent claimed that the Player should be sanctioned by a ban from playing and requested to pay in its favour an amount of EUR 25,000 corresponding to the Player's agent commission.

In a decision dated 15 June 2011, the DRC held that a) the Second Contract was valid and binding upon the Parties; b) by failing to return to the Respondent on 1 July 2008, the Player breached the Second Contract without just cause; c) the claim for compensation was solely based on the costs incurred by the Respondent to recruit the Player; d) the Respondent satisfactorily established that it disbursed EUR 25,000 to acquire the Player's services for the time frame between August 2007 until June 2010; and e) "*in line with art. 17 par. 1 of the* [Regulations on the Status and Transfer of Players, edition 2008] *said amount (…) shall be amortised over the term of the employment contract".*

Accordingly and considering the fact that "o*ne sporting season had already elapsed at the time when the breach of contract occurred, the* [DRC] *concluded that two sporting seasons out of three sporting seasons initially foreseen were still to be executed at the time when the breach occurred*". Consequently, it found that the Player must pay to the Respondent the amount of EUR 16,666 (= EUR 25,000 ./. 3 x 2), which it considered as reasonable and appropriate.

The DRC was silent on the possible imposition of a ban upon the Player.

On 25 May 2012, the Player filed a statement of appeal with the Court of Arbitration for Sport (hereinafter "CAS"). On 10 June 2012, he submitted an appeal brief, containing a statement of the facts and legal arguments accompanied by supporting documents. He challenged the above mentioned Appealed Decision with the following request for relief:

"Therefore we suggest to CAS to reconsider the DRCH FIFA Decision and to issue the decision that:

Court of Arbitration for Sport repeals the Decision of the FIFA's Dispute Resolution Chamber and Rudolf Urban is not obliged to pay any financial compensation to the Hungarian Club FC Györi ETO kft".

On 29 June 2012, the Respondent submitted its answer, with the following request for relief:

"The Respondent requests the Sole Arbitrator:

1. To reject Appellant's appeal.

2. To approve The Decision taken by Dispute Resolution Chamber of Federation Internationale de Football Association issued 15 June 2011.

3. To condemn the Appellant to the payment of the whole incurring CAS administration and procedural costs and the fee of the Sole Arbitrator".

Extracts from the legal findings

On the one hand, the Player claims that he was entitled to terminate his employment contract due to the late payment of some of his wages, whereas, on the other hand, the Respondent alleges that the Player did not fulfil any of his obligations arising from the Second Contract, which was valid.

In addition, the Player claims that he has never had the intention to extend his employment relationship with the Respondent and had been deceived by Mr Tibor Klement into signing the Second Contract, which, therefore, cannot be binding.

Hence, the main issues to be resolved by the Sole Arbitrator in deciding this dispute are the following:

a. Who failed to perform the contractual obligations with what consequences?

b. Is any compensation due and if so, what is its correct calculation?

c. Is a sporting sanction to be imposed?

A. Who failed to perform the contractual obligations with what consequences?

1. Regarding the First Contract

It is the Player's submission that, in compliance with article IX of the First Contract and as a result of the late payment of his salaries of February and March 2008, he validly put an end to all contractual relations with the Respondent.

Given the months to which the unpaid salaries are related, the Respondent failed to meet his obligations articulated in the First Contract, which was indisputably terminated by mutual agreement. As a matter of fact, on 31 March 2008, the Parties signed a *"Working agreement cancellation by mutual accord",* whereby they ended with immediate effect the First Contract. In particular they confirmed that *"they have no further obligation of 30 June 2010 timing, and they have finished all settlements with each other now".*

Consequently, when the Player allegedly served the notice of termination on 6 June 2008, the First

Contract as well as any claim which may stem from it, had already expired.

In other words, the Player cannot derive any right from the delays in the payments of the wages for the months of February and March 2008 and the Sole Arbitrator can dismiss without further consideration the issues raised by the Parties in this regard, in particular whether the Respondent eventually paid the late salaries, when, under what circumstances, whether the Image Contract was validly terminated, whether it is compatible with article 18 bis of the FIFA Regulations, etc.

2. Regarding the Second Contract

The possible non-compliance of the Respondent with its obligations under the First Contract does not affect the validity of subsequent agreements entered into by the Parties.

Henceforth the question to be resolved is whether the Second Contract was validly established.

The Player does not dispute the fact that he signed the Second Contract. As a matter of fact, in his appeal brief, the Player explains that *"On 1 April 2008, both parties signed a new employment contract, again in Hungarian language, valid from 1 July 2008 until 30 June 2010, with the same termination period and same financial conditions as previous employment contract. Only difference was the possibility to loan the player to another club. Player signed this contract again in good faith, and thought that these documents only allows him to play as amateur without noticing that, he is signing the another employment contract, for the same period, as amicably cancelled previous one"*. He further contends that he had been deceived by Mr Tibor Klement and by the interpreter into signing the Second Contract, which is therefore not legally binding. Furthermore and according to the Player, the Second Contract lacks the minimum contents of a contract for it to be held effective.

On a preliminary basis, the Sole Arbitrator observes that the Player admittedly signed the Second Contract. He cannot hold against the Respondent the fact that he accepted to sign contractually binding documents in the absence of his agent. Indeed, it is on the Player's own proposal that the meeting with Mr Tibor Klement took place on 31 March 2008. The Player could not ignore the purpose of the meeting, which he requested in order to renegotiate the terms of the First Contract so that he could be transferred as an amateur to his home club MFK Košice. Under the circumstances, the meeting did not come as a surprise to the Player, who, therefore, had the time to make the required arrangements to be accompanied by his agent, should he feel that the latter's presence was necessary. In spite of this, the Player chose to go to the meeting alone and further accepted to immediately sign various documents, including the Second Contract, without taking the time to consult beforehand with his agent and/or a counsel.

This said, it is noteworthy to recall that in the context of contractual relationships, it is fundamental to be able to rely on the principle that a signature on a written contract binds the signatory to the terms of the contract. If this principle was not to be applied, any business enterprise would become hazardous. As a general rule, a party to a contract is, in principle, bound by its signature. The fact that the Player accepted to sign a document written in a language which he does not understand, does not preclude enforcement of the contract. All the more so in the present case, since the contractual obligations in the First and Second contract were quasi identical. Hence, the Player must take responsibility for agreeing to terms in writing without understanding or investigating them (Bruno Schmidlin, in Thévenoz/Werro (eds.), Commentaire romand, Code des obligations I, Genève, Bâle, Munich, 2012, ad art. 23/24 CO, N. 15 - 17, p. 225).

The above general rule will naturally not apply if the signature was obtained by mistake or misrepresentation, fraud, duress, undue influence or if the contract is vitiated by illegality (see articles 23 et seq. of the Swiss Code of Obligations). This was manifestly not the case here, since no arguments to this effect were presented to the Sole Arbitrator.

The Player claimed that he was not aware of the real implications of the Second Contract, which he had been induced to sign by dint of the wilful deception of Mr Tibor Klement, assisted by the interpreter.

The rules in connection with burden of proof are set forth in article 8 of the Swiss Civil Code (since the relevant FIFA Regulations are silent on this score, and as stated above, Swiss Law applies to the extent necessary). As a general and natural rule, the party which asserts facts to support its rights has the burden of establishing them. In other words, it is the Player's duty to objectively demonstrate the existence of his subjective rights and that he possesses a legal interest for their protection (ATF 123 III 60 consid. 3a). It is not sufficient for him to simply assert the mere existence of a violation of his interests.

In this case, it appears to the Sole Arbitrator that the Player's arguments regarding the validity of the Second Contract are either not supported by any evidence or are inconsistent in several aspects:

- The Player adduced no evidence to ascertain a plausible plot hatched against him, which is disputed by the Respondent and contradicted by the written statement of Mr Németh Jenö, produced by the Player himself. He also did not establish in any manner that it was the Respondent's intention to prematurely end the agreement, which was initially entered into for three years.

- The Player's account of the facts is less credible than the Respondent's: the latter affirmed that it had accepted to terminate the First Contract only to allow the Player to join the Slovakian club MFK Košice as an amateur until 30 June 2008. The Respondent's story is consistent with the relevant circumstances of the case, with the simultaneousness of the signatures of the various agreements during the meeting of March 2008, with the fact that the Player's wish to play as an amateur inevitably required the termination of the First Contract. The signature of the Second Contract, which entered into force after the end of the Player's stay with MFK Košice and ran until 30 June 2010 does not suggest that the Respondent had acted out of malice. On the contrary, the Second Contract is the coherent continuation of the First Contract, as its terms and duration were identical to the ones mutually agreed on by the Parties at the beginning of their working relationship.

- The Player suggests that the interpreter deliberately translated the Second Contract in inaccurate manner, and thus led him to unwillingly extend his employment contract with the Respondent. He contradicts himself in this respect, when he seeks to rely on the fact that he actually signed the Second Contract on 1 April 2008 in the absence of the interpreter.

- The Player accepts that he signed the Second Contract, which was valid from 1 July 2008 until 30 June 2010. These dates stand out very well on the first page of the Second Contract, even for a non Hungarian-speaking person. Under the circumstances, the Player cannot reasonably expect the Second Contract to expire at the end of his stay with the Slovakian club MFK Košice, for which (according to the Player's own submissions) he was to play as an amateur for two months only. The Player does not offer any explanation as to why the Second Contract is a fix-term agreement for two years although he would be asked to play only for two months with the club MFK Košice.

- Likewise, and contrary to the Player's submissions, the Second Contract is not different from the First Contract with respect to the possibility for the Respondent to loan the Player to a club. Article III.6 of the employment agreement governs the eventual loan of the Player and is identical in both the First and the Second Contracts.

- In this regard, the content, the presentation and the wording of the First and of the Second Contracts are identical, save for the dates and the intervention of the agent, Mr Jozef Tokos. It is clear from even the most cursory glance at the two documents that they were identical. The Player does not give any plausible explanations as to how he could reasonably believe that he was bound by a radically different agreement than the First Contract, when he signed the Second Contract.

- The Player did not clarify in any manner how, in good faith, he believed that he had to sign a new contract with the Respondent in order to play as an amateur for the Slovakian club MFK Košice. In particular, he did not give a reasonable explanation as to the purpose of the new contract, bearing in mind the fact that the Parties had just signed an agreement, dated 31 March 2008, whereby they terminated with immediate effect the First Contract, i.e. all their contractual relations. Under the circumstances, the Sole Arbitrator finds also quite unpersuasive the Player's argument, according to which he candidly believed that, at the end of his stay with MFK Košice, he was free to sign an employment agreement with the employer of his choice and had no obligation to return to the Respondent.

- The mere fact that the Player accepts that the Respondent was in the position to loan his services to another club is at odds with the Player's theory according to which there was no valid employment contract between the Parties.

Finally, the Player contests the validity of the Second Contract, which does not include all "essentialia negotii" (key points) of a valid employment contract. Here again, the Player gives no indication about which "key points" are missing in the Second Contract, which is identical to the First Contract, the validity of which has never been contested by the Player. Consequently, this argument can be dismissed without further consideration.

Based on the foregoing, the Sole Arbitrator finds that the Player cannot dodge contractual liability by

failing to properly evaluate the content of the Second Contract, which he fully accepted without any reservation. The fact that he negligently assumed that he was signing another document is of no relevance. Consequently, the Sole Arbitrator holds that, by his signature, the Player had accepted the terms of the Second Contract and, hence, was bound by its conditions.

3. Conclusion

As a consequence of the above findings, it appears that there was a valid employer-employee relationship between the Respondent and the Player as of 1 July 2008 and that the Player refused to come back to his employer, despite the latter's legitimate and unambiguous request.

In other words, the Player breached his contractual obligations on 1 July 2008, i.e. when he refused to return to Hungary. The Sole Arbitrator observes that the Player and his representative have not been able to establish the existence of any cause justifying this conduct. Consequently, the Sole Arbitrator comes to the conclusion that the Player de facto terminated his contract with the Respondent unilaterally, prematurely and without just cause.

B. Is any compensation due and if so, what is its correct calculation?

1. In General

As already exposed, the present dispute is primarily governed by the FIFA Regulations.

In this matter, because of the unilateral and premature termination of the Second Contract and because of the lack of any justifiable cause as per article 14 of the FIFA Regulations, the Sole Arbitrator is satisfied that the Player's termination of the contract with the Respondent does fall under the application of article 17 of the FIFA Regulations. This provision provides for financial compensation as well as sporting sanctions. It reads as follows:

"Article 17 Consequences of Terminating a Contract Without Just Cause

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.*

2. *Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club shall be jointly and severally liable for its payment The amount may be stipulated in the contract or agreed between the parties.*

3. *In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. In all cases, these sporting sanctions shall take effect from the start of the following season at the new club. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.*

4. *In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two registration periods.*

5. *Any person subject to the FIFA Statutes and regulations (club officials, players' agents, players, etc.) who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned".*

Regarding the financial compensation, the DRC exclusively took into consideration the EUR 25,000 paid by the Respondent to Mr Jozef Tokos to acquire the Player's services for the time frame between August 2007 until June 2010. It held that *"in line with art. 17 par. 1 of the* [FIFA Regulations] *said amount (…)*

shall be amortised over the term of the employment contract". Considering that "*one sporting season had already elapsed at the time when the breach of contract occurred, the* [DRC] *concluded that two sporting seasons out of three sporting seasons initially foreseen were still to be executed at the time when the breach occurred"*. Consequently, it found that the Player must pay to the Respondent the amount of EUR 16,666, which it considered as reasonable and appropriate.

The DRC did not rule on the imposition of a sporting sanction upon the Player.

2. Did the Parties agree on how compensation for breach or unjustified termination shall be calculated?

Article 17 par. 1 of the FIFA Regulations sets the principles and the method of calculation of the compensation due by a party because of a breach or a unilateral and premature termination of a contract.

This provision states the principle of the primacy of the contractual obligations concluded by a player and a club ("*…unless otherwise provided for in the contract...*"). The same principle is reiterated in article 17 par. 2 of the FIFA Regulations (CAS 2008/A/1519 – 1520, par. 66, p. 21; CAS 2009/A/1838, par. 61, p. 15). Consequently, contractual arrangements to this effect take precedence over the FIFA Regulations.

In the present matter it is disputed between the Parties whether, in the contract between the Player and the Respondent, compensation had been agreed upon or not. The Player is of the opinion that the compensation must be calculated exclusively based on article VIII of the Second Contract. This provision reads as follows:

"*VIII*

Responsability matters

1./ The employee assumes sports disciplinary obligation in accordance with the provisions of the Act on Sport.

2./ The employee is obliged to pay compensation in an amount equal to his one-and-half month wage in case of causing damage in a careless way."

When the interpretation of a contractual clause is in dispute, one must seek the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Art. 18 par. 1 of the Swiss Code of Obligations).When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judging body has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422). The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood its declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

After careful analysis of article VIII, the Sole Arbitrator comes to the conclusion that this provision cannot be interpreted as a penalty/liquidated damages clause in the meaning of article 17 of the FIFA Regulations. In view of its content and structure, it appears that the purpose of article VIII is to implement a code of conduct outlining the principles, values and other rules of behaviour which apply to the Player. Article VIII.2 obviously comes into play exclusively when the Player does not meet the requirements of article VIII.1 and, consequently, causes harm "*in a careless way*". Nothing in this provision indicates that the Parties have provided how compensation for breach or unjustified termination shall be calculated and have agreed on the amount to be paid by the breaching party in the event of a breach and/or of a unilateral, premature termination of the employment contract. The *"Discontinuation and termination of the legal relations"* is actually featured in another article (IX of the Contract), which does state that *"The parties will settle with each other at the discontinuation of the legal relations"*.

In other words, article VIII appears to be a general clause, exclusively of disciplinary nature, sanctioning possible breaches of the *"provisions of the Act on Sport"*.

3. How should the compensation be calculated?

Considering that the issue to be resolved is the compensation for the breach or the unjustified termination of a valid contract, the judging authority shall be led by the principle of the so-called "positive interest", i.e. it will aim at determining an amount which shall basically put the injured party in the position that the same party would have been, had the contract been performed properly. What the Sole Arbitrator tries to establish here is a counterfactual, that is, the financial position of the injured party 'but for' the commission of the illegality. (CAS 2008/A/1519 – 1520, par. 86, p. 24; CAS 2009/A/1856-1857, par. 186, p. 46; CAS 2010/A/2145-2147, par. 61, p. 27).

In the case at hand, the Respondent limits its claim for compensation to the agent fees of EUR 25,000 paid to Mr Jozef Tokos when recruiting the Player. In its answer, the Respondent alleges that the DRC *"rightly pointed out the fact that the football player's services had been acquired for duration of 3 sporting seasons by the originally agreed time between the parties and amount of € 25.000.- was invested into that by Respondent, so this was the basis of the calculation of financial compensation to be paid by the football player who breached the contract without just cause"*. In this regard and in its request for relief, the Respondent *"requests the Sole Arbitrator (…) To approve The Decision taken by Dispute Resolution Chamber of Federation Internationale de Football Association issued 15 June 2011"*.

The Sole Arbitrator observes that the Respondent is not asking for any compensation with respect to the loss of the value of the Player's services, the loss of possible earnings, or the eventual replacement costs. By doing so, the Respondent is consistent and in line with its attitude towards the Player during the first trimester of 2008: at that moment, the Image Contract was terminated due to the fact that it was impossible to generate any advertising income from the Player's image, whose performance was obviously a source of disappointment.

As a result and in order to establish the compensation due, the Sole Arbitrator does not need to take into account any objective criteria other than the amount of fees and expenses paid or incurred by the Respondent, and in particular the expenses incurred in order to acquire the Player. Article 17 par. 1 requires those expenses to be amortised over the whole term of the contract, irrespective whether the club has amortized the expenditures in linear manner or not (CAS 2008/A/1519 – 1520 par. 126, p 32; CAS 2009/A/1856-1857, par. 206, p. 50).

Based on the evidence presented by the Respondent (an invoice of EUR 25,000 signed by Mr Jozef Tokos in relation with *"consultation services regarding the signing of a contract with the* [Player]*"*; a photocopy of Mr Tokos' agent card; a copy of an agreement between the Respondent and Mr Tokos in relation with the recruitment of the Player and with the agent's fees of EUR 25,000; a copy of a bank statement confirming that a payment of EUR 25,000 was made by the Respondent), the Sole Arbitrator has no difficulty to accept that the Respondent paid EUR 25,000 to Mr Jozef Tokos in relation with the signing of the Player.

By terminating the Second Contract prematurely, the Player did not allow the Respondent to amortize the amount of the costs which it agreed to pay for the acquisition of his services for a period of three seasons. The contract was considered terminated upon breach of the Player two years before the agreed term.

As a result, by breaching the Second Contract, the Player did not allow the Respondent to amortize the cost of its investment, thereby causing a financial damage of EUR 16,666 (EUR 25,000 ./. 3 x 2).

In view of the foregoing, the Sole Arbitrator reaches the same result as the DRC in the Appealed Decision. However, the DRC failed to take into account the money actually saved by the Respondent due to the Player's breach of the contract. As a matter of fact, the Respondent has not tried to allege that it had to replace the Player, who was *"not member of first class football team* [and] *was not able to implement the image-transfer contract"* (according to Mr Tibor Klement's own terms). Considering that the Respondent has not claimed that it had to bring back a replacement for the Player, it actually saved two years of his wages and loyalties that it did not have to pay to the Player.

Pursuant to the terms of the Second Contract, the Player was entitled to a monthly salary of 200,000 Hungarian Forint (corresponding approximately to EUR 700 at the current exchange rate, which is lower than the exchange rate in 2008). Hence, the amounts actually saved by the Respondent amounts to at least EUR 16,800 (= 24 months x EUR 700).

In view of the above, the Sole Arbitrator concludes that in these circumstances, the Respondent saved more money compared to its losses because of the breach of contract committed by the Player, and, consequently, no compensation should be awarded to the Respondent after all. It bears repetition that the standard for compensation applied here in line with applicable Swiss law requests from the Sole Arbitrator to determine what the financial situation of the club would have been had the Player not committed the illegality: the club suffered a damage of EUR 16,666 but profited at least EUR 16,800 by not being obliged to pay the Player. The decision could have been different had the club claimed that it was forced to seek reinforcements as a result of the Player's conduct. No similar claims were presented to the Sole Arbitrator. (CAS 2009/A/1856-1857, par. 221, p. 52).

The above conclusion makes it unnecessary for the Sole Arbitrator to consider the other requests submitted by the Parties. Accordingly, all other prayers for relief are rejected.

C. Is a sporting sanction to be imposed?

The deterrent effect of article 17 FIFA Regulations shall be achieved not only through the risk to have to pay a compensation for the damage caused by the breach or the unjustified termination but also through the impending risk for a party to incur disciplinary sanctions, if some conditions are met (cf. article 17 par. 3 of the FIFA Regulations) (CAS 2008/A/1519-1520, par. 82, p. 23).

In the case at hand, when it initiated proceedings with the DRC, the Respondent sought an order a) awarding it compensation as well as b) sanctioning the Player by a ban from playing. However, in its Appealed Decision, the DRC did not address the question of sporting sanctions against the Player in accordance with article 17 par. 3 of the FIFA Regulations. As a consequence no ban was imposed upon the Player. In its answer filed before the CAS, the Respondent requested the Sole Arbitrator to confirm the Appealed Decision.

Under the circumstances, there is no ground for the Sole Arbitrator to intervene and make a determination on a issue which was of no relevance for the FIFA or the injured party. Consequently, no disciplinary sanction will be imposed upon the Player in the present proceedings.

Arbitration CAS 2012/A/2821
Bursaspor Kulübü Dernegi v. Union Européenne de Football Association (UEFA)
10 July 2012

Football; Disciplinary sanction due to violation of the UEFA Club Licensing and Financial Fair Play Regulations (UEFA CL&FFP Regulations); Mistakes in the interpretation of the events and/or the law by the first-instance body and CAS' power of review; Aim of the UEFA CL&FFP Regulations; Disclosure obligations for clubs under the UEFA CL&FFP Regulations; Assessment of the sanctions under the UEFA CL&FFP Regulations

Panel:
Mr. Manfred Nan (The Netherlands), President
Prof. Ulrich Haas (Germany)
Mr. Stuart McInnes (United Kingdom)

Relevant facts

Bursaspor Kulübü Dernegi (the "Appellant" or "Bursaspor") is a Turkish professional football club, currently playing in the Turkish 1st division *"Spor Toto Super Lig"*, and a member of the Turkish Football Federation (TFF). The latter is a member of the Fédération Internationale de Football Association (FIFA) and the Union des Associations Européennes de Football.

The Union des Associations Européennes de Football (UEFA) is the Confederation in charge of football in Europe, working with and acting on behalf of Europe's national football associations.

On 31 July 2007, the Appellant entered into an agreement with the English club Portsmouth FC ("Portsmouth") for the transfer of the player Collins Mbesuma (the "Player") from Portsmouth to the Appellant (the "Transfer Agreement").

In this Transfer Agreement, Portsmouth agreed to transfer the Player to the Appellant in exchange for a fee (the "Transfer Fee") of EUR 500'000 to be paid in four instalments:

" € 100.000 on 31st August 2007;
€ 100.000 on 31st October 2007;
€ 150.000 on 30th April 2008;
€ 150.000 on 31th August 2008.
All the above payments to be paid within 14 days of the due dates"

On 21 August 2007, Portsmouth received from the Appellant the amount of EUR 100'000, and on 31 October 2007 the amount of EUR 100'000, corresponding to the first two agreed instalments, in total EUR 200'000.

In 2008 Portsmouth and/or the English Football Association ("FA") on behalf of Portsmouth, filed a claim before FIFA alleging that the Appellant had failed to pay part of the transfer compensation. By letter dated 13 June 2008 the FA submitted to FIFA that *"as of today's date 350,000 GBP remains unpaid with a further 150,000 GBP due on 31st August"*, followed by a letter dated 21 April 2009 in which the FA stated that "*The Turkish club have made one payment of 100'000 Euro but our club are still owed payments totalling 400'000 Euro: 100'000 Euro due on 31st October 2007, 150'000 Euro due on 30th April 2008, 150'000 Euro due on 31st August 2008"*. On 25 August 2009 FIFA informed the TFF regarding the claim of Portsmouth, amounting to a total of EUR 400'000.

By letter dated 5 May 2010, FIFA informed the parties that FIFA's competent decision making bodies could not deal with the case because Portsmouth appeared to be in administration.

By letter dated 31 January 2011, FIFA informed the parties that the case had been submitted to the Players' Status Committee for consideration and a formal decision as Portsmouth was no longer in administration.

On 25 March 2011, the Appellant applied for a license to the TFF, as the delegated UEFA Licensor, to participate in the UEFA 2011/2012 season.

Article 49 of the UEFA Club Licensing and Financial Fair Play Regulations, edition 2010 ("UEFA CL&FFP Regulations") requires clubs to prepare and submit to the licensor a transfer payables table disclosing all transfer activities, including loans, which have occurred prior to the previous 31 December.

In the Transfer Payables Form, the Appellant disclosed there was a pending dispute with Portsmouth at FIFA regarding an overdue payment of EUR 400'000.

On 14 April 2011, the Appellant requested information from FIFA regarding the status of the proceedings, in order to present it to the TFF for licensing purposes. By letter dated 18 April 2011 FIFA replied that *"no formal decision has been passed until this date (...)"*.

On 1 June 2011, Articles 53 to 56 and 64 to 68 of the UEFA CL&FFP Regulations came into force in which the Respondent introduced a monitoring process.

On 9 June 2011, the TFF granted the Appellant the license for the 2011/2012 season and the Appellant took part in the UEFA Europa League club competition for the 2011-2012 season, receiving EUR 180'000 from UEFA as participation fees plus EUR 70'000 from certain event rights.

On 15 July 2011, the TFF submitted the payables information from the Appellant on its monitoring process to the UEFA Club Financial Control Panel ("UEFA CFCP").

By letter dated 23 September 2011, the UEFA CFCP confirmed the identification of the overdue payment as on 30 June 2011, characterized it legally as a breach of indicator 4 as defined in Article 62(3) of the UEFA CL&FFP Regulations and requested the Appellant – inter alia - to provide within the deadline of 17 October 2011 *"an update of the overdue payable tables in order to prove that as at 30 September 2011 the Appellant has no overdue payables towards other football clubs (…)"* and also *"to provide clear explanations/arguments concerning the grounds of the dispute in order to demonstrate to the reasonable satisfaction of the CFC Panel that it is a founded dispute"*.

By letter dated 14 October 2011, the Appellant informed the UEFA CFCP that it would not be in *"compliance with the regulations and the law or equity to apply a sanction for not making a payment with an ongoing case at FIFA which still awaiting for a formal decision (…)* and added that *"if FIFA Dispute Resolution Chamber give any decision about the subject, we are ready to fulfil requirements of the decision immediately"*.

On 23 November 2011, the Appellant paid to Portsmouth the amount of EUR 350'979,45 corresponding to the outstanding instalments plus interest. As a result of the settlement between the Appellant and Portsmouth, FIFA closed the case by letter dated 30 November 2011.

On 25 November 2011, the UEFA CFCP issued its report in relation to the licence granted by the TFF to the Appellant (hereinafter the "CFCP Report").

The CFCP Report found that the Appellant had failed to meet a number of criteria laid down in the UEFA CL&FFP Regulations.

As a result, the CFCP and the UEFA Control and Disciplinary Body opened disciplinary proceedings, which were notified to the Appellant by letters dated 6 and 8 December 2011.

On 24 February 2012, the UEFA Control and Disciplinary Body (the "UEFA CDB") issued its decision, (the "UEFA Disciplinary Decision"). It found the Appellant guilty of violating the UEFA CL&FFP Regulations and issued the following decision:

a. The Appellant was fined EUR 200'000.

b. The Appellant was excluded from one UEFA club competition for which it qualifies in the next 4 seasons, which exclusion was suspended for a probationary period of 3 years.

c. The UEFA Disciplinary Decision was based on the following grounds:

   i. The Appellant had failed to meet the requirements set out in Article 65 UEFA CL&FFP Regulations because as of 30 June 2011 it had an overdue payable in favour of Portsmouth as a result of a transfer undertaken up to 30 June 2011.

   ii. The Appellant had failed to meet the requirements set out in Article 49 UEFA CL&FFP Regulations because it did not mention the overdue payment in favour of Portsmouth in its licensing process.

   iii. The Appellant *"has not complied with an essential obligation, which is to mention all overdue payables within the licensing process. Taking into account the fact that the monitoring system is one of the pillars of the club licensing and financial fair play system and any breach in this regard constitutes a serious offence, with the absence of any previous record not a decisive factor, the CDB considers it to be proportionate and appropriate to fine the club EUR 200.000 (approximately the amount of what the club gained during the 2011/12 UEFA competition) and to exclude the club from the next UEFA club competition for which its qualifies in the next three seasons. It would be disproportionate for this exclusion not to be suspended for a probationary*

period, in comparison with other cases. The club is apparently strong in its finances; it paid the amount to Portsmouth FC as soon as it appeared that it had to face disciplinary proceedings. The CDB considers that it must give Bursaspor a chance".

On 28 February 2012 the Respondent, through its disciplinary inspector, appealed against the UEFA Disciplinary Decision.

In its appeal, the Respondent argued that the facts and the offences committed by the Appellant were too serious for its whole exclusion from UEFA competitions to be suspended for a probationary period. The Respondent concluded that the UEFA Appeals Body should confirm the EUR 200'000 fine and should exclude the Appellant from one UEFA club competition for which it qualifies in the next four seasons.

On 2 April 2012, the Appellant submitted its reply to the appeal and lodged a cross-appeal on several grounds. The Appellant concluded that the UEFA Appeals Body should annul the sanctions imposed or subsidiary should scale down the sanctions imposed by the UEFA CDB.

On 30 May 2012, the UEFA Appeals Body rendered the following judgement (as relevant):

a. "The appeal lodged by UEFA is partially admitted. Therefore, Bursaspor is excluded from one UEFA club competition for which it qualifies in the next three seasons.

b. Bursaspor is fined EUR 50.000, with payment of the fine suspended for a probationary period of three years.

c. The cross-appeal of Bursaspor is partially admitted as explained in the full written decision (…)".

The Appeal Decision of the UEFA Appeals Body was based on the following grounds, which were notified to the Parties on 8 June 2012:

a. The UEFA CL&FFP Regulations (edition 2010) apply even if the dispute between Bursaspor and Portsmouth began in 2008.

b. Contrary to Articles 49, 65 and Annex VIII UEFA CL&FFP Regulations, Bursaspor had failed to provide the information required with regard to the debt relating to the payment due from the Transfer Agreement with Portsmouth.

c. Bursaspor grossly violated the applicable regulations and undermined the whole licensing system by creating the false impression that it had no overdue payables on 31 March 2011, despite the fact that there has never been any question of a debt of less than EUR 300'000.

d. The exclusion of Bursaspor from UEFA competitions should not be suspended for a probationary period. *"The first instance body showed unjustified leniency. Not only did Bursaspor announce wrongly, during the monitoring procedure covering 30 June and 30 September 2011, that the amount owed to Portsmouth FC was a contested debt; in order to obtain its licence for 2011/12 it also failed to indicate the existence of this overdue payable, as defined in Annex VII, as at 31 March 2011. For lesser overdue payables and even though the club in question had also already been awarded a licence, the Appeals Body has already ruled in a decision upheld by CAS, that an immediate exclusion from a UEFA competition (with no suspension for a probationary period) should be imposed (see CAS 2012/A/2707, para. 158 et seq.). Moreover, the fact that a club pays its debt only after a disciplinary procedure has been opened against it cannot be considered a mitigating circumstance. In the present case, there is nothing in the case file or the arguments of the club to justify the Control and Disciplinary Body breaking with the precedent set, and by doing so it risks violating not only the principle of proportionality but also that of equality of treatment".*

e. A fine of EUR 200'000 *"does seem disproportionate and to a certain extent contrary to the objectives of the CL&FFP Regulations, which aim to improve the economic and financial capability of the clubs (Article 2(2)(a)). The fine will therefore be reduced from EUR 200.000 to EUR 50.000, with payment suspended for a probationary period of three years".*

On 8 June 2012, the Appellant filed its Statement of Appeal at the Court of Arbitration for Sport (CAS) and requested the CAS Court Office to treat the matter expeditiously, stating that the operative part of the award ought to be rendered by 22 June 2012 so that both parties would know whether the Appellant was eligible to take part in the draw for the next UEFA club competition on 25 June 2012. The Appellant nominated Mr Ulrich Haas as arbitrator.
On 21 June 2012, the hearing was held at the CAS headquarters in Lausanne, Switzerland.

The Appellant requested the CAS to issue the following relief:

"Subject to supplementing or otherwise amending the present prayer for relief at a later stage of the proceedings, the Appellant hereby requests CAS

1. To declare that the Appellant has not violated the UEFA Club Licensing and Financial Fair Play Regulations;

2. *To annul the decision of the UEFA Appeals Body dated 30 May 2012;*

3. *To order the Respondent to pay the entire costs of the present arbitration, if any;*

4. *To order the Respondent to pay the entire costs for Claimant's legal representation and assistance as well as other costs incurred by the Claimant in connection with this arbitration".*

At the hearing the Appellant supplemented a subsidiary request for relief by explicitly authorising the Panel to increase the amount of any fine which would be imposed.

The Respondent requested the CAS to *"(…) dismiss the appeal and to order payment by the Appellant of all costs of the arbitration as well as legal costs suffered by UEFA".*

Extracts from the legal findings

A. The alleged mistakes in the interpretation of the events and/or the law committed by the UEFA Appeals Body

The Appellant avers that the UEFA Appeals Body made several errors as mentioned in Chapter IV.1 of this award.

In relation to the above, the Panel refers to the fact that under these proceedings the Appellant had the opportunity to present its case in the way to address and cure all the above mentioned irregularities as raised.

Therefore, pursuant to Article R57 of the CAS Code, which grants the Panel power to review the facts and the law, and CAS jurisprudence, any prejudice suffered by the Appellant before the UEFA Appeals Body has been cured by virtue of this appeal, in which the Appellant has been able to present its case afresh (CAS 2008/A/1574, CAS 2009/A/1840 & CAS 2009/A/1851, CAS 2008/A/1545; see also CAS 2012/A/2702 "the Gyori case"). Therefore, the Panel does not need to examine whether the alleged mistakes and errors in the interpretation of the events and/or the law have indeed been established.

B. Did the UEFA Appeals Body lack jurisdiction with regard to Article 49 UEFA CL&FFP Regulations?

It is the Appellant's assertion that the Respondent had no jurisdiction over violations of Article 49 UEFA CL&FFP Regulations because according to Articles 1 – 52 UEFA CL&FFP Regulations the Respondent has delegated to the TFF not only its right to operate the entire licensing process, which right includes the power to issue licences based on the assessment of the documents submitted, but also the right to sanction.

The Respondent underlines that it has jurisdiction in relation to Article 49 CL&FFP Regulations and refers inter alia to Article 72 CL&FFP Regulations, which article provides that *"any breach of these regulations may be penalised by UEFA in accordance with the UEFA Disciplinary Regulations".* The Respondent refers also to Articles 19 and 20 of the UEFA Organisational Regulations and adds that CAS in the Gyori case (CAS 2012/A/2702) has recognized UEFA's power to sanction clubs for non-compliance with the provisions relating to club licensing.

The Panel examined the structure of the UEFA CL&FFP Regulations as described by the Respondent in its submissions and not disputed by the Appellant. The Panel establishes that the UEFA CL&FFP Regulations have been enacted by the UEFA Executive Committee on the basis of Article 50 par. 1 bis of the UEFA Statutes, which empowers the UEFA Executive Committee to draw up regulations governing the conditions of participation in and the staging of UEFA competitions. Compliance with these rules is a condition of entry into club competitions such as the UEFA Champions League and UEFA Europa League (Article 2.04/c of the Regulations of the UEFA Champions League 2012/13 and Article 2.07/c of the Regulations of the UEFA Europa League).

It is obvious that the UEFA CL&FFP Regulations – in particular – aim at promoting fair play in UEFA club competitions by improving the economic and financial capability of the clubs, increasing their transparency and credibility and by ensuring that clubs settle their liabilities with players, social/tax authorities and other clubs punctually. The precise objectives of these regulations are defined in Article 2 UEFA CL&FFP Regulations.

According to these Regulations, clubs need a licence to participate in UEFA competitions. The criteria (sporting, infrastructure, personnel and administrative, legal and finance) are defined by the Regulations.

The licence is granted by the national association, which is therefore referred to as the "licensor" (Article 5 UEFA CL&FFP Regulations). As per this provision, each national association, as licensor, must integrate the rules of the UEFA CL&FFP Regulations into its national club licensing regulation. The licence applicant is the legal entity fully responsible

for the football team participating in national and international club competitions which applies for a licence (Article 12 UEFA CL&FFP Regulations). Such licence applicant is either a registered member of a UEFA member association and/or its affiliated league (Article 12 par. 1 lit. a) or has a contractual relationship with a registered member (Article 12 par. 1 lit. b). The license applicant that has been granted a license is the "licensee".

Among the licensing criteria set forth by the UEFA CL&FFP Regulations, financial requirements are described in Articles 46 and following of the UEFA CL&FFP Regulations. One of these requirements consists in the absence of overdue payables towards other clubs (Article 49 UEFA CL&FFP Regulations). As to the information to be given by a license applicant, Article 49 of the UEFA CL&FFP Regulations provides that:

(1) The licence applicant must prove that as at 31 March preceding the licence season it has no overdue payables (as defined in Annex VIII) that refer to transfer activities that occurred prior to the previous 31 December.

(2) Payables are those amounts due to football clubs as a result of transfer activities, including training compensation and solidarity contributions as defined in the FIFA Regulations on the Status and Transfer of Players, as well as any amount due upon fulfilment of certain conditions.

(3) The licence applicant must prepare and submit to the licensor a transfer payables table, unless the information has already been disclosed to the licensor under existing national transfer requirements (e.g. national clearing house system). It must be prepared even if there have been no transfers/loans during the relevant period.

(4) The licence applicant must disclose all transfer activities (including loans) undertaken up to 31 December, irrespective of whether there is an amount outstanding to be paid at 31 December. In addition, the licence applicant must disclose all transfers subject to a claim pending before the competent authority under national law or proceedings pending before a national or international football authority or relevant arbitration tribunal.

(5) The transfer payables table must contain the following information as a minimum (in respect of each player transfer, including loans):

- *a) Player (identification by name or number);*
- *b) Date of transfer/loan agreement;*
- *c) The name of the football club that formerly held the registration;*
- *d) Transfer (or loan) fee paid and/or payable (including training compensation and solidarity contribution);*
- *e) Other direct costs of acquiring the registration paid and/or payable;*
- *f) Amount settled and payment date;*
- *g) The balance payable at 31 December in respect of each player transfer including the due date for each unpaid element;*
- *h) Any payable as at 31 March (rolled forward from 31 December) including the due date for each unpaid element, together with explanatory comment; and*
- *i) Conditional amounts (contingent liabilities) not yet recognised in the balance sheet as of 31 December.*

(6) The licence applicant must reconcile the total liability as per the transfer payables table to the figure in the financial statements balance sheet for 'Accounts payable relating to player transfers' (if applicable) or to the underlying accounting records. The licence applicant is required to report in this table all payables even if payment has not been requested by the creditor.

(7) The transfer payables table must be approved by management and this must be evidenced by way of a brief statement and signature on behalf of the executive body of the licence applicant.

Licences are issued on a yearly basis (Article 14 par. 2 UEFA CL&FFP Regulations). They are granted in spring. As regards financial information, this is done on the basis of financial statements of December of the previous year or measures taken until 31 March of the then current year (Annex VIII par. 2 of the UEFA CL&FFP Regulations).

Further, the UEFA CL&FFP Regulations set up a monitoring process for all licensees that have qualified for a UEFA club competition (Article 53 and following of the UEFA CL&FFP Regulations). More precisely, Article 53 UEFA CL&FFP Regulations sets up a Club Financial Control Panel which *inter alia* governs the monitoring process, while Articles 57 and following UEFA CL&FFP Regulations describe the monitoring requirements which must be observed by all licensees that have qualified for a UEFA club competitions. These monitoring requirements are the break-even requirement (as set out in Articles 58 to 63 UEFA CL&FFP Regulations) and the other monitoring requirements (as set out in Articles 64 to 68 UEFA CL&FFP Regulations).

Among the other monitoring requirements, the licensee must prove that it has no overdue payables (as specified in Annex VIII of the UEFA CL&FFP Regulations) towards other clubs as a result of transfer activities undertaken up to 30 June (Article 65 par. 1 UEFA CL&FFP Regulations). Payables are those amounts due to football clubs as a result of transfer activities, including training compensation

and solidarity contributions as defined in the FIFA Regulations on the Status and Transfer of Players, as well as any amount due upon fulfilment of certain conditions (Article 65 par. 2 UEFA CL&FFP Regulations). The absence or existence of overdue payables towards employees and social/tax authorities must be confirmed by the licensee within the deadline and in the form communicated by the UEFA administration (Article 66 par. 2 UEFA CL&FFP Regulations). As to the information to be given by a licensee within the course of the monitoring process, Article 65 UEFA CL&FFP Regulations provides that:

(1) The licensee must prove that as at 30 June of the year in which the UEFA club competitions commence it has no overdue payables (as specified in Annex VIII) towards other football clubs as a result of transfer activities undertaken up to 30 June.

(2) Payables are those amounts due to football clubs as a result of transfer activities, including training compensation and solidarity contributions as defined in the FIFA Regulations on the Status and Transfer of Players, as well as any amount due upon fulfilment of certain conditions.

(3) By the deadline and in the form communicated by the UEFA administration, the licensee must prepare and submit a transfer payables table, even if there have been no transfers/loans during the relevant period.

(4) The licensee must disclose all transfer activities (including loans) undertaken up to 30 June, irrespective of whether there is an amount outstanding at 30 June. In addition, the licensee must disclose all transfers subject to legal proceedings before a national or international sporting body, arbitration tribunal or state court.

(5) The transfer payables table must contain the following information as a minimum (in respect of each player transfer, including loans):

a) Player (identification by name or number);

b) Date of transfer/loan agreement;

c) The name of the football club that formerly held the registration;

d) Transfer (or loan) fee paid and/or payable (including training compensation and solidarity contribution);

e) Other direct costs of acquiring the registration paid and/or payable;

f) Amount settled and payment date;

g) Balance payable at 30 June in respect of each player transfer;

h) Due date(s) for each unpaid element of the transfer payable; and

i) Conditional amounts (contingent liabilities) not yet recognised in the balance sheet as of 30 June.

(6) The licensee must reconcile the total liability as per the transfer payables table to the figure in the financial statements balance sheet for 'Accounts payable relating to players transfers' (if applicable) or to underlying accounting records. The licensee is required to report in this table all payables even if payment has not been requested by the creditor.

(7) The transfer payables table must be approved by management and thus must be evidenced by way of a brief statement and signature on behalf of the executive body of the licensee.

(8) If the licensee is in breach of indicator 4 as defined in Article 62(3) [The licensee has overdue payables as of 30 June of the year that the UEFA club competitions commence], then it must also prove that, as at the following 30 September, it has no overdue payables towards other football clubs as a result of transfer activities undertaken up to 30 September. Paragraphs 2 to 7 above apply accordingly.

Annex VIII of the UEFA CL&FFP Regulations defines the notion of "overdue payables" as follows:

(1) Payables are considered as overdue if they are not paid according to the agreed terms.

(2) Payables are not considered as overdue, within the meaning of these regulations, if the licence applicant/licensee (i.e. debtor club) is able to prove by 31 March (in respect of Articles 49 and 50) and by 30 June and 30 September (in respect of Articles 65 and 66) respectively that:

a) It has paid the relevant amount in full; or

b) It has concluded an agreement which has been accepted in writing by the creditor tot extend the deadline for payment beyond the applicable deadline (note: the fact that a creditor may not have requested payment of an amount does not constitute an extension of the deadline); or

c) It has brought a legal claim which has been deemed admissible by the competent authority under national law or has opened proceedings with the national or international football authorities or relevant arbitration tribunal contesting liability

in relation to the overdue payables; however, if the decision-making bodies (licensor and/or Club Financial Control Panel) consider that such claim has been brought or such proceedings have been opened for the sole purpose of avoiding the applicable deadlines set out in these regulations (i.e. in order to buy time), the relevant amount will still be considered as an overdue payable; or

d) *It has contested a claim which has been brought or proceedings which have been opened against it by a creditor in respect of overdue payables and is able to demonstrate to the reasonable satisfaction of the relevant decision making bodies (licensor and/or Club Financial Control Panel) that the claim which has been brought or the proceedings which have been opened are manifestly unfounded.*

As already established by the Panel, the UEFA CL&FFP Regulations (edition 2010) are applicable in the present case, which edition replaced the UEFA Club Licensing Regulations (edition 2008) and came into force on 1 June 2010. However, pursuant to Article 74 UEFA CL&FFP Regulations, the rules on the monitoring process, more specifically Articles 53 to 56 and 64 to 68 entered into force on 1 June 2011. The Panel observes that both Articles 49 and 65 UEFA CL&FFP Regulations have the same objectives. The difference is that Article 49 refers to obligations of a license applicant with regard to the – domestic - license procedure and Article 65 refers to obligations of a licensee within the course of the monitoring process at UEFA.

With regard to the issue of UEFA's lack of jurisdiction on Article 49 UEFA CL&FFP Regulations as alleged by the Appellant, the Panel acknowledges that the Respondent by letter dated 8 February 2012 instigated disciplinary proceedings with regard to the requirements of the monitoring process and notified the Appellant of an alleged violation of Articles 65 and 66 UEFA CL&FFP Regulations.

Further, the Panel observes that during the disciplinary proceedings the UEFA Disciplinary Bodies also noticed that the Appellant violated Article 49 UEFA CL&FFP Regulations, but the Appellant was never charged explicitly with such violation.

Pursuant to Article 72 UEFA CL&FFP Regulations *"any breach of these regulations may be penalised by UEFA in accordance with the UEFA Disciplinary Regulations".*

Under Article 27.1 of the UEFA Disciplinary regulations, "[t]*he Control and Disciplinary Body handles disciplinary cases arising from breaches of the statutes, regulations, directives and decisions of UEFA. It decides on cases relating to player and club eligibility for UEFA competitions."*

Article 27.2 of the UEFA Disciplinary regulations adds that "[t]*he Appeals Body is competent to hear appeals against decisions of the Control and Disciplinary Body in accordance with Article 49 of the present regulations".*

The subject matter of this appeal, together with the disputes before the UEFA CDB and the UEFA Appeals Body relate to the charge that Appellant breached Articles 65 and 66 of the UEFA CL&FFP Regulations.

UEFA was therefore competent to assert its jurisdiction on the basis of Article 72 UEFA CL&FFP Regulations in connection with Article 27 of the UEFA Disciplinary Regulations.

It therefore follows that the Appellant´s arguments on UEFA´s lack of competence with respect to Article 49 UEFA CL&FFP Regulations are dismissed. In this respect, the Panel adds that no violation of the principle *ne bis in idem* has occurred, as there is no sanction pronounced by the TFF regarding the subject matter of this appeal.

C. Did the Appellant breach the UEFA CL&FFP Regulations?

1. Did the Appellant have an overdue payable?

Article 65 par. 1 UEFA CL&FFP Regulations obliges the Appellant to prove that *"as at 30 June of the year in which the UEFA club competitions commence it has no overdue payables (as specified in Annex VIII) towards other football clubs as a result of transfer activities undertaken up to 30 June"* and if the Appellant is in breach of indicator 4 as defined in Article 62(3), it must also prove that, *"as at the following 30 September, it has no overdue payables towards other football clubs as a result of transfer activities undertaken up to 30 September".*

The Panel observes that on 15 July 2011 the Appellant provided the Respondent through its Transfer Payables Table with information that it had an overdue payable to Portsmouth which was in dispute at FIFA. As a consequence thereof, the UEFA CFCP (by letter dated 23 September 2011) confirmed the identification of the overdue payment, characterized it legally as a breach of indicator 4 as defined in Article 62(3) of the UEFA CL&FFP Regulations and requested the Appellant to provide within the deadline of 17 October 2011 *"an update of the overdue payable tables in order to prove that as at 30 September 2011 the Appellant has no overdue payables towards other football clubs (…) and also to provide clear explanations/arguments*

concerning the grounds of the dispute in order to demonstrate to the reasonable satisfaction of the CFC Panel that it is a founded dispute".

By letter dated 14 October 2011, the Appellant informed UEFA CFCP that it would not be in *"compliance with the regulations and the law or equity to apply a sanction for not making a payment with an ongoing case at FIFA which still awaiting for a formal decision (…) and added that "if FIFA Dispute Resolution Chamber give any decision about the subject, we are ready to fulfil requirements of the decision immediately".*

The Panel observes that it is undisputed that the Appellant did not pay Portsmouth on the agreed terms, that the relevant amount was paid in full by the Appellant only on 23 November 2011, hence after 30 June and/or 30 September 2011, that no agreement was concluded between the Appellant and Portsmouth to extend the deadline for payment, that the Appellant did not bring forward a legal claim against Portsmouth contesting its liability in relation to the overdue payable and/or that the Appellant did contest Portsmouth's claim at FIFA.

As a result, the Panel has no hesitation to conclude that the Appellant had an overdue payable on 30 June and 30 September 2011 and therefore breached Article 65 par. 1 and 8 UEFA CL&FFP Regulations. The Panel concludes that during the monitoring process no violation has occurred regarding the principle *venire contra factum proprium* or the principle of legal certainty, as alleged by the Appellant.

2. Did the Appellant fail to disclose correct information?

In continuation, the Panel turns its attention to the allegation of the Respondent to the effect that the Appellant has provided misleading information, more specifically has tried to hide the overdue payable by describing it as a disputed amount although there was no dispute.

The Panel concurs with the CAS Panel in the Gyori case that "*the disclosure obligations are essential for UEFA to assess the financial situation of the clubs that are participating in its competitions and for this reason, as the Panel can confirm from the above quoted regulations, the disclosure must be correct and accurate"* (CAS 2012/A/2702 at par. 136). The Panel underlines that providing misleading information to UEFA to obtain a licence ought to be strongly opposed.

Pursuant to Article 2 UEFA CL&FFP Regulations, the aim of the duty of disclosure is to ensure that the clubs participating in a UEFA competition *inter alia*:

a) Have adequate level of management and organization;

b) Improve their economic and financial capability, by increasing their transparency and credibility, and placing the necessary importance on the protection of creditors; and

c) Promote financial fair play in UEFA club competitions.

Articles 65.3, 65.4 and 65.5 UEFA CL&FFP Regulations provide that as a licensee, the Appellant was required to do the following:

"65.3. By the deadline and in the form communicated by the UEFA administration, the licensee must prepare and submit a transfer payables table, even if there have been no transfers/loans during the relevant period.

65.4. The licensee must disclose all transfer activities (including loans) undertaken up to 30 June, irrespective of whether there is an amount outstanding at 30 June. In addition, the licensee must disclose all transfers subject to legal proceedings before a national or international sporting body, arbitration tribunal or state court.

65.5. The transfer payables table must contain the following information as a minimum (in respect of each player transfer, including loans):

a) Player (identification by name or number);
b) Date of the transfer/loan agreement;
c) The name of the football club that formerly held the registration;
d) Transfer (or loan) fee paid and/or payable (including training compensation and solidarity contribution);
e) Other direct costs of acquiring the registration paid and/or payable;
f) Amount settled and payment date;
g) The balance payable at 30 June in respect of each player transfer;
h) Due date(s) for each unpaid element of the transfer payables; and
i) Conditional amounts (contingent liabilities) not yet recognised in the balance sheet as of 30 June".

It is manifest that the Appellant was required to ensure the correct and accurate disclosure in its monitoring process to UEFA of all financial information.

The Panel establishes that the Appellant by submitting the Transfer Payable Tables on its monitoring process to UEFA CFCP by the deadline and in the form communicated by UEFA, the Appellant complied with the obligations set out in Article 65 par. 3 UEFA

CL&FFP Regulations.

From the information disclosed in the Transfer Payables Forms submitted to UEFA during the monitoring process, the Appellant indicated that an amount of EUR 400'000 was overdue in relation to the Transfer Agreement. The Panel observes that the overdue amount was in reality EUR 300'000 plus late interest. Therefore, the Panel concludes that the Appellant by supplying this information, did not hide the overdue payables, but complied with the minimum requirements as set out in Article 65 par. 5 UEFA CL&FFP Regulations.

The Respondent argues that the Appellant provided clearly misleading information by filing that there was a pending dispute regarding the overdue payables to Portsmouth, although there never was a real dispute. The Respondent states that the Appellant never contested the obligation to pay the last two instalments to Portsmouth and only tried to delay its obligation to pay.

On the other hand, the Appellant argues that since 2008 it has received a licence from the TFF every year although it disclosed in its transfer payables tables the amount due to Portsmouth and the existence of the dispute with Portsmouth regarding this overdue payable. The Appellant emphasizes that it had no intention at all to "buy time" or "obtain low-cost credit", and argues that it acted in good faith, not only because Portsmouth was in administration, but also by requesting FIFA to provide information regarding the status of the case for licensing purposes and informing the Respondent about the amount in dispute before FIFA. The Appellant submits that it paid in the last 5 years over USD 18 million to other clubs for transfer fees, so that one single (and partial) non payment of a transfer fee in the amount of EUR 300'000 does not constitute a pattern of delaying tactics or an attempt to benefit from credit. The Appellant asserts that it has managed not only to pay off all its debts from the previous management since 2007 in accordance with FIFA decisions and to not create new debts, but also to succeed on the sporting field with a financial strong position. The Appellant submits that Articles 65 and 66 and Annex VIII UEFA CL&FFP Regulations entered into force on 1 June 2011, i.e. just 29 days prior to the first alleged violation attributed to the Appellant. The Appellant argues that "*the requirements of Annex VIII establish in reality a cultural change, where clubs have to pay all claims pending against them, unless they believe (and can prove to UEFA) that these claims are manifestly unfounded. In the case of the Appellant this constitutes a serious mitigating factor for the following two reasons:*

- *The Appellant had in all previous cases during the last 5 years paid all its disputed debts following a FIFA DRC/ PSC decision. (..);*

- *The management of the Appellant had to overcome the threat of criminal liability under Turkish law. (..)".*

The Panel observes that Article 65 par. 4 UEFA CL&FFP Regulations obliges the Appellant to disclose all transfers subject to legal proceedings before a national or international sporting body, arbitration tribunal or state court. Indeed, the Appellant in its Transfer Payables Form submitted that the amount was in dispute with the following explanation: *"Contractual Dispute/Case is ongoing at FIFA".*

In continuation, the Panel observes that in 2008 Portsmouth filed a claim at FIFA, that in May 2010 FIFA suspended the case because Portsmouth was in administration, that on 31 January 2011 FIFA submitted the case to the Players' Status Committee for consideration and a formal decision considering Portsmouth was no longer in administration, and that since 2008 the Appellant was given a licence by the TFF although it disclosed yearly in its transfer payables tables submitted to the TFF the existence of the dispute with Portsmouth with regard to the overdue payable.

Further the Panel notes that on the issue of (the grounds of) the dispute even at the hearing the Respondent could not convince the Panel how the Appellant should have completed the Transfer Payables Form in a manner prescribed by the UEFA CL&FFP Regulations to comply with the obligations of disclosure as set out in Article 65.

The Panel observes that the Appellant disclosed the true facts, i.e. the overdue amount and the pending case at FIFA regarding this amount. Although the Panel identifies that the information provided by the Appellant was incomplete and could have been more accurate, the Panel does not believe that the Appellant submitted misleading information. The Panel takes into account that apparently since 2008 the TFF – wrongly – did not request the Appellant to provide clear explanations concerning the grounds of the dispute and granted the Appellant the licence yearly. Moreover, the Panel takes into consideration that the proceedings at FIFA arose before the obligations set out in Article 65 UEFA CL&FFP Regulations came into force (on 1 June 2011), and that the new rules of administrative nature broke – for that matter justifiably - with a – in fact reprehensible – standing practise of the Appellant to pay its debts following a FIFA decision only. The Panel adds that

it is undisputed that the Appellant paid its debt – although far too late – on 23 November 2011, but still before the disciplinary proceedings were opened in February 2012.

In view of the foregoing, the Panel finds that the Appellant did disclose the information required under the UEFA CL&FFP Regulations, in particular Article 65 par. 3, 4 and 5. This finding by the Panel is further backed by the contents of the Gyori decision. In the latter it was the Respondent itself that distinguished the breach committed in the Gyori case from the one being at stake here by pointing out that the case at hand – contrary to the Gyori case – was not about concealing information.

3. Are the sanctions imposed in the Appeal Decision proportionate?

Having found the Appellant guilty of breaching Article 65 (par. 1 and 8) UEFA CL&FFP Regulations, because it had an overdue payable on 30 June and 30 September 2011, the Panel must now determine whether the sanctions imposed in the Appeal Decision are proportional.

The Appellant argues that the sanctions imposed in the Appeal Decision are harsh and have not followed past UEFA precedents, such as decisions in the Gyori case and Besiktas case.

In assessing the sanctions, reference must be made to Article 72 UEFA CL&FFP Regulations, which, in order to ensure the protection of clubs as creditors, states that "*any breach of these regulations may be penalised by UEFA in accordance with the UEFA Disciplinary Regulations*".

Article 17 UEFA Disciplinary Regulations contains general principles with regard to the determination of sanctions. Article 17.1 UEFA Disciplinary Regulations states that "*the disciplinary body shall determine the type and extent of the disciplinary measures to be imposed, according to the objective and subjective elements, taking account of both aggravating and mitigating circumstances. (…)*".

Article 14 of the UEFA Disciplinary Regulations provides that the following disciplinary measures may be imposed on member associations and clubs:

"1.
a) warning,
b) reprimand,
c) fine,
d) annulment of the result of a match,
e) order that a match be replayed,
f) deduction of points,
g) awarding of a match by default,
h) playing of a match behind closed doors,
i) stadium closure,
j) playing of a match in a third country,
k) disqualification from competitions in progress and/or exclusion from future competitions,
l) withdrawal of a title or award,
m) withdrawal of a licence.

2. A fine shall be no less than EUR 100 and no more than EUR 1.000.000".

The Panel observes that Article 15bis of the UEFA Disciplinary Regulations deals with a suspended sanction and reads as follows:

1. All disciplinary sanctions may be suspended except for:

a) Warnings,
b) Reprimands,
c) Bans on all football-related activities;

2. The probationary period shall be a minimum of one year and a maximum of five (…).

3. (...)

It is apparent from Articles 14 and 15bis of the UEFA Disciplinary Regulations, that a deciding body of UEFA has a wide discretion when it comes to sanctioning, and that account must be taken of any aggravating or mitigating circumstances.

The Panel notes that the UEFA Appeals Body Decision fined the Appellant with EUR 50'000 with payment suspended for a probationary period of three years, and excluded the Appellant from one UEFA club competition for which it qualifies in the next three seasons annulling the non suspended fine of EUR 200'000 and the initial exclusion for one year which was suspended for a probationary period of three years issued by the UEFA Disciplinary Decision.

The Panel observes that the decision of the UEFA CDB and the decision of the Appeals Body show wide discretion, as the decisions of these disciplinary bodies – both considering the behaviour of the Appellant a serious offence – significantly differ in opinion regarding the sanctioning of the established breach of the UEFA CL&FFP Regulations.

Furthermore, the Appellant argues that the Appeals Body grossly misapplied the principles of proportionality and equal treatment. The Appellant submits that the violation was not of such gravity to lead to an exclusion from UEFA club competitions

and compares the sanctions imposed in the Appeal Decision to previous sanctions issued by UEFA against other clubs such as Gyori for breaching the UEFA Club Licensing Regulations, edition 2008, and Besiktas for breaching the UEFA CL&FFP Regulations. It says that despite Gyori committed multiple violations and submitted misleading information, UEFA and CAS only excluded Gyori for one year from the UEFA club competition. According to the Appellant the "*club Besiktas was also excluded for one year from the UEFA Club Competitions for not having paid five different overdue payables for a total amount of ca. 4,2 million Euros in addition to outstanding taxes, while benefiting with 6 million Euros from its participation in UEFA Club Competitions*".

The Panel observes that the CAS Panel in the Gyori case established that Gyori *"committed two breaches; the first being the fact that it had overdue payables, and the second being its failure to disclose the correct and accurate payables"*. As a consequence of these two breaches the CAS Panel in the Gyori case considered an effective exclusion for one season not disproportionate. In addition, it follows from the Gyori case that the issue of misleading UEFA, i.e. the failure to disclose the correct and accurate payables, is a decisive element to conclude that a non suspended exclusion is not disproportionate. The Panel concurs with this judgement.

The Panel acknowledges that although the Appellant committed one breach, i.e. the overdue payable to Portsmouth, the UEFA Appeals Body excluded the Appellant also for one season.

In continuation, the Panel observes that on 30 May 2012 the UEFA Appeals Body fined the Turkish club Besiktas EUR 200'000 of which EUR 100'000 suspended for a probationary period of five years, and excluded Besiktas from the next two UEFA club competitions for which it qualifies in the next five seasons with the exclusion for the second competition suspended for a probationary period of five years, for breaching the UEFA CL&FFP Regulations. Although five different overdue payables were involved for a total amount around 4 million Euros a practical exclusion for one season was imposed.

At the hearing, the Respondent stressed that one of the underlying principles of the UEFA CL&FFP Regulations is that no licence is supposed to be granted to a club with an overdue payment. The Respondent argues that just by breaching this issue the standard sanction must be a non suspended exclusion for one season as a minimum.

However, the Panel notes that the UEFA Disciplinary Regulations only provides for standard sanctions with regard to misconduct of players (Article 10 UEFA Disciplinary Regulations) and discrimination and similar conduct (Article 11bis UEFA Disciplinary Regulations) as Article 17.2 UEFA Disciplinary Regulations adds that "*the disciplinary measures enumerated in Articles 10 and 11bis of the present regulations are standard sanction. (…).*"

Therefore, the Panel assesses that the current regulations do not provide for a standard sanction to be imposed regarding a violation of Article 65 UEFA CL&FFP Regulations.

In view of the foregoing facts, the specific circumstances of this case and given the fact that the breach of Article 65 UEFA CL&FFP Regulations occurred during a transitional period between old and new rules, the Panel is of the view that the Appellant has proved that the sanction imposed in the Appeal Decision is disproportionate to the offence, and that the assessment of the UEFA Appeals Body diverted from previous and/or other decisions of similar facts and circumstances. The Panel has therefore justifiable grounds for modifying the sanctions imposed in the Appeal Decision.

The Panel concurs with the considerations of the UEFA CDB to give the Appellant a chance and to exclude the Appellant from one UEFA club competition for which it qualifies in the next four seasons, which exclusion is suspended for a probationary period of three years, because *"It would be disproportionate for this exclusion not to be suspended for a probationary period, in comparison with other cases."*

In continuation, the Panel also concurs with the considerations of the UEFA CDB to impose a fine – at least - corresponding to approximately the amount of what the Appellant gained during the 2011/12 UEFA club competition. The Appellant benefited by playing in the UEFA Europa League 2011-2012 club competition although it had an overdue payable. At the hearing, the Appellant submitted that it gained EUR 250'000, which remains undisputed. Therefore, the Panel considers it to be proportionate and appropriate to fine the Appellant EUR 250'000.

D. Conclusion

Considering all the facts, evidence and arguments adduced, the appeal is – partially - upheld.

Arbitration CAS 2012/A/2822
Erkand Qerimaj v. International Weightlifting Federation (IWF)
12 September 2012

Weightlifting; Doping; Specified substance (methylhexaneamine); S.6 b) Specified stimulants; Specified Substance criteria; Intent to enhance performance through the product (distinction between direct and indirect intent); Degree of fault of the athlete; Relevant factors to be considered in reducing the period of ineligibility

Panel:
Mr Patrick Lafranchi (Switzerland), President
Prof. Petros C. Mavroidis (Greece)
Prof. Ulrich Haas (Germany)

Relevant facts

Mr. Erkand Qerimaj (hereinafter referred to as "the Athlete" or "the Appellant" is an Albanian international-level weightlifter and member of the Albanian national weightlifting team.

The International Weightlifting Federation (hereinafter referred to as "IWF" or "the Respondent") is an association constituted under Swiss law and the international governing body for weightlifting with its registered seat in Lausanne, Switzerland and its Secretariat in Budapest, Hungary.

On 12 April 2012 the Appellant provided a urine sample while competing at the 2012 European Championships in Antalya, Turkey. The in-competition sample tested positive for *methylhexaneamine*. *Methylhexaneamine* is a prohibited substance classified under S6 b (Specified Stimulants) on the 2012 Prohibited List of the World Anti- Doping Agency (hereinafter referred to as the "2012 WADA Prohibited List"). The substance is only prohibited in-competition, but not out-of-competition.

The Athlete has been competing at international level since 2003. In approximately 30 in- and out-of-competition doping tests prior to the sample taken on 12 April 2012, the Appellant had never tested positive for any prohibited substances.

The Athlete does not dispute that the prohibited substance was found in his body.

It is undisputed between the Parties that the prohibited substance in question can be traced back to a food supplement called *Body Surge* (the "Supplement) that the Appellant took prior to sample collection.

On the Doping Control Form that the Appellant filled out on the occasion of the sample collection he declared having taken the Supplement during the seven days preceding the testing.

The Appellant had received the Supplement from Mr Mark Nicholson, a personal trainer, former weightlifter and a New York State licensed massage therapist, domiciled in the United States. Mr Nicholson met the Appellant on the occasion of a weightlifting competition in Albania in 2006 and has since supplied him with food supplements and some advice regarding his athletic career. In September 2011, the Appellant replaced the supplement *creatine elite* with the supplement *Body Surge* upon the advice of Mr Nicholson.

The label of the Supplement does not explicitly mention *methylhexaneamine*, but refers to *1.3-dimethylamylamine* as an ingredient. *1.3-dimethylamylamine* is a synonym for *methylhexaneamine*.

The Appellant claims to have checked the label of *Body Surge* for prohibited substances and to also have asked Mr Nicholson whether or not he could take the Supplement. The latter confirmed that the Supplement did not contain any prohibited ingredients, and the Appellant did not do any research on the product himself.

By email dated 4 May 2012, the IWF informed the President of the Albanian Weightlifting Federation that the IWF Doping Hearing Panel would investigate the matter on the occasion of the Junior World Championships in Guatemala on 12 May 2012, in case the Appellant requested the Panel to decide on his case based on the submitted documentation.

On 7 May 2012, the Albanian Weightlifting Federation informed the Respondent that the Appellant requested a hearing in front of the IWF Hearing Panel.

On 22 May 2012, following a hearing on 12 May 2012, the IWF Doping Hearing Panel imposed on the Appellant the maximum sanction of two years of ineligibility because of an anti-doping violation committed by the Appellant. The IWF Hearing Panel held that the Appellant had not produced corroborating evidence that he had not taken the supplement with the intent to enhance his performance. As a consequence thereof, the IWF Hearing Panel found that the Appellant was not eligible for a reduction or elimination of the sanction.

The proceedings before the Court of Arbitration for Sport (hereinafter referred to as the "CAS") can be summarized in their main parts as follows:

By letter dated 11 June 2012, the Appellant filed his statement of appeal with the CAS.

On 3 July 2012 a hearing was held at the premises of the CAS in Lausanne.

On 11 June 2012, in his statement of appeal, and on 19 June 2012 in his Appeal Brief, the Appellant requested – *inter alia*:

1. *The decision issued by the IWF on 22 May 2012 sanctioning the Appellant with a two year period of ineligibility is set aside;*

2. *The Appellant is sanctioned with a warning or a reduced period of ineligibility expiring at the latest on 8 July 2012;*

3. *IWF shall bear all the costs of the arbitration if any and shall be ordered to reimburse to the Appellant the Court Office fee in an amount of CHF 1.000.*

4. *IWF shall compensate the Appellant for the legal and other costs incurred in connection with this arbitration, in an amount to be determined at the discretion of the Panel.*

In its Answer to the appeal dating 27 June 2012, the Respondent – *inter alia* – requested:

1. *The Appeal filed by the Appellant is dismissed.*

2. *The Respondent is granted an award for costs.*

Extracts from the legal findings

It is undisputed that Appellant has committed an anti-doping rule violation. What is at stake here is the consequences of this action. The standard sanction for an anti-doping rule violation according to Art. 10.2 IWF ADP is a two-year period of ineligibility. The Parties are in dispute, whether or not the Appellant is entitled to a reduction of the standard period of ineligibility under Art. 10.4 IWF ADP. Art. 10.4 IWF ADP requires a two-step examination. In a first step the scope of applicability must be examined (see below). In case the provision is applicable the length of the sanction must be determined in a second step (see below).

A. Applicability of Art. 10.4 ADP IWF

Art. 10.4 ADP IWF is only applicable if

(1) the substance detected in the bodily specimen of the Athlete is a Specified Substance within the meaning of Art. 4.2.2 IWF ADP;

(2) the Athlete establishes how the Specified Substance entered his body;

(3) the Athlete establishes the *"absence of an intent to enhance sport performance or mask the Use of a performance-enhancing substance"*.

In the case at hand it is undisputed that the first two prerequisites are fulfilled. *Methylhexaneamine* is a specified substance and it entered into the Athlete's body through the intake of the product *Body Surge*. The Parties, however, disagree in regard to the third condition (absence of intent). In particular the Parties disagree on how this term should be interpreted. The following core question is to be decided by the Panel:

In order to establish whether or not an athlete has intent to enhance his sport performance, does it suffice to demonstrate that the product (i.e. the nutritional supplement) was taken for sporting purposes or is it necessary to establish that the athlete had the intent to enhance his sport performance with the help of the prohibited substance contained in the product?

The Appellant declared in his submissions that he started taking *Body Surge* to supplement for the product *creatine elite*, which he had been taking previously. When creatine elite went out of production, the Appellant replaced it with *Body Surge* in November 2011, following the advice of Mr Nicholson. The reason for choosing *Body Surge* was, according to the Appellant's submissions, that it helped him during his pre-workout and with intensive workouts. According to Mr Nicholson's witness statement, the creatine contained in the product *"helps the muscle in a critical moment"*, *"increases its productivity"*, *"prevents injury by strengthening the muscle"* and *"helps to grow new muscle cells"*. Furthermore, the Appellant stated that he took the Supplement prior to competitions to lose weight in order to maintain his weight category. Hence, the Appellant used the Supplement to enable

him to compete in a weight category that provided for better chances of success in competitions. If of course, he had failed to maintain his weight category, he would have had to compete in a higher weight category against heavier and therefore probably stronger athletes. The Appellant also explained that he used *Body Surge* to replace the energy that he lost during the intensive periods of training before competitions. Thus, the supplement allowed him to continue exercising even though staying on a diet, i.e. without consuming the amount of calories he would have otherwise consumed. To sum up, the Appellant used the product *Body Surge* in order to improve his sport performance. Therefore, this Panel must rule on the question whether the absence of intent to enhance the sport performance must be linked to the prohibited substance or not.

Paragraph one of Art. 10.4 IWF ADP explicitly links the (absence of the) intent to the Specified Substance. The provision reads insofar as relevant:

"Where an Athlete (…) can establish how a Specified Substance entered his or her body (…) and that such Specified Substance was not intended to enhance the Athlete's sport performance (…)".

However, in order to justify any elimination or reduction, the second paragraph of Art. 10.4 IWF ADP states that

"The Athlete (…) must produce corroborating evidence in addition to his or her word (…) the absence of an intent to enhance sport performance (…)".

1. Overview as to the jurisprudence in this matter

The dispute as to the correct interpretation of Art. 10.4 ADP IWF (which is identical to Art. 10.4 of the WADC) has been dealt with by other arbitral tribunals, in particular in *CAS 2012/A/2107 Oliveira v. USADA*, award of 6 December 2010. In this regard, the Panel remarked the following:

"The Panel does not read clause two of Article 10.4 as requiring Oliveira to prove that she did not take the product (…) with the intent to enhance sport performance. If the Panel adopted that construction, an athlete's usage of nutritional supplements, which are generally taken for performance- enhancing purposes, but which is not per se prohibited by the WADC, would render Article 10.4 inapplicable even if the particular supplement that is the source of a positive test result contained only a specified substance. Although an athlete assumes the risk that a nutritional supplement may be mislabelled or contaminated and is strictly liable for ingesting any banned substance, Article 10.4 of the WADC distinguishes between specified and prohibited substances for purposes of determining an athlete's period of ineligibility. Art. 10.4 provides a broader range of flexibility (i.e., zero to two years ineligibility) in determining the appropriate sanction for an athlete's use of a specified substance because "there is a greater likelihood that Specified Substances, as opposed to other Prohibited Substances, could be susceptible to a credible, non-doping explanation". See Comment to Article 10.4.

If the Panel adopted USADA's proposed construction of clause two of Article 10.4, the only potential basis for an athlete to eliminate or reduce the presumptive two- year period of ineligibility of ingestion of a specified substance in a nutritional supplement would be satisfying the requirements of Article 10.5, which requires proof of "no fault or negligence" or "no significant fault or negligence" for any reduction. Unless an athlete could satisfy the very exacting requirement for proving that "no fault or negligence", the maximum possible reduction for use of nutritional supplement containing a banned substance would be one year. This consequence would be contrary to the WADC's objective of distinguishing between a specified substance and a prohibited substance in determining whether elimination or reduction of an athlete's period of ineligibility is appropriate under the circumstance".

This view expressed in *Oliveira* was followed by other CAS Panels, e.g. in the cases *CAS 2011/A/2645*, Award of 29 February 2012, no 79.- 81 and *CAS 2011/A/2495*, Award of 29 July 2011, no 8.31.

In the *Foggo* decision (*CAS 2A/2011 Kurt Foggo v National Rugby League*, Award of 3 May 2011, at no. 47), the Panel found *"that Oliveira should not be followed"*. However, the Panel in *Foggo* did not give any reasons for its decision, nor did the decision deal with the legal issues and systematic questions raised by *Oliveira*.

2. Opinion

The Panel – in principle – is prepared to follow the approach taken by the arbitral tribunal in *Oliveira*.

First, the wording of Art. 10.4 IWF ADP speaks in favour of *Oliveira*. Paragraph 1 expressly links the intent to enhance performance to the taking of the specified substance. It is true, that this link is not repeated in the second paragraph that constitutes a rule of evidence. However, the second paragraph does not exclude similar interpretation either.

It follows from the above that whether or not to follow a broad or restrictive interpretation of Art. 10.4 IWF ADP must be decided depending on the purpose of the rule. The underlying rationale of Art. 10.4 IWF ADP is that – as the commentary puts it – *"there is a greater likelihood that specified substances, as opposed to other prohibited substances, could be susceptible to a credible non-doping explanation"* and that the latter warrants

– in principle – a lesser sanction. What Art. 10.4 IWF ADP wants to account for is, in principle, that in relation to specified substances there is a certain general risk in day to day life that these substances are taken inadvertently by an athlete. The question is what happens if the risk at stake is not a "general" but a (very) specific one that the athlete has deliberately chosen to take. The Respondent submits that Art. 10.4 IWF ADP was not intended for such cases. If an athlete chooses to engage in risky behaviour (by taking nutritional supplements), he should not benefit from Art. 10.4 IWF ADP. The Panel is not prepared to follow this interpretation for the following reasons:

(1) The Panel finds it difficult to determine what patterns of behaviour qualify for risky behaviour as defined above. This is all the more true since – in particular when looking at elite athletes – most of their behaviour is guided by a sole purpose, i.e. to maintain or enhance their sport performance. The term 'enhance sport performance' is like an accordion that could be interpreted narrowly or widely: at one end of the spectrum, if an athlete takes – e.g. – a cough medicine, in most circumstances it will be to enable him to recover quicker in order to train again or to compete. Were the Panel to adopt a similar interpretative attitude, then it would risk outlawing a very wide spectrum of activities that are remotely only connected to sports performance. It is very difficult to draw an exact dividing line between products taken by an athlete that constitute a "normal" risk and products that constitute high risks in the above sense, preventing the application of Art. 10.4 IWF ADP from the outset. It is not for this Panel to act as a legislator by drawing this dividing line. It is for this Panel though to decide on the instant case, and the reasoning above should be understood as underscoring our resolve to thwart a wide interpretation of the term 'enhance sport performance'.

(2) It follows from the above that whether or not the behaviour of the athlete as such is intended to enhance his sport performance is not a sufficient criteria to establish the scope of applicability of Art. 10.4 IWF ADP. This is all the more true since – as the arbitral tribunal in *Oliveira* has stated – nutritional supplements are usually taken for performance-enhancing purposes which is not *per se* prohibited. The characteristic of "performance-enhancing" as such is neutral. An athlete is entitled to consume any substance that seems useful to enhance his sport performance as long as this substance is not listed on WADA's Prohibited List. Therefore, the primary focus can obviously not be on the question whether or not the athlete intended to enhance his sport performance by a certain behaviour (i.e. consuming a certain *product*), but moreover if the intent of the athlete in this respect was of doping-relevance.

(3) Finally, the view held by the Panel is also in line with the commentary in Art. 10.4 IWF ADP. The latter reads – inter alia: *"Generally, the greater the potential performance-enhancing benefit, the higher the burden on the Athlete to prove lack of an intent to enhance sport performance"*. Thus, the commentary assumes that there is a sliding scale with regard to the standard of proof in relation to absence of intent. The more risky the behaviour is in which an athlete engages the higher is the standard of proof for the absence of fault. It is exactly this sliding scale that the Panel will apply in the case at hand.

As a result, Art. 10.4 IWF ADP is applicable to the case at hand if the Appellant is able to produce corroborating evidence in addition to his word that establishes to the comfortable satisfaction of the Panel the absence of an intent to enhance sport performance through consuming *methylhexaneamine*.

3. Consequence of the view held here

The Appellant claims not to have known that *methylhexaneamine* was contained in the food supplement *Body Surge* and consequently having acted without intent. According to Mr Nicholson's witness statement, he had reassured the Appellant upon his request that Body Surge was clean and that it was prohibited in the United States to sell products that contained banned substances over the counter. As *methylhexaneamine* itself was also not mentioned on the label of the product, the Panel is convinced that the Appellant did indeed not know that *methylhexaneamine* was contained in *Body Surge*. This finding is also not disputed by the Respondent. However, the question is whether the mere fact that an athlete is unaware of a substance contained in the product suffices to rule out his intent to enhance sport performance.

This Panel holds that the term "intent" should be interpreted in a broad sense. Intent is established – of course – if the athlete knowingly ingests a prohibited substance. However, it suffices to qualify the athlete's behaviour as intentional, if the latter acts with indirect intent only, i.e. if the athlete's behaviour is primarily focused on one result, but in case a collateral result materializes, the latter would equally be accepted by the athlete. If – figuratively speaking – an athlete runs into a "minefield" ignoring all stop signs along

his way, he may well have the primary intention of getting through the "minefield" unharmed. However, an athlete acting in such (reckless) manner somehow accepts that a certain result (i.e. adverse analytical finding) may materialize and therefore acts with (indirect) intent. In such case Art. 10.4 IWF ADP is excluded. However, Art. 10.4 IWF ADP remains applicable, if the athlete's behaviour was not reckless, but "only" oblivious. Of course this Panel is well aware that the distinction between indirect intent (which excludes the applicability of Art. 10.4 ADP IWF) and the various forms of negligence (that allow for the application of Art. 10.4 ADP IWF) is difficult to establish in practice.

The Panel believes that the Athlete was not aware that the product *Body Surge* contained *methylhexaneamine*. Therefore, the Athlete had no **direct intent** to enhance his sports performance through the Specified Substance contained in the product. What has to be determined is, whether the Athlete had indirect intent. Such indirect intent can only be determined by the surrounding circumstances of the case. The Panel holds that an athlete competing at national and international level who also knows that he is subject to doping controls as a consequence of his participation in national and/or international competitions cannot simply assume as a general rule that the products he ingests are free of prohibited/specified substances. According to the Panel's view, the question if and to what extent the athlete is obliged to do research on a product and its contents, is also determined by the purpose of the product. The more the product is likely to be used in a sport/training related context, in other words: to enhance sport performance, and the more it is processed, the likelier it is that it contains prohibited/specified substances. It is beyond the scope of the Panel in this case to establish a graduated system of the duty of care an athlete has to take for every single product (food, medication, supplements) that he ingests in order to be eligible to claim not having had intent. However, in the case of a food supplement like *Body Surge*, that is taken in a sport/training related context, the athlete has to take a certain level of precautionary measures in order not to qualify his behaviour as reckless, i.e. with indirect intent. Any other interpretation would privilege athletes who close themselves off from their duties stipulated in Art. 2.1.1 IWF ADP the most. Moreover, it can be assumed that athletes competing at international level are aware of their anti-doping duties.

In the case at hand the Panel finds that the Appellant did also not have **indirect intent** to enhance his sport performance within the meaning of Art. 10.4 IWF ADP. However, this does not follow from the fact that Appellant claims to have looked at the label of the product *Body Surge* without being able to identify *methylhexaneamine* or any prohibited / specified substance. At no point did the Appellant invoke of having been aware of the contents of WADA's Prohibited List or having compared this list to the ingredients labelled on the product. So even if *methylhexaneamine* (instead of *1.3 dimethylamylamine*) had been explicitly listed on the label, the Panel has severe doubts that the Appellant would have been able to identify it as a specified substance and act accordingly. In his statement, the Appellant simply stated that he *"didn't understand anything of the product"* and that he knew that *"certain substances are forbidden"*. Merely looking at the label can therefore not unburden him in the case at hand. The Appellant has also admitted not having done any research himself. Still, the Appellant showed general awareness about his anti-doping duties according to Art. 2.1.1 IWF ADP in asking Mr Nicholson whether or not *Body Surge* was "clean". The latter assured him that no prohibited/specified substances were contained in the product, and that it was moreover prohibited by United States law to sell products that contained banned substances over the counter. Mr Nicholson also told him that he had made a personal inquiry and that everything "was fine" with the supplement. This was confirmed by Mr Nicholson in his witness statement and his testimony in the hearing. The Panel believes that the Appellant (wrongly) trusted Mr Nicholson's word and also takes into consideration that the Appellant listed the supplement *Body Surge* on the doping control forms of 4 and 12 April 2012 which he would have most likely not done if he had believed he had to hide the use of said supplement. The Panel is therefore comfortably satisfied that the Appellant did not have indirect intent to enhance his sport performance through the use of a specified substance, i.e. *methylhexaneamine*.

B. The appropriate reduction of the period of ineligibility

The fact that the athlete did not have intent within the meaning of Art. 10.4 ADP IWF does however not automatically lead to the impunity of the athlete. It still has to be determined in a second step to what extent the Appellant is eligible for a reduction of the normal period of ineligibility. The sanction according to Art. 10.4 IWF ADP ranges between a reprimand and no period of ineligibility as a minimum, to a period of two years of ineligibility as a maximum. According to Art. 10.4 IWF ADP the athlete's degree of fault (e.g. light or gross negligence) is the decisive criterion in assessing the appropriate period of ineligibility.

It is the Panel's view that the Appellant showed considerable fault in the case at hand. First and contrary to the Appellant's submissions, it has no influence on his degree of fault that it is established to the satisfaction of the Panel that he did not intend to enhance his sport performance through *methylhexaneamine*. This aspect was considered in the Appellant's favour when assessing whether or not Art. 10.4 IWF ADP was applicable at all. It cannot be taken into account twice.

Furthermore, the following findings speak in favour of a rather high degree of fault of the Appellant:

(1) There can be no doubt that Mr Nicholson is and was not a competent contact for advice in anti-doping matters. Based on the Appellant's submission and Mr Nicholson's witness statement and oral testimony, the Panel concludes that:

- Mr Nicholson is neither a medical doctor nor a pharmacist. He has no education/ training in anti- doping matters.
- He knew that a list of prohibited substances existed, but he had not read it and was unaware of its contents.
- He only undertook minimal (and completely insufficient) precautionary measures to make sure that there were no prohibited/specified substances in the supplement *Body Surge*. Mr Nicholson claims to have contacted the online store where he had purchased the supplement to inquire about its contents. He failed, however, to ask suitable questions. According to his oral statement, he only asked the salesperson of the online store – whose education in anti-doping matters remains unknown to the Panel – whether or not the product was "clean". He was satisfied with the online store's answer that *Body Surge* was "clean". Also, when asked about the general procedure when buying supplements for the Appellant, Mr Nicholson submitted – among others – in his written statement, that he would ask the online store sales person: *"Are there any steroids or anything bad in the supplement?"* and was satisfied with the answer: *"No Sir, we don't sell any such"*. The terms *"clean"* and *"anything bad"*, however, are open to various interpretations and can include everything from *"no artificial additives"* through *"allowed only out- of competition"* to *"no substances that are listed on WADA's Prohibited List"*. Also, the answers given by the sales person are as open to interpretation as Mr Nicholson's questions. At least, Mr Nicholson would have had to explicitly refer to WADA's Prohibited List when asking if the product was *"clean"* or contained *"anything bad"*.
- Speaking English and having access to the Internet, Mr Nicholson could have easily obtained information on anti-doping in general and on the product *Body Surge* and WADA's Prohibited List in particular.

(2) The Appellant knew that Mr Nicholson was not a medical doctor or a pharmacist but still trusted his judgment blindly. He did not get a second opinion by a doctor or a pharmacist, even though he had at least access to doctors. He also did not ask his federation or the National Doping Organization of his home country for assistance. Even though he might not have gotten sufficient and correct information there, he did not even try.

(3) The Appellant never requested specific information on the contents of the products he received from Mr Nicholson. He was satisfied with Mr Nicholson's reassurances that the products were *"clean"*.

The Panel does however also see circumstances that speak in favour of a reduction of the period of ineligibility:

(1) Even though one has to differentiate between the trust in a person and the trust in that person's expertise in a certain field, the Panel finds it understandable that the Appellant trusted Mr Nicholson, especially after the latter offered him advice and help on the occasion of the Appellant's injury in 2005 or 2006.

(2) According to WADA's 2011 Compliance Report, Albania is a non- compliant state. Even though this only means that Albania has not provided WADA with information as required by the World Anti- Doping Code, it shows – together with the undisputed submissions of the Appellant and the witness statements of Zef Kovaci (weightlifting coach), Sokol Bishanaku (weightlifting coach), Muhamet Tuzi (weightlifting coach), Daniel Godelli (weightlifter), Ervis Tabaku (weightlifter) and Briken Calja (weightlifter) that anti-doping has a low priority in Albania and that there is no anti-doping program currently in place. Also, except for Mr Bishanaku, neither the Appellant, nor the above mentioned coaches and athletes have ever received information from the national federation about forbidden supplements and/or substances.

Having regard to all of the above mentioned criteria that speak against as well as in favour of the Appellant, the Panel considers it appropriate to impose a period of ineligibility of 15 months. In doing so, the Panel is guided by the following circumstances:

(1) The starting point for this Panel is the principle enshrined in Art. 2.1.1 IWF ADP that every athlete is responsible for what he ingests. In light of this principle, the Appellant showed considerable fault in blindly trusting Mr Nicholson and not making further inquiries with other trained and skilled personnel.

(2) The Panel is prepared, however, to take into account the fact that Albania is a non-compliant state with practical no anti-doping education and information for its athletes. In doing so the Panel does not ignore that the Respondent has a legitimate interest in creating a level playing field for all its athletes worldwide. No level playing field would exist if the governing regulations would not apply to every participant to the same extent. One of the core principles in creating uniform conditions between the athletes is to put the individual burden on the athlete according to Art. 2.1.1 IWF ADP. The mere fact that some countries – due to lacking financial resources – cannot provide for adequate anti-doping education/information does, therefore, not give athletes from these countries a licence to be oblivious and negligent in anti- doping matters. Moreover, every athlete who wants to compete at international level has to abide by the regulations governing these competitions and therefore has to make sure that he is aware of their contents. On the other hand, Art. 10.4 IWF ADP refers to the length of the sanction to the athlete's "personal fault" [emphasis added]. The degree of this personal fault is, however, determined by the circumstances of the individual case. This is also supported by the commentary to Art. 10.4 IWF ADP that states that *"the circumstances considered must be specific and relevant to explain the Athlete's or others Person's departure from the expected standard of behavior"*. The standard to be applied here is, therefore, a subjective and not an objective one.

(3) The Panel comes to its conclusion also in light of several CAS decisions related to the taking of a specified/prohibited substance contained in a food supplement. Among others:

- *CAS 2011/A/2645*, Award of 29 February 2012: reprimand and no period of ineligibility (*hydrochlorothiazide*);
- *Foggo* (*CAS 2A/2011 Kurt Foggo v National Rugby League*, Award of 3 May 2011): 6 months of ineligibility (*methylhexaneamine*);
- *CAS 2011/A/2518*, Award of 10 November 2011: 8 months of ineligibility (*methylhexaneamine*);
- *International Rugby Board*, Award of 27 January 2012: 12 months (*methylhexaneamine*);
- *International Rugby Board*, Award of 16 September 2011): 9 months (*methylhexaneamine*)
- *Oliveira (CAS 2012/A/2107 Oliveira v. USADA*, award of 6 December 2010: 18 months (*methylhexaneamine*)
- *CAS 2011/A/2615/2618*, award of 19 April 2012: 18 months (*tuaminoheptane*)

The Panel understands that the imposed sanction of 15 months is considerably higher than the sanctions issued in most of the aforementioned cases. And even though decisions rendered by international federations without adjudicated determination by an independent tribunal are of limited significance, the same is not true for the above referenced CAS decisions. Yet, the Panel agrees with the view taken by the Panel in *CAS 2011/A/2518*, Award of 10 November 2011, under 10.23) that stated:

"Although consistency of sanctions is a virtue, correctness remains a higher one: otherwise unduly lenient (or, indeed, unduly severe) sanctions may set a wrong benchmark inimical to the interests of sport".

Also, the Panel in *Oliveira* and *CAS 2011/A/2615/2618* imposed a sanction of 18 months of ineligibility and applied a very high standard of care demanding the athlete to do intensive research on the contents of a food supplement. Having compared the starting conditions of the Athletes' access to information as well as their precautionary measures, the Panel deems the Appellant's fault roughly equivalent.

In the case at hand, it is the Panel's task to balance the two conflicting positions of the parties, i.e. the Respondent's interest in creating equal conditions for competitions and the Appellant's limited access to information in anti-doping matters. The Panel deems it appropriate to reduce the sanction imposed on the Appellant for the reason that he never received any education or information in anti- doping matters by his federation or the anti-doping agency of his country. This explains that the Appellant's awareness of the dangers of prohibited/ specified substances being contained in food supplements was not as high as it should have been. The Panel further finds that the case at hand cannot be compared to cases where an athlete uses prohibited/specified substances deliberately and intentionally. A reduction

of the standard sanction of 2 years seems therefore mandatory. On the other hand, the Respondent's interests are safeguarded by the fact that the sanction imposed on the Appellant is still considerably high compared to the possible maximum sanction of two years of ineligibility. In the Panel's view, the Appellant's poor judgment in blindly trusting Mr Nicholson's advice and not doing further research does not allow for a further reduction even if one assumed the complete absence of an established anti-doping system in the Appellant's home country. The Panel understands that the consequences of this decision are far reaching for the Appellant. Being his country's most successful athlete, he was banned from taking part in the 2012 Olympic Games. However, every sanction that would have allowed the Appellant to take part in the Games, i.e. a sanction of no more than three or four months, depending on the commencement date of the period of ineligibility, would have sent out the wrong signal. Not having intent to enhance his sport performance through a prohibited/specified substance alone does not make the violation of Art. 2.1.1 IWF ADP a minor and pardonable offence.

Arbitration CAS 2012/A/2824
Besiktas JK v. Union des Associations Européennes de Football (UEFA)
31 October 2012

Football; Disciplinary sanction due to violation of the UEFA Club Licensing and Financial Fair Play Regulations (UEFA CL&FFP Regulations); Interpretation of a rule (Annex VIII UEFA CL&FFP Regulations); UEFA right to challenge the issuance of licences in case of breach of the UEFA CL & FFP Regulations; Overdue payables; Proportionality of the sanction; Fair and equal treatment

Panel:
Mr. Mark Hovell (United Kingdom), President
Mr Michael Gerlinger (Germany)
Mr. Rui Botica Santos (Portugal)

Relevant facts

Besiktas Jimnastik Kulübü (hereinafter referred to as "Besiktas" or the "Appellant" or "the Club") is a Turkish professional football club with its registered office in Istanbul, Turkey.

The Union des Associations Européennes de Football (hereinafter referred to as "UEFA" or the "Respondent") is an association under Articles 60 *et seq.* of the Swiss Civil Code, with headquarters in Nyon, Switzerland. UEFA is a confederation recognised by the Fédération Internationale de Football Association (hereinafter referred to as "FIFA") and promotes and governs football in Europe.

On 22 May 2008, Club X. entered into a contract with the Appellant for the transfer of the player to the Appellant from Club X. for the net transfer fee of €4,500,000 payable: €1,500,000 by 1 July 2008, €1,500,000 by 30 June 2009 and €1,500,000 by 30 June 2010 (hereinafter referred to as "the T. Contract")

On 28 May 2008, Club X. entered into a further contract with the Appellant for the transfer of the player S. by way of a loan from 1 July 2008 to 30 June 2009 and on a permanent basis from 1 July 2009 (hereinafter referred to as "the S. Contract"). Under the S. Contract the Appellant was to pay €300,000 net by 1 July 2008 in respect of the loan period and a further €4,400,000 in respect of the definitive transfer by way of the following instalments: €1,450,000 by 30 June 2009, €1,450,000 by 30 June 2010 and €1,500,000 by 30 June 2011.

On 29 March 2010, Club X., at the Appellant's request, and the Appellant agreed that the remaining monies due and owing under the T. Contract and the S. Contract would be paid as follows: €2,950,000 by 30 June 2010 and €1,500,000 by 30 June 2011 (hereinafter referred to as "the Payment Agreement"). The Payment Agreement provided that, in case of default in the payment of any of the amounts due under the agreement, the whole of the remaining payments would become immediately due. Further, the Appellant agreed to pay Club X. €350,000 in default interest due under the Payment Agreement.

On 9 August 2010, Club X. filed a request for arbitration with the Court of Arbitration for Sport (hereinafter referred to as "the CAS") seeking to enforce payment under the Payment Agreement.

On 14 December 2010, the Appellant made a payment of €1,450,000 to Club X.

On 31 March 2011, which was the last date upon which overdue payables could be settled as per the UEFA Club Licensing and Financial Fair Play Regulations (Edition 2010) (hereinafter referred to as "UEFA CL & FFP Regulations"), in order to be awarded a licence to compete in the 2011/12 Season UEFA Europa League, the Appellant had overdue payables due to Club X. (€1,500,000 in relation to the Payment Agreement) and additional overdue payables to Club Y. (€750,000 in relation to the last instalment of a transfer fee for the player, F.).

On 31 May 2011, the Turkish Football Federation (hereinafter referred to as "TFF") sent the UEFA administration the list of clubs to which it had granted licences for 2011. This list included Besiktas, which had qualified for the 2011/12 UEFA Europa League on sporting merit.

On 30 June 2011, the Appellant's transfer payables table provided that the Appellant owed €1,608,000 in relation to S. and €1,669,000 in relation to T., but stated that both amounts were "in dispute". Further, the Appellant stated that €365,000 was owed in

relation to solidarity contributions for the player R.; €225,000 in solidarity contributions for the player M.; and €750,000 in relation to a transfer instalment for the player F. ; all of which were reported as "disputed".

On 15 July 2011 the TFF submitted to the UEFA Club Financial Control Panel ("UEFA CFCP") information based on the figures provided by Besiktas as part of the monitoring procedure, including the overdue payables position of Besiktas as at 30 June 2011, in accordance with the UEFA CL & FFP RegulationS. Subsequently the UEFA CFCP asked the TFF for additional monitoring information in order to establish Besiktas situation as at 30 September 2011.

On 18 July 2011, the CAS upheld Club X. request for arbitration and awarded Club X. the net amount of €3,350,000 plus interest pursuant to the breached Payment Agreement.

On 30 September 2011 the Appellant's transfer payables table provided that the Appellant owed €1,608,000 in relation to S. and €1,669,000 in relation to T. but stated that both amounts were "in dispute". Further, the Appellant stated that €364,000 was owed in relation to solidarity contributions for the player R.; €103,000 in solidarity contributions for the player M.; and €750,000 in relation to a transfer instalment for the player F.; all of which were reported as "disputed".

On 17 October 2011, the TFF forwarded to the UEFA CFCP the information provided by Besiktas in relation to its overdue payables position as at 30 September 2011.

On 20 October 2011, the Appellant paid €3,000,000 to Club X.

On 25 November 2011, the UEFA CFCP decided to commission a compliance audit to verify the information provided by Besiktas.

On 19 and 20 December 2011, Pricewaterhouse Coopers (hereinafter referred to as "PWC") conducted the audit at the TFF headquarters under the supervision of the UEFA administration.

On 23 January 2012, PWC submitted its report confirming the existence of overdue payables and also indicated that some figures provided by the Club were incorrect, having discussed its draft report with and having it approved by the TFF and BesiktaS. On the same day, the UEFA administration submitted its compliance report and the PWC report to the UEFA CFCP.

On 30 March 2012, the Appellant entered into a further agreement with Club X. in respect of the outstanding amounts from the CAS award. The parties acknowledged that €748,747.42 remained due and the parties agreed that the Appellant would make the following payments: €400,000 by 2 May 2012 and €348,747.42 by 3 May 2012.

On 19 April 2012, the UEFA disciplinary inspector submitted his report, in which he concluded that Besiktas had violated the UEFA CL&FFP RegulationS.

On 1 May 2012, Besiktas submitted its petition in response of the allegations of the UEFA disciplinary inspector.

On 1 May 2012, the UEFA Control & Disciplinary Body rendered its decision finding the Club guilty of violating not only Articles 65 and 66 of the UEFA CL & FFP Regulations but also the principles of good faith and transparency (hereinafter referred to as the "First Decision") and held:

"1. Besiktas JK is suspended from the next two UEFA Club competitions for which it qualifies in the next five seasonS. This sentence is suspended for a probationary period of five years.

2. Besiktas JK is fined €600,000.

3. This decision has no impact whatsoever on the 2012/13 club licensing procedure or the associated requirements and deadlines.

4. The above fine must be paid into the bank account indicated below within 30 days of the communication of this decision".

On 16 May 2012, UEFA, through its disciplinary inspector, submitted a statement of appeal against the First Decision.

On 24 May 2012, UEFA filed appeal pleadings against the First Decision.

On 29 May 2012, Besiktas submitted its petition in response to the disciplinary inspector's statement of appeal and, in doing so, lodged a cross-appeal.

On 30 May 2012, the UEFA Appeals Body rendered a decision (hereinafter referred to as the "Appealed Decision") and held:

"1. The appeal lodged by UEFA is admitted. Therefore, Besiktas JK is excluded from the next two UEFA club competitions for which it qualifies in the next five seasons.

The exclusion for the second competition is suspended for a probationary period of five years.

2. *Besiktas JK is fined €200,000, of which €100,000 is suspended for a probationary period of five years.*

3. *The cross appeal of Besiktas is partially admitted as explained in the full written decision.*

4. *The costs of the procedure, amounting to* €6,000, are charged as follows *€4,000 to Besiktas JK and the rest to UEFA.*

5. *This decision is final (in accordance with Article 66 DR)".*

On 8 June 2012, the Appealed Decision was notified to the parties.

On 15 June 2012, Besiktas filed a Statement of Appeal with the CAS against UEFA with the following request for relief:

"… Besiktas requests the Panel to decide that UEFA have adopted unlawful decision and the Club respectfully seeks an award:

ordering UEFA to grant Besiktas the requested provisional measures and make the Club enable to participate in the 2012/13 Europa League competition of which it has qualified on sporting merits;

ordering UEFA to pay all costs and legal fees incurred by the Club in these arbitration proceedings on a full indemnity basis;

awarding any such other relief as the Panel may deem necessary or appropriate".

Further, Besiktas requested the stay of the Appealed Decision.

On 21 June 2012, the Appellant filed its Appeal Brief with the CAS, repeating its request for relief.

On 22 June 2012, the Respondent filed its response to the Appellant's request for provisional measures.

On 29 June 2012, UEFA submitted its Answer, together with various exhibits, seeking the following requests for relief:

"UEFA respectfully requests CAS to dismiss the Appeal and to order payment by the Appellant of all costs of the arbitration as well as legal costs suffered by UEFA."

On 2 July 2012, the CAS Panel rejected the request for provisional measures in a written order delivered to the parties.

A hearing was held on 5 July 2012 at the CAS premises in Lausanne, Switzerland.

Extracts from the legal findings

In these present proceedings, the Panel had to determine the following:-

(a) Were there any procedural irregularities?

(b) If not, were there any substantive irregularities? In other words, did the UEFA Appeals Body treat the Appellant unfairly, disproportionately or unequally?

The Panel notes the principle objectives behind the UEFA CL&FFP Regulations are, inter alia, to protect the integrity of UEFA Club Competitions, to improve the financial capabilities of clubs, to protect creditors (players, tax authorities and other clubs) of clubs and to introduce more discipline in clubs' football finances. All of these objectives are there to protect the long-term viability and sustainability of European club football.

The Panel notes that the Appellant ultimately did not challenge the breaches of the UEFA CL&FFP Regulations, as set out by the Respondent and PWC. It was ultimately undisputed that:

(a) as at 31 March 2011, the Appellant had significant overdue payables. In accordance with Article 49 of the UEFA CL&FFP Regulations, the Appellant should have disclosed those to the TFF. As it could not satisfy the test of having no overdue payables as at that date, it should not have been granted a licence to participate in the 2011/12 Europa League;

(b) however, it was granted that licence and as such was then subjected to the monitoring process. As at 30 June 2011, the Appellant had significant overdue payables to a number of clubs. In accordance with Article 65 of the UEFA CL&FFP Regulations the Appellant should have disclosed these too. If these had been properly disclosed, then the Appellant could not have satisfied the test of having no overdue payables as at that date and would then have had to demonstrate these overdue payable would be settled by 30 September 2011; and

(c) as at 30 September 2011, significant overdue payables remained due to a number of other clubs.

These breaches were eventually discovered and UEFA, in pursuance of its objectives, who then sought to sanction the Appellant, resulting in the Appealed Decision.

A. Procedural Challenges

1. Misapplication of an unlawful rule

Whilst not denying the fact that these overdue payables existed before the CAS, the Appellant had before UEFA sought to argue that these were "disputed". UEFA, in the Appealed Decision were clear in their interpretation of Annex VIII of the UEFA CL & FFP Regulations, paragraph (1)(d), in that to dispute a claim brought by a creditor, it must be "contested" and the Appellant would need to demonstrate to the UEFA Appeals Body that any claim it faced was "manifestly unfounded".

The Appellant sought to argue before the CAS that UEFA had wrongly interpreted these regulations and that Annex VIII is itself unlawful. The Appellant argued that UEFA was wrong to assume that no action or not submitting petitions to a legal process meant a party has accepted that process or claim. The Appellant argues that unless it is expressly accepted, a claim should be deemed objected to.

The Panel determined that Annex VIII of the UEFA CL & FFP Regulations was perfectly clear and could see no substantial arguments regarding its lawfulness. The Panel noted that the Appellant has merely called the regulations "unlawful" but advanced absolutely no grounds to challenge their legality. As such the Panel can see no reason to dispute the lawfulness of the regulations. The party facing the claim has to "contest" it .

In addition, the Appellant would need to show to the UEFA Appeals Body (or the UEFA Control and Disciplinary Body, as the case may be) that the claim it faced was "manifestly unfounded". In these cases, the Appellant did nothing at all. There was no evidence of any objection or defence; the Appellant did not offer to pay part of any transfer fee, training competition or solidarity payments it felt was due; and then to contest the balance of the claim. The Appellant did absolutely nothing; whilst this may not amount to an acceptance of the claims, it certainly did not amount to "contesting" the claims. Further the Appellant was notable to demonstrate the claims were "unfounded" in any way. The Panel conclude that the UEFA Appeals Body interpreted and applied Annex VIII correctly and that the overdue payables were not "disputed", just "unpaid".

2. Need to proceed against the licence grantor

The second procedural challenge brought by the Appellant was that UEFA needed to bring an action under the UEFA CL&FFP Regulations against the TTF, as it had done in the Györi Award. UEFA stated it could have acted against the TFF, but that the case at hand is solely related to the Appellant and there is nothing in the UEFA CL&FFP Regulations that obliges UEFA to take action against the licence grantor in order to sanction the licence holder. The Panel concurred with UEFA on that point.

The Appellant appeared to be arguing that as UEFA had known that the TFF had issued the licence to the Club and failed to take action against the TFF, it has accepted the process. The Panel noted this line of argumentation seemed a little contradictory, in light of the fact it had argued the opposite when claiming its own silence over claims from other clubs could not be deemed its acceptance of those claims. The Panel determined here that UEFA ultimately did challenge the granting of the licence, but only when they became suspicious during the monitoring process. The Panel recognises UEFA cannot be deemed to accept every single federation's or association's decision to issue their clubs with licences. It must maintain the right to challenge these against both the licence holder (club) and licence grantor (federation) at a later stage should it become aware of any breaches of the UEFA CL & FFP Regulations.

3. Procedural wrongdoings

The Appellant submitted that the process before the UEFA Appeals Body was in breach of its own regulations. The Panel certainly noted the lack of time the Club was presented with to contest such serious allegations, with severe sanctions, particularly when the Appellant was only given hours to prepare its defence to the UEFA disciplinary inspector's appeal.

That stated, this Panel, as many before it (there are detailed references on both the Györi Award and the Bursaspor award) recognises the curing effect at Article R57 of the Code. The Appellant's appeal against the Appealed Decision is heard *de novo* and the Appellant therefore had its opportunity to challenge the UEFA disciplinary inspector's appeal before this Panel.

The Panel therefore concludes that there were no procedural issues which should result in the Appealed Decision becoming null and void, so now turns to the substantive issues.

B. Substantive issues

1. Unequal treatment

The Appellant relied particularly upon the PAOK case, but the Panel noted there were references to the Györi case, the Olympiacos Volou case and the Bursaspor case, which were all UEFA decisions arising of the UEFA CL&FFP Regulations or the UEFA Disciplinary Regulations.

The PAOK, Györi and Bursaspor cases all related to breaches of the UEFA CL&FFP Regulations, whereas Olympiacos Volou involved match fixing. Some clubs had a single instance of overdue payables; others had more than one; some had significant sums overdue; others less so; some should not have been issued with a licence (and earned significant revenues from the same); other breaches occurred only within the monitoring process. However, the Panel noted only one club should not have been granted a licence and then failed the monitoring test at both dates, with many, significant overdue payments – that club was the Appellant.

2. Proportionality

On the question of proportionality, the Panel accepts the position of UEFA, as established by the CAS jurisprudence it cited – just because another sanction could be issued, it does not make the one issued disproportionate. The Appellant would have to demonstrate that the Appealed Decision was "grossly disproportionate". The Panel determined that the range of sanctions included a fine and a competition ban. Where a licence had been issued where it should not have been, due to the concealment of overdue payables by labeling them as "disputed", whilst, as noted above, not contesting these; and where the club has earned significant revenues that it should not have; then it is within the range of a competition ban and a fine. The Panel also noted that the Appellant had a systematic approach to debts with other clubs – it simply ignored them until forced by FIFA or the CAS to pay. This is sometimes referred to as a "FIFA loan", a club procures credit from other clubs and thereby creates an uneven playing field. The Appellant had a large number of clubs that it had not paid. The Appellant cannot argue it had not paid in good faith, allegedly having it "made it a principle" to wait for final decisions, in order to obtain a correct calculation. If so, it should have provided the decision making bodies with its position and calculation parameters. As the Appellant simply ignored the claims without contesting them, it had acted in bad faith.

In addition, if clubs during the monitoring period have large amounts of overdue payables or many of them (or both as in the case of the Appellant), they will find themselves in the range of a competition ban and a fine. The number and/or amounts will be taken into consideration by UEFA. In this case, the Panel has no doubt that these breaches, especially when coupled with the fact the licence should not have been issued in the first place, should have resulted in the sanctions contained in the Appealed Decision.

The Appellant did argue, however, that a one competition ban looked disproportionate in the light of the Olympiacos Volou's similar ban (putting the suspended part of their sanction to one side) when looking at their offence (match fixing) compared to the Appellant's breaches. The Panel noted that this is perhaps a sign of how seriously UEFA considers significant breaches of the UEFA CL&FFP Regulations too. In any event, as stated above, the Panel determined the UEFA Appeals Body acted within the UEFA CL&FFP Regulations range of sanctions and determined the sanctions were proportionate to the Appellant's breaches.

3. Mitigation

The Appellant also sought to argue that it should have been given a second chance, as it believed PAOK were. The Panel were impressed by the changes the new management team at the Club had made in a relatively short period of time, which should only put the Club in good stead for the future. However, the Panel also noted the evidence of UEFA's compliance officer, who stated the Club was given a second chance, as the second competition ban was suspended and the fine issued by the UEFA Control & Disciplinary Body was reduced by the UEFA Appeals Body. If the new management continue to run the Club as they have started, then that second competition ban should fall away. The Panel also noted PAOK's breaches were all in the monitoring process; it had earned its licence by not having any overdue payables on 31 March.

C. Conclusion

In conclusion, the Panel were satisfied that the UEFA Appeals Body properly followed the UEFA CL & FFP Regulations and that the Appellant committed numerous breaches of these regulations gaining a licence to compete in the 2011/12 Europa League that it should not have received and continued to breach the regulations during the monitoring process by continually labeling many and large overdue payables as "disputed", whilst not contesting these in any way. These breaches were such that a competition ban and a fine was fair and proportionate. The

efforts of the Appellant's new management were to be commended, but had been taken into account by UEFA and as such, the Panel felt the Appellant was treated equally and fairly by the UEFA Appeals Body; as such the Panel dismisses the Appeal and upholds and confirms the UEFA Appeal Body's decision.

4A_312/2012
Arrêt du 1er octobre 2012
Ire Cour de droit civil

Composition	Mmes et M. les Juges Klett, Présidente, Corboz et Rottenberg Liatowitsch Greffier: M. Carruzzo
Parties	Club X._____Ltd., recourant, représenté par Me Afshin Salamian, **contre** Club Y._____, intimée, représentée par Me Pascal Philippot,
Objet	arbitrage international; avance de frais; délai, recours en matière civile contre la sentence rendue le 4 avril 2012 par le Tribunal Arbitral du Sport (TAS).

Faits

A.

A.a Le 17 juillet 2007, X._____ Ltd (ci-après: X._____), club de football professionnel, et V._____ Ltd (ci-après: V._____), société chargée de la réalisation des transferts de joueurs pour X._____, désignés collectivement the Firm (ci-après: X._____, par souci de simplification), d'une part, et Y._____ (ci-après: Y._____), club de football professionnel, d'autre part, ont passé un accord (ci-après: le Contrat), portant sur le transfert de Y._____ à X._____ d'un footballeur professionnel (ci-après: le joueur). En vertu du Contrat, le prix du transfert se composait d'un montant fixe de 4'000'000 euros, à payer en quatre tranches, auquel viendraient s'ajouter, le cas échéant, des indemnités complémentaires soumises à condition: 375'000 euros si X._____ se qualifiait pour les 8èmes de finale de la Ligue des Champions lors de la saison 2007/2008, 500'000 euros en sus s'il atteignait les quarts de finale de cette compétition et un supplément de 750'000 euros s'il terminait à la première place de son championnat national à l'issue de ladite saison (art. 3.1 du Contrat); en cas de transfert du joueur par X._____ à un autre club, 20% de la différence entre la somme perçue par X._____ à cette occasion et l'indemnité versée par lui à Y._____ pour l'acquisition du joueur (art. 3.2 du Contrat). X._____ s'engageait, en outre, à verser directement à ce dernier le 5% du montant du transfert, soit 200'000 euros, indemnité qui serait additionnée à celle que l'intéressé toucherait à la signature du contrat de travail avec X._____ (art. 3.3 du Contrat). Le joueur a contresigné le Contrat.

Le lendemain, soit le 18 juillet 2007, X._____, agissant sans le concours de V._____, et Y._____ ont signé un contrat (ci-après: le Protocole), qui portait sur le transfert du même joueur pour un montant fixe identique. En revanche, les conditions auxquelles était subordonné le droit de Y._____ à des indemnités complémentaires ne coïncidaient

pas avec celles prévues dans le Contrat: le supplément de 375'000 euros serait exigible si X._____ se qualifiait pour les 16èmes de finale déjà (au lieu des 8èmes de finale) de la Ligue des Champions lors de la saison 2007/2008 (art. 5 du Protocole); l'indemnité complémentaire de 500'000 euros serait payable en cas de qualification de X._____ pour les 8èmes de finale (et non plus seulement pour les quarts de finale) de cette compétition (art. 6 du Protocole); quant à l'indemnité additionnelle de 750'000 euros, elle serait acquise à Y._____ si X._____ terminait à la première place de son championnat national, soit à l'issue de ladite saison, soit - nouvelle hypothèse - au terme de la saison 2008/2009 (art. 7 du Protocole). L'indemnité à payer par X._____ en cas de transfert du joueur à un autre club était reprise telle qu'elle (art. 4 du Protocole), tandis que celle relative au paiement des 200'000 fr. en mains du joueur ne faisait l'objet d'aucune stipulation dans le Protocole. X._____ s'engageait, en outre, à verser à un club Z._____ une indemnité de 5% du montant du transfert du joueur en conformité avec une convention passée entre Y._____ et ledit club en 2002 (art. 2 du Protocole). Il acceptait, enfin, de payer, en sus du prix du transfert, l'indemnité de solidarité de 5% prévue par le règlement ad hoc de la Fédération Internationale de Football Association (FIFA; art. 3 du Protocole). Le joueur n'a pas contresigné le Protocole, au pied duquel figurent les signatures de B._____, président de X._____, et de D._____, manager général de Y._____, au-dessus, respectivement au-dessous, de la mention manuscrite "lu et approuvé".

A.b X._____ a remporté son championnat national au terme de la saison 2008/2009. Il n'a pas atteint les 16èmes de finale de la Ligue des Champions lors de la saison 2007/2008.

A.c Un différend a surgi entre les parties au sujet du paiement des indemnités complémentaires prévues dans les deux conventions susmentionnées.

En 2009, Y._____ a assigné X._____ devant les instances compétentes de la FIFA en vue d'obtenir le paiement des montants prévus par les art. 2, 3 et 7 du Protocole. Son action a été divisée en deux procédures distinctes, eu égard à la nature différente des prétentions élevées par elle.

Les conclusions fondées sur l'art. 2 (indemnité à verser au club Z._____) et 3 (indemnité de solidarité) du Protocole ont été soumises à la Chambre de Résolution des Litiges de la FIFA (ci-après: la CRL); celle déduite de l'art. 7 (indemnité en cas d'obtention du titre de champion national lors de la saison 2008/2009), à la Commission du Statut du Joueur de la FIFA (ci-après: la Commission).

Par décision du 7 décembre 2010, dont les motifs ont été communiqués aux parties le 19 janvier 2012, la CRL a rejeté le chef de la demande fondé sur l'art. 3 du Protocole sans se prononcer, apparemment, sur celui découlant de l'art. 2 du Protocole. Le 23 janvier 2012, Y._____ a interjeté appel contre cette décision auprès du Tribunal Arbitral du Sport (TAS); elle a développé son argumentation dans un mémoire du 3 février 2012. La procédure y relative, enregistrée sous le numéro ... (ci-après: la cause B), est, semble-t-il, toujours pendante.

Par décision du 16 novembre 2010, le juge unique de la Commission a condamné X._____ à payer à Y._____ la somme de 750'000 euros avec intérêts à 5% l'an dès le 15 juin 2009.

B.

B.a Le 30 août 2011, X._____ a saisi le TAS d'un appel visant la décision du 16 novembre 2010, lequel a été enregistré sous le numéro .... (ci-après: la cause A). X._____ a déposé son mémoire d'appel en date du 12 septembre 2011, concluant à l'annulation de la décision attaquée et au rejet de la prétention admise en première instance. Au terme de sa réponse du 23 septembre 2011, Y._____ a invité le TAS a confirmé cette décision.

La Formation du TAS a tenu séance à Lausanne le 25 janvier 2012. Elle a procédé à l'audition de deux témoins - l'avocat C._____, conseil de X._____, et D._____, susnommé, dirigeant de Y._____ - et des représentants des parties, demandé à celles-ci de se prononcer sur l'argument de l'appelant tiré des vices du consentement qui auraient affecté la conclusion du Protocole et entendu leurs déclarations finales. Tant au début qu'au terme de cette audience, les parties ont indiqué expressément qu'elles étaient satisfaites de la façon dont la procédure avait été conduite.

B.b Dans sa réponse du 19 mars 2012 à l'appel déposé par Y._____ (cause B), X._____ a requis préalablement la jonction des causes A et B ainsi que la production par Y._____ de

tous les contrats conclus avec le joueur. Devant le refus de Y._____, le TAS, par courrier du 22 mars 2012, a rejeté cette requête en se fondant sur l'art. 52 du Code de l'arbitrage en matière de sport (ci-après: le Code).

Le 26 mars 2012, X._____ a relancé le TAS en le priant:

- d'octroyer, à titre exceptionnel un délai aux parties pour qu'elles puissent compléter leurs écritures dans la cause A, en application de l'art. 56 du Code, une fois la cause B liquidée, subsidiairement de verser tous les actes de cette cause-ci dans le dossier de cette cause-là;

- de verser au dossier de la cause B les déclarations des témoins faites dans la cause A, subsidiairement de convoquer à nouveau les témoins C._____ et D._____ pour être entendus dans la cause B;

- de verser au dossier de la cause A les déclarations des témoins qui seraient entendus dans la cause B.

Par lettre du 3 avril 2012, faisant référence à la cause B, le TAS, après avoir recueilli les déterminations de Y._____, a rejeté les requêtes formulées dans la lettre du 26 mars 2012 et indiqué que la sentence dans la cause A serait notifiée aux parties dans le délai prévu pour ce faire. Il a, en outre, pris acte de ce que X._____ acceptait que la Formation appelée à statuer dans la cause B pût consulter les actes de la cause A et procéder à l'audition des témoins entendus dans celle-ci. Enfin, le TAS a accepté la requête de X._____ relative à la production par Y._____ des contrats conclus par elle avec le joueur.

B.c Le lendemain, soit le 4 avril 2012, le TAS a rendu sa sentence. Il a rejeté l'appel, confirmé la décision prise le 16 novembre 2010 par le juge unique de la Commission et écarté toutes autres requêtes ou conclusions.

La Formation a commencé par mettre en exergue les divers éléments par lesquels le Protocole se distinguait du Contrat. Cherchant ensuite à déterminer les rapports existant entre ces deux conventions, elle a écarté la thèse de la novation, soutenue par Y._____ et accueillie par le juge unique de la Commission, pour lui préférer celle voulant que les deux accords coexistassent et interagissent, ayant ainsi tous deux vocation à régir les relations entre Y._____ et X._____. Pour la Formation, en effet, il n'était pas possible de conclure à une novation du Contrat par le Protocole du fait, notamment, que les parties à ces deux conventions n'étaient pas les mêmes, V._____ n'ayant pas signé le Protocole, et que les signataires du second accord n'avaient pas spécifié que celui-ci remplacerait le Contrat alors qu'ils auraient pu aisément le faire. Cela posé, les trois arbitres du TAS, constatant que l'obligation faite à X._____ de payer l'indemnité complémentaire de 750'000 euros pouvait être déduite, ratione temporis, de l'art. 7 du Protocole mais non de l'art. 3.1 du Contrat, ont analysé les faits pertinents afin de pouvoir décider à laquelle de ces deux clauses incompatibles il fallait donner la priorité. A cet égard, ils ont mis en évidence les sept circonstances suivantes: le Protocole avait été signé postérieurement au Contrat; B._____, en apposant sa signature au pied du Protocole avec la mention manuscrite "lu et approuvé", était conscient de l'engagement qu'il souscrivait et l'avait donc assumé; l'idée qu'il ait pu penser que les termes utilisés dans le Protocole étaient identiques à ceux du Contrat ne pouvait du reste pas sérieusement être envisagée, étant donné les circonstances; de plus, X._____ avait expressément reconnu l'existence et les effets du Protocole dans les lettres qu'il avait échangées avec Y._____; X._____ avait d'ailleurs fait référence, dans deux courriers, à des obligations issues du seul Protocole; au demeurant, les différences entre le Protocole et le Contrat, telles qu'elles avaient été mises en évidence, laissaient à penser que certaines conditions du transfert du joueur avaient été renégociées pour figurer dans le nouvel accord; enfin, X._____ avait lui-même proposé à Y._____ une solution transactionnelle pour l'exécution de l'obligation découlant de l'art. 7 du Protocole. Sur la base de ces éléments, la Formation est arrivée à la conclusion que X._____ avait accepté l'obligation conditionnelle de payer 750'000 euros supplémentaires à Y._____ au cas où il remporterait son championnat national lors de la saisons 2008/2009, condition qui s'était réalisée.

C.

Le 23 mai 2012, X._____ (ci-après: le recourant) a formé un recours en matière civile au Tribunal fédéral en vue d'obtenir l'annulation de la sentence du 4 avril 2012. Il se plaint de la violation de son droit d'être entendu (art. 190 al. 2 let. d LDIP) et de l'incompatibilité de cette sentence avec l'ordre public, tant formel que matériel (art. 190 al. 2 let. e LDIP).
Dans sa réponse du 19 juin 2012, Y._____

(ci-après: l'intimée) a conclu principalement à l'irrecevabilité du recours et, subsidiairement, au rejet de celui-ci.

Le TAS, qui a produit son dossier, a proposé le rejet du recours au terme de ses observations du 10 juillet 2012.

Le recourant a maintenu sa conclusion et les motifs qui l'étayent dans une réplique déposée le 27 juillet 2012. L'intimée et le TAS ne se sont pas déterminés sur cette écriture dans le délai qui leur avait été imparti pour ce faire.

La requête du recourant tendant à l'octroi de l'effet suspensif a été rejetée par ordonnance présidentielle du 21 juin 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 le mémoire qu'il a adressé au Tribunal fédéral, le recourant a employé le français. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra, par conséquent, son arrêt en français.

2.
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 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 en liaison avec l'art. 21 al. 1 LDIP).

La sentence attaquée revêt un caractère final et peut donc être attaquée pour l'ensemble des motifs prévus à l'art. 190 al. 2 LDIP. Les griefs soulevés par le recourant figurent dans la liste exhaustive de ces motifs-là.

Le recourant, qui a pris part à la procédure devant le TAS, est particulièrement touché par la sentence attaquée, car celle-ci confirme une décision le condamnant à payer la somme de 750'000 euros, intérêts en sus, à l'intimée. Il a ainsi un intérêt personnel, actuel et digne de protection à ce que cette sentence n'ait pas été rendue en violation des garanties découlant de l'art. 190 al. 2 LDIP, ce qui lui confère la qualité pour recourir (art. 76 al. 1 LTF).

Le recours a été déposé dans la forme prévue par la loi (art. 42 al. 1 LTF). Bien que l'intimée soutienne le contraire, il l'a été en temps utile. 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_428/2011 du 13 février 2012 consid. 1.3 et l'arrêt cité). En l'espèce, la sentence originale, signée par le président de la Formation, a été notifiée aux parties sous plis recommandés du 20 avril 2012, et le recourant affirme l'avoir reçue le 23 du même mois, sans être contredit par l'intimée. En déposant son mémoire le 23 mai 2012, 30 jours après le lendemain de la réception de la sentence attaquée (cf. art. 44 al. 1 LTF), le recourant a donc respecté le délai légal dans lequel il devait saisir le Tribunal fédéral.

Rien ne s'oppose, partant, à l'entrée en matière.

3.
Le Tribunal fédéral statue sur la base des faits constatés dans la sentence attaquée (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). L'état de fait à la base de la sentence attaquée peut toutefois être revu 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_428/2011 du 13 février 2012 consid. 1.6 et les précédents cités).

En l'espèce, le recourant reproche à la Formation de n'avoir pas retenu un certain nombre de faits en violation de son droit d'être entendu (recours, n. 36 à 49). La pertinence de ce reproche et, par voie de conséquence, la nécessité de compléter l'état de fait sur lequel repose la sentence attaquée seront examinées conjointement avec l'analyse du grief fondé sur l'art. 190 al. 2 let. d LDIP.

4.
4.1 Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'a en principe pas un contenu différent de celui

consacré en droit constitutionnel (**ATF 127 III 576** consid. 2c; **119 II 386** consid. 1b; **117 II 346** consid. 1a p. 347). Ainsi, il a été admis, dans le domaine de l'arbitrage, que chaque partie avait le droit de s'exprimer sur les faits essentiels pour le jugement, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral (**ATF 127 III 576** consid. 2c; **116 II 639** consid. 4c p. 643).

S'agissant du droit de faire administrer des preuves, il faut qu'il ait été exercé en temps utile et selon les règles de forme applicables (**ATF 119 II 386** consid. 1b p. 389). Le tribunal arbitral peut refuser d'administrer une preuve, sans violer le droit d'être entendu, si le moyen de preuve est inapte à fonder une conviction, si le fait à prouver est déjà établi, s'il est sans pertinence ou encore si le tribunal, en procédant à une appréciation anticipée des preuves, parvient à la conclusion que sa conviction est déjà faite et que le résultat de la mesure probatoire sollicitée ne peut plus la modifier (arrêt 4A_440/2010 du 7 janvier 2011 consid. 4.1). Le Tribunal fédéral ne peut revoir une appréciation anticipée des preuves, sauf sous l'angle extrêmement restreint de l'ordre public. Le droit d'être entendu ne permet pas d'exiger une mesure probatoire inapte à apporter la preuve (arrêt 4A_600/2010 du 17 mars 2011 consid. 4.1).

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_150/2012 du 12 juillet 2012 consid. 4.1).

4.2

4.2.1 Le recourant fait valoir qu'il était nécessaire pour le TAS de traiter en parallèle les causes A et B pour quatre raisons:

- premièrement, parce que les deux décisions le concernant émanaient de la même fédération (la FIFA), visaient les mêmes parties, étaient fondées sur le même état de fait, portaient sur des prétentions issues du même contrat et commandaient de répondre à la même question préalable (i.e. celle des rapports entre le Protocole et le Contrat);

- deuxièmement, parce que la position adoptée par l'intimée entre ces deux procédures avait varié sur deux points pertinents: d'une part, dans la cause B, l'intimée avait soutenu que le Contrat avait dû être renégocié car il violait un règlement de la FIFA interdisant à un club de signer un contrat de transfert avec un tiers (in casu V._____) autre qu'un club, alors que, dans la cause A, elle avait soutenu que le Contrat n'était, en réalité, qu'un précontrat par rapport au Protocole; d'autre part, dans la cause B, l'intimée n'avait plus allégué, contrairement à ce qu'elle avait fait dans la cause A, que B._____ aurait été accompagné de Me C._____ lors de la signature du Protocole, le 18 juillet 2007;

- troisièmement, parce que le TAS ne pouvait pas nier la pertinence, pour la cause A, des documents relatifs aux contrats conclus par l'intimée avec le joueur, alors qu'il avait fait droit à la requête du recourant concernant la production des mêmes documents dans la cause B; en effet, ces documents devaient permettre au recourant de démontrer que les prétendues "concessions réciproques" que les deux partenaires contractuels auraient consenties, d'après l'intimée, en signant le Protocole, et singulièrement la renonciation à exiger du recourant qu'il versât les 200'000 euros au joueur en application de l'art. 3.3 du Contrat, n'étaient rien d'autre que de nouvelles exigences fixées en défaveur du seul recourant; il était de toute façon établi par pièces que c'était, en définitive, le recourant qui avait versé cette somme au joueur;

- quatrièmement, parce que le TAS n'a pas retenu le fait que le Contrat porte la signature du joueur, ce qui n'est pas le cas du Protocole.

Selon le recourant, ce sont ces quatre raisons qui l'avaient conduit à présenter sa requête du 26 mars 2012 (cf. let. B.b, ci-dessus). Dès lors, en écartant cette requête et en refusant de tenir compte de ces nouveaux éléments, la Formation aurait négligé des circonstances de fait importantes, en violation de son droit d'être entendu. Aussi la nature formelle de cette garantie imposerait-elle l'annulation de la sentence, sans plus ample examen, c'est-à-dire indépendamment du point de savoir si les arguments invoqués

pourraient justifier une autre solution sur le fond.

4.2.2 Dans sa réponse, l'intimée relève que les parties ont expressément admis, à l'audience du 25 janvier 2012, que la procédure avait été conduite à leur satisfaction commune. Elle ajoute que le refus de joindre les deux causes était conforme à l'art. R52 du Code, conteste, par ailleurs, que sa position ait varié d'une cause à l'autre, souligne encore que tous les éléments prétendument nouveaux dont fait état le recourant ont été débattus lors de cette audience et soutient, enfin, que les documents contractuels auxquels le recourant se réfère n'ont aucune pertinence pour dire si les cocontractants ont fait ou non des concessions réciproques.

Le TAS expose, de son côté, que la procédure dans la cause A était déjà "pratiquement terminée" lorsque la procédure dans la cause B avait débuté, le 30 janvier 2012, puisqu'elle avait été clôturée à l'issue de l'audience du 25 janvier 2012 sans que les parties eussent élevé la moindre objection quant à la manière dont elle avait été menée. Il ajoute que le recourant s'était contenté de requérir la jonction des deux causes dans la procédure relative à la cause B, mais pas dans celle afférente à la cause A. D'ailleurs, poursuit-il, les conditions objectives fixées à l'art. R52 du Code pour une telle jonction n'étaient pas réalisées. Les deux causes lui apparaissent, de surcroît, comme étant manifestement de nature différente, puisque la cause A porte sur le paiement d'une prime additionnelle de transfert, soumise à condition, en faveur de l'intimée, tandis que la cause B a pour objet le paiement d'une indemnité éventuellement due à un club formateur sur la base du mécanisme de solidarité institué par la FIFA. En définitive, pour le TAS, le recourant, sous le couvert du grief tiré de la violation de son droit d'être entendu, ne cherche, en réalité, qu'à contester la décision au fond rendue dans la cause A.

4.3

4.3.1 En vertu de l'art. 52 al. 4 du Code, lorsqu'une partie dépose une déclaration d'appel relative à une décision à l'égard de laquelle une procédure d'appel est déjà en cours devant le TAS, le président de la Formation peut, après consultation avec les parties, décider de joindre les deux procédures. Comme le TAS le fait remarquer à juste titre dans sa réponse au recours (n. 10 s.), la condition objective à laquelle cette disposition subordonne la jonction de causes n'est pas réalisée dans le cas concret, dès lors que les appels dans les causes A et B portent sur deux décisions distinctes, rendues respectivement les 16 novembre 2010 (cause A) et 7 décembre 2010 (cause B). Le recourant en convient du reste (recours, n. 38). Toutefois, le respect de cette disposition, qui régit la procédure devant la juridiction arbitrale spécialisée, n'exclurait pas à lui seul une violation du droit d'être entendu, lequel droit est garanti par l'art. 182 al. 3 LDIP "quelle que soit la procédure choisie" (cf., mutatis mutandis, l'arrêt 4A_274/2012 du 19 septembre 2012 consid. 3.2.1; voir aussi: Kaufmann-Kohler/Rigozzi, Arbitrage international, 2e éd. 2010, n° 839). Qui plus est, le recourant, après que sa demande de jonction de causes eut été rejetée, avait présenté, le 26 mars 2012, une nouvelle requête fondée, cette fois, sur l'art. R56 du Code. Or, cette disposition, en son alinéa 1, eût permis au président de la Formation d'accepter, par exception à la règle générale, la production de nouvelles pièces ou la formulation de nouvelles offres de preuves.

Force est de constater, par ailleurs et à la suite du recourant (réplique, n. 5), pour répondre à certains arguments avancés dans les observations du TAS, que l'intéressé a soumis ses requêtes à la Formation avant que celle-ci n'ait rendu sa sentence, soit à un moment où la procédure dans la cause A n'était pas encore terminée; qu'il n'est sans doute guère compatible avec l'interdiction du formalisme excessif de lui reprocher de les avoir formulées dans le cadre de la procédure relative à la cause B et non dans celui de la procédure touchant la cause A, alors qu'il avait spécifié expressément, dans son courrier du 26 mars 2012, en quoi certaines d'entre elles concernaient cette cause-ci; enfin, que les déclarations des parties faites à l'issue de l'audience du 25 janvier 2012 ne sauraient être opposées au recourant puisque ce dernier se plaint du refus de donner suite à des requêtes présentées postérieurement à la tenue de cette audience.

Cela étant, il y a lieu d'examiner si la Formation a méconnu ou non le droit d'être entendu du recourant en n'acceptant pas les requêtes procédurales que celui-ci lui avait soumises. Pareil examen se fera dans le cadre des quatre raisons invoquées par l'intéressé (cf. consid. 4.2.1 ci-dessus). Il ne portera pas, cela va sans dire, sur la question de savoir s'il était opportun ou non de traiter séparément

les causes A et B, quand bien même elles ne pouvaient pas être formellement jointes, car la réponse à une telle question excéderait les limites que l'art. 190 al. 2 LDIP assigne à la cognition du Tribunal fédéral lorsqu'il connaît d'un recours en matière civile dirigé contre une sentence arbitrale internationale.

4.3.2 Considéré à la lumière des principes jurisprudentiels susmentionnés (cf. consid. 4.1) et sur le vu des arguments que lui opposent l'intimée et le TAS, le moyen soulevé par le recourant n'apparaît pas fondé. Aussi bien, la Cour de céans ne parvient pas à se convaincre, notamment, de la pertinence des éléments de fait censés nécessiter le complément d'instruction requis par le recourant.

D'abord, s'il est certes indéniable que les causes A et B présentent des traits communs à maints égards, dire s'il se justifiait d'attendre la fin de l'instruction de la cause B avant de statuer dans la cause A, dont l'instruction était déjà terminée, est essentiellement une question d'opportunité, exorbitante du présent examen. La requête formulée dans ce sens pouvait du reste fort bien obéir à d'autres motivations que la seule clarification du débat et viser, par exemple, à différer l'exécution de l'obligation litigieuse. La possibilité, inhérente au refus de la jonction des causes A et B, que des sentences contradictoires puissent être rendues dans l'une et l'autre cause n'impliquait pas non plus, en soi, une violation du droit à la preuve du recourant, ce dernier n'ayant été restreint d'aucune façon dans ce droit-là au cours de l'instruction de la cause A.

Ensuite, il n'apparaît nullement, à la lecture des écritures déposées par l'intimée dans la cause B, tel son mémoire d'appel du 3 février 2012, que la position de cette partie aurait varié entre les deux procédures. Il en appert, au contraire, que celle-ci a toujours soutenu que le Protocole constituait une novation du Contrat. D'autre part, s'agissant de la présence de Me C._____ aux côtés de B._____ lors de la signature du Protocole, le recourant reconnaît lui-même, dans une note 11 figurant au pied de la page 12 de son mémoire, que l'intimée avait maintenu que cet avocat était présent le 18 juillet 2007 pour assister le président du recourant, fût-ce en une autre qualité que précédemment (traducteur au lieu de conseil). Quoi qu'il en soit, la Formation souligne que la solution adoptée par elle serait la même, que B._____ ait été assisté ou non de Me C._____ à cette occasion (sentence, n. 73b). Le recourant n'a ainsi aucun intérêt à voir ce point de fait éclairci.

En outre, l'intéressé soutient à tort que la production des documents concernant les contrats passés entre l'intimée et le joueur serait de nature à démontrer l'absence des prétendues concessions réciproques faites par les parties dans le Protocole signé le 18 juillet 2007. La circonstance, alléguée par lui, selon laquelle l'intimée s'était engagée, dans des accords internes conclus en 2005 déjà avec le joueur, à verser à ce dernier les 200'000 fr. n'enlève rien au fait que la suppression, dans le Protocole, de l'engagement pris par le recourant de verser lui-même ce montant au joueur constituait bel et bien une concession en faveur du recourant. Du point de vue juridique, cette suppression équivalait à une renonciation, de la part du débiteur (i.e. l'intimée), à la reprise de dette interne dont il était convenu avec le reprenant (i.e. le recourant) et entraînait, partant, l'extinction de la créance de l'intimée du chef de cette reprise à l'égard du recourant. Peu importe, d'ailleurs, s'agissant de déterminer s'il y a eu concession ou non de la part de l'intimée, de savoir qui a finalement versé les 200'000 fr. au joueur. Les deux pièces, datées du 24 octobre 2007 et du 7 novembre 2007, que le recourant a produites afin d'établir que ce serait lui (cf. réplique, n. 38) démontrent, entre parenthèses, qu'il n'était pas nécessaire de compléter l'instruction sur ce point.

Enfin, on ne voit pas en quoi le fait que le Contrat a été contresigné par le joueur, mais pas le Protocole, serait d'un quelconque intérêt pour clarifier les rapports existant entre ces deux conventions. Les explications peu claires fournies à ce propos par le recourant dans sa réplique (n. 34 à 37) ne sauraient de toute façon remplacer la motivation lacunaire du passage topique de son mémoire (recours, n. 49). Une partie ne peut, en effet, se servir d'une telle écriture pour compléter, hors délai, une motivation insuffisante (arrêt 4A_14/2012 du 2 mai 2012 consid. 4).

4.4 Il suit de là que le moyen pris de la violation du droit d'être entendu du recourant tombe à faux.

5.

Le recourant soutient, par ailleurs, que la sentence attaquée serait incompatible avec l'ordre public procédural.

Selon une jurisprudence constante, l'ordre public procédural, au sens de l'art. 190 al. 2 let. e LDIP, n'est qu'une garantie subsidiaire ne pouvant être invoquée que si aucun des moyens prévus à l'art. 190 al. 2 let. a à d LDIP n'entre en ligne de compte. Ainsi conçue, cette garantie constitue une norme de précaution pour les vices de procédure auxquels le législateur n'aurait pas songé en adoptant les autres lettres de l'art. 190 al. 2 LDIP. Elle n'a nullement pour but de permettre à une partie de soulever un moyen entrant dans les prévisions de l'art. 190 al. 2 let. a à d LDIP, mais irrecevable pour une autre raison (arrêt 4A_488/2011 du 18 juin 2012 consid. 4.5).

Le recourant méconnaît cette jurisprudence lorsqu'il présente, au titre de la violation de l'ordre public procédural, la même argumentation que celle qu'il a exposée sous l'angle de l'art. 190 al. 2 let. d LDIP.

6.
Dans un dernier moyen, le recourant cherche à démontrer que la sentence attaquée serait incompatible avec l'ordre public matériel, en tant qu'elle méconnaîtrait le principe pacta sunt servanda.

6.1 Une sentence est contraire à l'ordre public matériel, au sens de l'art. 190 al. 2 let. e LDIP, lorsqu'elle viole des principes fondamentaux du droit de fond au point de ne plus être conciliable avec l'ordre juridique et le système de valeurs déterminants, telle la fidélité contractuelle.

Le principe pacta sunt servanda, au sens restrictif que lui donne la jurisprudence relative à la disposition citée, n'est violé que si le tribunal arbitral refuse d'appliquer une clause contractuelle tout en admettant qu'elle lie les parties ou, à l'inverse, s'il leur impose le respect d'une clause dont il considère qu'elle ne les lie pas. En d'autres termes, le tribunal arbitral doit avoir appliqué ou refusé d'appliquer une disposition contractuelle en se mettant en contradiction avec le résultat de son interprétation à propos de l'existence ou du contenu de l'acte juridique litigieux. En revanche, le processus d'interprétation lui-même et les conséquences juridiques qui en sont logiquement tirées ne sont pas régis par le principe de la fidélité contractuelle, de sorte qu'ils ne sauraient prêter le flanc au grief de violation de l'ordre public. Le Tribunal fédéral a souligné à maintes reprises que la quasi-totalité du contentieux dérivé de la violation du contrat est exclue du champ de protection du principe pacta sunt servanda (arrêt 4A_150/2012 du 2 juillet 2012 consid. 5.1).

6.2 Selon le recourant, le TAS aurait reconnu la validité du Contrat tout en refusant d'appliquer certaines de ses clauses, en particulier celle relative à la créance litigieuse, violant ainsi le principe de la fidélité contractuelle.

Il n'en est rien. Ecartant, à tort ou à raison, la figure de la novation, la Formation a considéré que le Contrat et le Protocole pouvaient coexister, sauf exceptions. L'une de ces exceptions tenait au fait que l'obligation souscrite par le recourant de payer l'indemnité complémentaire de 750'000 euros à l'intimée n'était pas soumise à la même condition dans ces deux conventions. La Formation s'est donc employée à déterminer lequel de ces deux actes devait prévaloir. Au terme de son analyse des circonstances de l'espèce, elle est arrivée à la conclusion qu'il s'agissait du Protocole. Constatant alors que la condition posée à l'art. 7 du Protocole était réalisée, elle en a déduit l'existence de la créance litigieuse et l'obligation pour le sujet passif de celle-ci, à savoir le recourant, d'exécuter l'obligation correspondante en versant l'indemnité complémentaire au titulaire de ladite créance, i.e. l'intimée. Ce faisant, elle ne s'est nullement mise en contradiction avec le résultat de son interprétation, quoi qu'en dise le recourant.

7.
Le présent recours doit ainsi être rejeté. Succombant, son auteur paiera les frais judiciaires (art. 66 al. 1 LTF); il versera, en outre, des dépens à son adverse partie (art. 68 al. 1 et 2 LTF).

Par ces motifs, le Tribunal fédéral prononce:

1.
Le recours est rejeté.

2.
Les frais judiciaires, arrêtés à 9'500 fr., sont mis à la charge du recourant.

3.
Le recourant versera à l'intimée une indemnité de 10'500 fr. à titre de dépens.

4.
Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport (TAS).

Lausanne, le 1er octobre 2012

Au nom de la Ire Cour de droit civil du Tribunal fédéral suisse

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_314/2012**
Judgment of 16 October 2012
First Civil Law Court

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Kolly Clerk of the Court: Mr Carruzzo
Parties	Federation X._____, Appellant, represented by Mr. Patrick Mbaya and Mr. Seri Zokou, **versus** Club A._____, Respondent, represented by Mr. Jean-Louis Dupont, & Club B._____, Respondent, represented by Mr. Greg Griffin & Confederation C._____,

*** From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).**
*** Translator's note: Quote as Federation X._____ v. Club A._____, Club B._____ and Confederation C._____, 4A_314/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch**

Facts

A.

A.a In a decision of December 2, 2012 following a decision taken on November 29, 2011 by the [name omitted] football federation (hereafter: X._____), the [name omitted] football confederation (hereafter: C._____) excluded the A._____ football club from the play-offs of the Champions League it organized in 2012.

A.b On December 19, 2011 A._____ filed a statement of appeal with the CAS against this decision and designated X._____, C._____ and B._____, a football club of [name of country omitted] as respondents, the latter being the club that it was supposed to play in the aforesaid competition beginning in February 2012.

On December 31, 2011, A._____ filed its appeal brief with a request for provisional measures. None of the Respondents expressed their position on the request in the time limit there were given to do so. However, C._____ and B._____ both filed an answer on the merits, as opposed to X._____, which filed its answer after the time limit had expired.

On February 1, 2012 the Panel of the Court of Arbitration for Sport (CAS) informed the Parties that it was granting the provisional measures and decided that club [name omitted] had the right to participate in the play-offs of the 2012 Champions League organized by C._____. The reasons of the order contained a chapter devoted to the jurisdiction of the CAS and were communicated to the parties on February 14, 2012.

On March 2, 2012 A._____ – having lost the game against B._____ – formally withdrew its appeal subject to a decision of the CAS on the costs of the arbitral proceedings.

B.
In a letter of March 7, 2012, X._____ submitted that club [name omitted] should be ordered to pay the entire costs of the arbitration and an amount of € 25'000 for its costs.

The CAS issued an award on costs on April 27, 2012. After striking the case from the list, it held that X._____ and C._____ would each pay 40% of the costs of the arbitration, the remaining 20% being shared equally by A._____ and B._____. Moreover X._____ and C._____ were ordered to pay CHF 5'000 each to A._____ and the same amount to club [name omitted] for their costs. However the Panel held that it had no jurisdiction as to B._____'s claim for the payment of an amount in connection with the additional costs exceeding USD 100'000 it claimed to have undergone as a consequence of the decision concerning the provisional relief requested by A._____.

C.
On May 25, 2012 X._____ filed a Civil law appeal to the Federal Tribunal with a view to obtaining the annulment of the award. It argues a violation of Art. 190 (2) (b), (c) and (e) PILA[1].

The Respondents were not asked to submit an answer. The CAS submitted that the appeal should be rejected in a brief of August 29, 2012, within the time limit it had been given for this purpose. The brief was communicated to Counsel for the Appellant on September 6, 2012. They were given an opportunity to submit their observations by the 21st of the same month but did not avail themselves of this faculty.

Reasons

1.
According to Art. 54 (1) LTF[2] the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. When the decision is in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties. In front of the CAS they used English. In the brief sent to the Federal Tribunal the Appellant used French. According to its practice, the Federal Tribunal will adopt the language of the appeal and consequently issue its judgment in French.

2.
In the award under appeal, the CAS took note of the discontinuance by the Appellant, closed the arbitral proceedings, set the costs of the arbitration and awarded costs. In doing so and bringing the arbitration to an end on procedural grounds it issued a final award (judgment 4P.280/2005 of January 9, 2006 at 1). The aforesaid award is consequently subject to a Civil law appeal within the meaning of Art. 77 (1) (a) LTF on all the grounds stated at Art. 190 (2) PILA (ATF 130 III 755 at 1.2.2 p. 762).

Timely filed (Art. 100 (1) LTF) in the legally prescribed format (Art. 42 (1) and (2) LTF), against this final award issued in an international arbitration (Art. 176 ff PILA), the appeal at hand raises only the grievances limitatively listed in Art. 190 (2) PILA and is admissible under these various requirements. The appealing party has standing to appeal (Art. 76 (1) LTF) because it has a personal, present and legally protected interest to ensure that the CAS did not issue an award falling within Art. 190 (2) PILA when it ordered the Appellant to pay part of the costs of the arbitration and to compensate the two clubs implicated in the arbitral proceedings.

3.
The Federal Tribunal issues its judgment on the basis of the facts found in the award under appeal (see Art. 105 (1) LTF).It may not rectify or supplement ex officio the factual findings of the arbitrators even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77 (2) LTF ruling out the applicability of Art. 105 (2) LTF). However the factual findings on which the award under appeal is based may be reviewed if one of the grievances mentioned at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (judgment 4A_428/2011[4] of February 13, 2012 at 1.6 and the precedents quoted).

The Appellant in this case, although quoting these principles of case law, deviates from them in their actual application when in a topical part of its brief it merely formulates some legal criticisms against the award under appeal and asks that the award "be

1. 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.

2. Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

3. Translator's note: The official languages of Switzerland are German, French and Italian.

4. Translator's note: Full English translation at http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o/

supplemented… by associating the facts described in the two decisions of the Court of Arbitration for Sport" (appeal nr 11 p. 5). Its ad hoc request thus appears manifestly inadmissible.

4.
In a first argument the Appellant invokes Art. 190 (2) (b) PILA and argues that the CAS was wrong to accept jurisdiction to issue the award under appeal.

Recalling in detail the various steps of the arbitral proceedings in its answer to the appeal, the CAS demonstrates – without being contradicted by the Appellant, which did not submit a reply – that the Appellant never challenged its jurisdiction in due course during the arbitral proceedings. It rightly deducts from that on the basis of Art. 186 (2) PILA and relative case law (ATF 118 III 50 at 2c/aa p. 58) that the argument raised by the Appellant today is time barred.

5.
According to the Appellant the CAS would have failed to rule on one of the claims in violation of Art. 190 (2) (c) PILA because it did not decide "the jurisdictional issues" (appeal nr 33).

According to the second hypothesis of Art. 190 (2) (c) PILA, the award may be appealed when the arbitral tribunal failed to rule on one of the heads of claim. The failure to rule related to a formal denial of justice. By "heads of claim" one means the claims or submissions of the parties. What is meant here is an incomplete award, namely the case in which the arbitral tribunal did not decide one of the submissions made by the parties. When the award rejects any other and further submissions, the argument is excluded. Neither does it provide the possibility to argue that the arbitral tribunal failed to decide an issue important to the resolution of the dispute (ATF 128 III 234 at 4a and references).

The criticism made in the argument under review seeks to demonstrate that the CAS would not have examined the issues relating to its jurisdiction and has nothing to do with the formal ground of appeal as interpreted by the aforesaid case law.

6.
Finally, the Appellant argues that the award under appeal is manifestly incompatible with public policy without being more specific. The latter argument, contained in this mere statement, is obviously inadmissible for lack of any substantiating argument (Art. 77 (3) LTF).

7.
Consequently this appeal may only be rejected to the limited extent that it is admissible. The Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF). However there is no need to grant costs to the Respondents as they were not invited to submit an answer.

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 2'000, shall be borne by the Appellant.

3.
This judgment shall be communicated to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne October 16, 2012.

In the name of the First Civil Law Court of the Swiss Federal Tribunal.

La Présidente:	Le Greffier:
Klett	Carruzzo

4A_276/2012**
Judgment of 6 December 2012
First Civil Law Court

Composition	Federal Tribunal Judge Klett, President Federal Tribunal Judge Corboz Federal Tribunal Judge Rottenberg Liatowitsch Clerk of the Court: Carruzzo
Parties	X._____Club, Appellant, represented by Mr. Jorge Ibarrola **versus** Z_____Club, Respondent, represented by Mr. Stephen Sampson and Mr. Mike Morgan, & Fédération Internationale de Football Association (FIFA), Respondent, represented by Mr. Christian Jenny.

*** From Charles Poncet's translation, courtesy of the law firm ZPG/Geneva (www.praetor.ch).**
*** Quote as X._____ Club v. Z._____ Club and FIFA, 4A_276/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch**

Facts

A.

A.a A._____ is a professional football player born on March 17, 1980.

Club X._____ (hereafter: X._____) and Club Z._____ (hereafter: Z._____) are two professional football clubs, members of [name omitted] Federation, itself affiliated to the Fédération Internationale de Football Association (FIFA).

A.b On October 1st, 2005 A._____ and Z._____ executed an employment contract expiring on June 30, 2006. A new employment contract signed by the same Parties on June 5, 2006 extended the contractual relationship between them until June 30, 2007.

At an unspecified date, the Player and Z._____ signed an addendum to the second employment contract extending it until June 30, 2009 (hereafter: the Annex).

On June 24, 2007 A._____ signed an employment contract with X._____ for the period from July 1st, 2007 to June 30, 2009. Simultaneously X._____ hired three other individuals still bound by a contract with Z._____, including the trainer of this team.

A.c Z._____ opposed in vain A._____'s registration as a player for X._____. Lengthy administrative proceedings followed in [name of country omitted]. Deciding the matter as a court of last instance the Court of Cassation of that country annulled the decision ratifying the registration in a judgment of February 9, 2011. According to the Court the Annex was

valid. Hence the player being under contract with Z._____ until June 30, 2009 had breached his duty of fidelity by letting himself be hired by X._____ before this date.

A.d On January 30, 2008 Z._____ filed a claim against A._____ and X._____ in the Dispute Resolution Chamber of FIFA (DRC) with a view to having them ordered to pay jointly and severally one million dollars for unjustified breach of contract and inciting to such breach, as well as sport sanctions.

Among other decisions on May 6, 2010, the DRC ordered A._____ to pay the amount of USD 400'000 to Z._____ (§ 2 of the operative part of the decision) found X._____ jointly and severally liable for this amount (§ 3), banned the player from any official game for four months from the beginning of the next season (§ 6) and enjoined X._____ from recruiting any new national or international players during the next two registration periods after the notification of its decision (§ 7). By way of reasons, the DRC held in substance that X._____ had induced the player to breach the employment contract with Z._____ without cause during the protected period, such behavior having to be sanctioned both financially and as a matter of sport pursuant to Art. 17 of the Regulations on the Status and Transfer of players adopted by FIFA (RSTP).

B.

B.a On August 16, 2010 X._____ sent a statement of appeal to the Court of Arbitration for Sport (CAS) before filing its appeal brief on September 23, 2010. A._____ did the same on August 20 and September 23, 2012. Both submitted that the DRC decision should be annulled, any monetary sanction revoked, as well as the sport sanction involved. The Appellants took the view that the player had never intended to extend his contract with Z._____ and became the victim of a fraud by an employee of this club, who had presented the Annex as a mere administrative formality to be complied with in connection with the termination of the contract. With regard to this document they stated that it was entirely written in [name of language omitted] and that the English version had been inserted afterwards. In their view these facts, confirmed by other circumstances, proved that the contract between the player and Z._____ had expired on June 30, 2007, in other words one day before the beginning of the contractual relationship between A._____ and X._____. Consequently, in the Appellants' view, Art. 17 RSTP was not applicable to the case.

In its answer of November 1st, 2010 FIFA endorsed the reasons of the DRC and submitted that the two appeals should be rejected and the decision under appeal confirmed.

Z._____ made similar submissions in his answer of November 8, 2010. In its view the issues relating to the alleged fraud against the player at the time the Annex was signed and as to the validity of this addendum had been conclusively decided by the courts of [name omitted], whose decisions were now res judicata. As to the Annex signed by the player it already contained the [name of language omitted] version and the English version. Moreover the Appellants did not meet their burden of proving that the player would have been induced to sign the document by fraud of an employee of Z._____.

The CAS consolidated the two aforesaid cases for hearing and judgment purposes. At the request of the Appellants it stayed the enforcement of the disciplinary sanctions against them.

Pursuant to a request by X._____ the CAS ordered a forensic investigation of the Annex.

The CAS held a first hearing in Lausanne on June 22, 2011. It heard the player, the expert and several witnesses.

At the second hearing in Lausanne on January 10, 2012, X._____, A._____ and Z._____ announced that they had concluded a settlement agreement (hereafter: the Settlement) and that they had in particular agreed as to the following facts (hereafter: the Stipulated facts; free translation from English):

- the player acknowledges having signed the Annex without realizing what he was effectively signing at the time; the player was prevented from playing for another club during the 2010-2011 season as a consequence of the present dispute;

- on the basis of the evidence furnished by the player, Z._____ acknowledges that it signed the Annex without fully understanding its meaning and that it did not intend to breach the employment contract between them, neither did it do so;

- the player confirms that X._____ did not induce him to breach his employment contract with Z._____.

- Z._____ acknowledges that X._____ did not induce the player to breach the employment contract between them.

In view of the Settlement its signatories abandoned any further proceedings. Z._____ in particular did not present a number of witnesses who were there and for whom it had already submitted a written summary of the issues on which they would be interrogated. Counsel for the Parties to the Settlement invited the CAS Panel to take into account the Stipulated facts while acknowledging that the Panel was free to assess their weight in view of the statements of the Parties and the other evidence already gathered.

For its part FIFA asked the Panel not to take into consideration the Stipulated facts, to the extent that they were inconsistent with the evidence adduced and with the opinions put forward by the Parties.

B.b The Panel issued its award on February 29, 2012. Partially admitting the two appeals it found that paragraphs 1 to 5 of the operative part of the DRC decision were to be annulled by consent of or failing any objection from all Parties. All other submissions by the Appellants were rejected.

The three Arbitrators reviewed the matter in dispute in the light of Art. 17 RSTP in its version in force on January 1st, 2008 and alternatively under Swiss law. Their main concern was to determine the impact of the Settlement on the appeal proceedings. In their view, Z._____ had filed monetary claims against the Appellants, whether justified or not and was free to renounce them as it did by entering into this agreement with the player and his new club. However the DRC decision was hybrid. Indeed besides granting financial compensation to the claimant club it imposed sport sanctions upon the Appellants. To this extent it affected FIFA and them but not Z._____. The Arbitrators then wondered whether the Parties could force the Panel by way of the Settlement – namely an internal agreement – to accept their version of the facts. In this respect they shared FIFA's concern that it could be deprived of its disciplinary power and consequently of the possibility to sanction the breaches of the fundamental principle of sanctity of contracts if it could be enough for the Parties to rewrite history without taking into account the real facts. Thus they did not accept that the statements made and the evidence adduced could be withdrawn by the mere intent of the parties as though they had never existed, particularly since one of them – here FIFA – had opposed such a course of action. And the Arbitrators concluded that while they certainly could not ignore the Stipulated facts they could and should determine the importance they were to be given in the context of all other evidence available.

Having set its power of review, the Panel addressed the merits. It considered itself bound by the judgment of the Court of Cassation pursuant to the rule of res judicata in as much as it found that the Annex was not a forgery and that the player had not been induced to sign it by fraud as to the nature and the effects of this addendum to his employment contract. However, considering the possibility that it may understand the effects of the [name of country omitted] decision imperfectly, the Panel then proceeded to assess the evidence in the file of the arbitration. Notwithstanding the Stipulated facts the Panel concluded that the player had breached the contract with Z._____ without just reason and that the new club had not been able to disprove the presumption embodied in Art. 17 (4) RSTP that it had induced the professional player to breach the contract. After recalling that the purpose of Art. 17 RSTP is to promote contractual stability the Panel concluded that the Parties could not circumvent the disciplinary regime meant to ensure the pursuit of this goal by seeking to escape the sport sanctions issued by the competent body of FIFA by way of an agreement contradicting the facts for which the sanctions were issued. However it reserved the possibility – alien to the case at hand – in which the circumstances allegedly justifying the sport sanction would prove to be erroneous or incomplete a posteriori if this were done in an agreement approved by FIFA.

The Arbitrators then endorsed the reasons contained in the DRC decision to justify the sport sanctions against the Appellants and confirmed them.

C.

On May 11, 2012 X._____ (hereafter: the Appellant) filed a Civil law appeal with a request for a stay of enforcement with a view to obtaining the

annulment of the February 29, 2012 award. However A._____ did not appeal the award to the Federal Tribunal.

By Presidential decision of May 31, 2012 the Appellant was invited to deposit the amount of CHF 7'000 with the Office of the Federal Tribunal as security for the costs of FIFA (hereafter: the Respondent) which had submitted a request to that effect. It did so in due course.

Pursuant to its observations of August 30, 2012 the CAS submitted its file and asked that the appeal be rejected.

The Respondent did the same in its answer of September 19, 2012.

As to Z._____ it did not file an answer in the time limit given to do so.

The Appellant did not avail itself of the possibility it was given to submit observations as to the answer of the CAS and the Respondent.

Reasons

1.
According to Art. 54 (1) LTF[1] the Federal Tribunal issues its decision in an official language[2], as a rule in the language of the decision under appeal. When the decision is in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties. In the CAS proceedings they used English and French. In its brief to the Federal Tribunal the Appellant used French. Respondent FIFA's answer was submitted in German. According to its practice the Federal Tribunal shall resort to the language of the appeal and consequently issue its judgment in French.

2.
In the field of international arbitration a Civil law appeal is allowed against the decisions of arbitral tribunals under the requirements at Art. 190 to 192 PILA[3] (Art. 77 (1) LTF). Whether as to the object of appeal, the standing to appeal, the time limit to do so, the Appellant's submissions or the grievances raised in the appeal brief, none of these admissibility requirements raises any problem in this case. There is accordingly no reason not to address the appeal.

1. Translator's note: LTF is the French 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.

3.
Firstly the Appellant argues that the Panel disregarded the principle of sanctity of contracts and consequently issued an award incompatible with substantive public policy.

3.1 The substantive review of an international arbitral award by the Federal Tribunal is limited to the issue of the compatibility of the award with public policy (ATF 121 III 331 at 3a).

An award is inconsistent with public policy if it disregards the essential and broadly acknowledged values which, according to the dominating views in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). It is contrary to substantive public policy when it violates some fundamental principles of material law to such an extent that it is no longer consistent with the determining legal order and system of values; among such principles is the sanctity of contract, expressed by the Latin adage pacta sunt servanda.

Within the restrictive meaning given by case law concerning Art. 190 (2) (e) PILA, the principle of pacta sunt servanda is violated only if the arbitral tribunal refuses to apply a contract clause while admitting that it binds the parties or, conversely, if it imposes upon them compliance with a clause of which it considers that it does not bind them. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a way that contradicts the result of its interpretation as to the existence or the contents of the legal deed in dispute. However the process of interpretation itself and the legal consequences logically derived therefrom are not governed by the principle of contractual loyalty so that they could not be attacked from the point of view of public policy. The Federal Tribunal has repeatedly emphasized that disputes concerning breaches of contract are almost entirely outside the scope of protection of the principle of pacta sunt servanda (judgment 4A_150/2012[4] of July 12, 2012 at 5.1 and the cases quoted).

3.2 According to the Appellant the Arbitrators, while admitting that the Settlement was binding to decide the monetary claims made by Z._____, would have refused in a contradictory manner to take it into account as to the issue of the sport sanctions. They would also have misinterpreted Art. 17 (4) RSTP by

4. Translator's note: Full English translation at http://www.praetor.ch/arbitrage/federal-tribunal-reiterates-that-the-principle-of-pacta-sunt-ser/

holding that the sport sanctions pronounced by FIFA would be independent of any possible compensation to the Claimant.

The Appellant's argument totally disregards the aforesaid case law concerning substantive public policy. As shown above in the summary of the award under appeal (see B.b) the Panel found that it was bound by the Settlement to the extent that the DRC decision concerned the compensation granted to Z._____; consequently it admitted the appeals on this issue without reviewing their merits. However the Arbitrators refused to be bound by this Settlement to the extent that the decision concerned the sport sanctions inflicted upon the Appellants and freely reviewed the situation themselves, both factually and legally from this perspective, which led them to endorse the sanctions notwithstanding the Stipulated facts. Thus not only is there no visible intrinsical incoherence in the reasons of the award under appeal – a flaw which, incidentally, would not fall within the definition of substantive public policy (aforesaid judgment 4A_150/2012 at 5.2.1) – but the foregoing shows that each of the two opposed conclusions drawn by the Panel corresponds to the premise on which it is based. Therefore a possible violation of substantive public policy could only be envisaged here if the Panel had confirmed the sport sanctions challenged while admitting that it could not depart from the Settlement no matter what was the object of the dispute. Moreover the Federal Tribunal does not have to verify if the CAS correctly applied the applicable sport regulations when assessing an argument of breach of substantive public policy in the framework of an appeal in the field of international arbitration.

The argument that substantive public policy was violated is therefore manifestly unsound.

4.
Secondly, the Appellant argues that the Arbitrators breached procedural public policy.

4.1 Procedural public policy within the meaning of Art. 190 (2) (e) PILA guarantees the parties the right to an independent judgment on the submissions and the facts presented to the arbitral tribunal in conformity with applicable procedural rules; procedural public policy is violated when some fundamental and generally recognized principles were violated, thus leading to an intolerable contradiction to the sense of justice, so that the decision appears inconsistent with the values acknowledged in a state governed by laws (ATF 132 III 389 at 2.2.1). Moreover public procedural policy is only an alternative guarantee and constitutes a precautionary norm in this respect for the procedural flaws which the legislator would not have thought of whilst adopting the other letters of Art. 190 (2) PILA (ATF 138 III 270 at 2.3).

4.2

4.2.1 Firstly the Appellant argues that the Panel violated the "principle of factual unity" because it relied upon the circumstances contained in the Settlement to endorse the withdrawal of the monetary claims raised by Z._____ and then departed from them to confirm the sport sanctions pronounced by the DRC.

The argument is a mere presentation from a different perspective of the similar argument raised previously in support of an alleged breached of substantive public policy. The Appellant disregards the alternative nature of the guarantee by raising it again as an alleged violation of procedural public policy.

Moreover the Appellant in no way demonstrates why the principle of factual unity – of which he gives no definition nor any precision as to its contents – would constitute a fundamental and generally recognized principle. Neither does it refer to a case that would have better defined the notion.

Furthermore the basis of the Appellant's reasoning is erroneous as the Respondent rightly points out. Indeed the CAS did not rely on the Stipulated facts to issue its award: on the one hand it saw in the Settlement a renunciation by Z._____ to the compensation which this club had requested and obtained from the DRC and took notice of the renunciation without reviewing the facts on which it was based; on the other hand it departed from the Stipulated facts to determine itself if there were some circumstances justifying a sport sanction against the Appellants.

4.2.2 According to the Appellant the Parties would have withdrawn their entire arguments, counterarguments and evidence submitted to the CAS as well as their claims, to submit jointly that the DRC decision should be annulled. Hence by ignoring their position in the appeal proceedings, the Panel would have disregarded the rule of explanation of positions and the principle of party disposition, which

the Appellant deducts from Art. R51 of the Sport Arbitration Code (hereafter: the Code) and from Art. 190 (2) (e) PILA respectively, as well as from Art. R55 of the Code in its version modified as of January 1, 2010, to the extent that it no longer authorizes the submission of a counterclaim. The argument is not better founded than the previous one.

The Appellant does not show why the rule of explanation of positions should be part of procedural public policy. As to the violation of a provision of the arbitration rules binding the parties, such as Art. R51 of the Code, it does not constitute ground for annulment of the award pursuant to Art. 190 (2) (e) PILA (ATF 117 II 346 at 1a p. 347; judgment 4A_612/2009[5] of February 10, 2010 at 6.3.1).

As to the principle of party disposition, the Appellant itself connects it with another letter of Art. 190 (2) PILA, so there is no reason here to call upon the alternative guarantee of procedural public policy. Be this as it may, the Panel holds that Counsel for all Parties to the Settlement accepted that the Arbitrators could assess the weight of the Stipulated facts themselves by replacing them in the context of the statements of the Parties and the evidence already adduced (see award nr 60 and 78). This is a finding as to the arbitral proceedings that binds the Federal Tribunal (judgment 4A_682/2011[6] of May 31, 2012 at 2.4 and the cases quoted) which the Appellant seeks to challenge in vain. Moreover it is constant that the Respondent – which indisputably had standing to be a party in the appeal proceedings – opposed that the Panel consider itself bound by the Stipulated facts. Under such conditions the Arbitrators cannot be blamed for departing from the facts mentioned in the Settlement when reviewing the soundness of the sport sanctions inflicted upon the Appellants.

As to the argument that the Panel would not have applied Art. R55 of the Code in its wording as of January 1, 2010, it cannot succeed. Indeed, no matter what the Appellant says, the Respondent did not submit a claim against the Appellant by merely inviting the CAS to reject the appeals and to confirm the decision under appeal. The Respondent therefore did not make a counterclaim.

Finally, according to the Appellant, it would create a shocking sense of injustice to accept that the CAS could issue a decision against the facts explicitly acknowledged in a settlement agreement by the party without which FIFA would never have proceeded against the player and the defending club. According to the Appellant this would be comparable to the withdrawal of a criminal complaint concerning a criminal offense not prosecuted ex officio, which binds the Court. However one does not see how this part of the Appellant's argument could be connected with the notion of procedural public policy as defined by federal case law. In any event one should bear in mind the specificity of Art. R17 RSTP which, on the one hand, establishes the right of the aggrieved club to seek compensation from the player breaching the contract without just cause as well as from its new club and to do so against them jointly and severally and, on the other hand, the power of FIFA to inflict sport sanctions not only upon the player and the club concerned, but also, as the case may be, upon all individuals falling under the Statutes and Regulations edicted by FIFA (officials, players' agents, etc.) acting in such a way as to provoke the breach of contract with a view to facilitating the transfer of the player (see Art. 17 (5) RSTP). The aforesaid regulation therefore has a two-fold aspect, involving both compensation and disciplinary measures. Yet if the former falls within the free disposition of the claiming club and the defendants (i.e. the defending player and his new club), this does not apply to the latter, in which a third party intervenes, namely FIFA in its quality as a legal entity with the disciplinary power and jurisdiction to issue the sport sanctions contemplated by Art. 17 RSTP. From this point of view the Appellant's comparison with an offense requiring a complaint by the victim is out of place. In this respect, one of the statutory goals given to the association – seeing to compliance with its own rules – would be jeopardized if one were to tolerate that without FIFA consenting, the parties to the dispute could arrogate to themselves the power to cause that which was not to have been, namely to construct a new set of facts excluding the existence, albeit established, of a non-justified breach of the employment contract. The hypothesis considered by the CAS remains reserved, namely when the circumstances justifying the penalties inflicted

5. Translator's note: Full English translation at http://www.praetor.ch/arbitrage/limited-judicial-review-of-awards-independence-of-cas-reaffirmed/

6. Translator's note: Full English translation at http://www.praetor.ch/arbitrage/claim-of-violation-of-due-process-rejected-by-the-federal-tribun/

upon the player and his new club would subsequently prove to be erroneous in the unanimous view of the parties and FIFA. In such a case, nothing would prevent the latter from endorsing an agreement of the parties stating so and agreeing to the annulment of the penalties imposed. However this is not the case here. This shows that the shocking sense of injustice expressed by the Appellant has no place here. To the contrary, what causes some perplexity in this case is the surprising backtracking by Z._____ at the end of the appeal proceedings, for whatever reason, when the circumstances duly established showed that it was right. Under such conditions the CAS could not have violated Art. 190 (2) (e) PILA by endorsing the sanctions in dispute regardless of the Settlement.

5.
Even more in the alternative, the Appellant argues that the Panel breached the rule of ne eat iudex ultra petita partium by departing from the Settlement to award something else than what was claimed, namely the entire annulment of the operative part of the DRC decision.

According to the first hypothesis contained in Art. 190 (2) (c) PILA the award may be appealed when the arbitral tribunal pronounced beyond the claims of which it was seized. The argument the Appellant raises against the CAS on the basis of this provision has no basis at all. Indeed the Panel was seized of submissions by FIFA that the appeal should be rejected and the decision under appeal entirely confirmed. Consequently, by admitting the appeals only in part and annulling only certain paragraphs of the operative part of the decision, the Panel acted within the framework of the submissions of both sides.

6.
In a last argument the Appellant claims that its right to be heard was violated within the meaning of Art. 190 (2) (d) PILA because the Panel would have decided its appeal without taking into account the Stipulated facts admitted in the Settlement.

However this last argument is only a repetition of the arguments presented by the Appellant to substantiate its claim that procedural public policy was violated. It may therefore be rejected by mere reference to the reasons developed above in this respect.

7.
The rejection of the appeal renders moot the request for a stay of enforcement.

8.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66 (1) LTF). It shall pay costs to the Respondent (Art. 68 (1) and (2) LTF but not to Z._____ as the other Respondent did not submit an answer. The compensation granted to the Respondent shall be taken from the security for costs given by the Appellant.

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 6'000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Fédération International de Football Association (FIFA) an amount of CHF 7'000 for the federal judicial proceedings; this amount shall be taken from the security for costs deposited with the Office of the Federal Tribunal.

4.
This judgment shall be notified to the Representatives of the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne December 6, 2012.

In the name of the First Civil Law Court of the Swiss Federal Tribunal.

La Présidente:	Le Greffier:
Klett	Carruzzo

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