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1. Introduction

In 2014, the Swiss Federal Tribunal rendered 30 decisions in international arbitration matters. The decisions concerning sports arbitration were less numerous than in the previous years: only eleven.

As in the past year, only one challenge brought against awards of the Court of Arbitration for Sport (the «CAS») was (partially) upheld by the Swiss Federal Tribunal for the very same reason: lack of jurisdiction of the CAS. The Swiss Supreme Court considered in this case that the CAS was not competent ratione personae to annul the decision of the UEFA Dispute Resolution Chamber concerning a player and his former club in the context of an appeal brought by the player’s new club1.

This is the only case that was published in the official record of the Swiss Federal Tribunal’s decisions2. In the other cases, which were not published in the official record but only on the website of the Swiss Supreme Court, the latter dismissed the challenges upholding the respective reasonings of the CAS.

The following is an overview of the most interesting decisions (seven out of eleven) rendered by the Swiss Federal Tribunal in 2014 in relation to sports arbitration.

These decisions deal with different and interesting issues, such as pathological clauses, characterisation of CAS awards rendered in appeal proceedings, ne bis in idem, deregistration of players, admissibility of illegally obtained evidence and standard of proof, to name a few.

Interestingly enough, all of the commented decisions concern the football world. Also, three of the commented decisions deal with one of the main scandals which have shaken the football world in these past years: match-fixing3.

As in the previous years4, the decisions will be grouped according to the main ground(s) for challenge, namely lack of jurisdiction, right to be heard and public policy5. The other grounds discussed in the decisions dealing with more than one ground will be mentioned in the relevant titles.

2. Lack of jurisdiction

2.1 Pathological clauses and the pro-arbitration approach of the Swiss Federal Tribunal towards them

In a decision dated 9 July 20146, the Swiss Federal Tribunal dismissed a challenge based on a purported lack of jurisdiction of the CAS by confirming its pro-arbitration approach when it comes to the interpretation of pathological arbitration clauses.

A professional football player had been transferred from his former club to a new club for a USD 3,5 million transfer fee. A dispute had then arisen between the player and his former club regarding the share of the transfer fee owed by the latter to the former. The player had initiated arbitration proceedings against his former club before the Players’ Status Committee of the country in which the club was domiciled (C), on the basis of the following arbitration clause contained in their contract:

«In case of a dispute regarding the performance or the interpretation of this contract, the parties will submit the dispute to an Arbitral Tribunal to be appointed for this purpose in accordance with the applicable law, and the award rendered by such Tribunal shall solely and exclusively be challenged before the Court of Arbitration for Sport, whose seat is in Lausanne (Switzerland). If the dispute arises from the Player’s intent to be transferred or from his actual causa sport 2/2015 © Richard Boorberg Verlag GmbH & Co KG

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1 See decision 4A_90/2014, below.
2 Decision 4A_62/2014 was published as ATF 140 III 520.
3 See decisions 4A_324/2014, 4A_362/2013, and 4A_448/2013.
4 See CaS 2011, 307; CaS 2012, 193; CaS 2014, 3, CaS 2014, 212.
5 Pursuant to Article 190(2) of the Swiss Private International Law Act («PILA»), an international award can also be challenged if the arbitral tribunal has been improperly constituted (let. a) or if the arbitral tribunal decided on points of dispute which were not submitted or if it left undecided prayers for relief which were submitted (let. d). None of the commented decisions dealt with these grounds.
6 Decision 4A_90/2014.
transfer to a foreign club, the jurisdiction lies, in first instance, with the FIFA Dispute Resolution Chamber or with the Players’ Status Committee, depending on the case, and, on appeal, with the Court of Arbitration for Sport.

Further to the club’s objection, the Players’ Status Committee of C had denied its jurisdiction. The player had appealed this decision before the CAS. Once again, the club had objected to the jurisdiction of the CAS, requesting the CAS to invite the player to proceed before the competent arbitral tribunal pursuant to the applicable arbitration law of the country in which he was domiciled. Alternatively, the club had argued on the merits that the amount owed to the player should be limited to USD 500,000 instead of USD 2,1 million as claimed by the player.

The sole arbitrator appointed by the CAS upheld its jurisdiction and partially admitted the player’s appeal by annulling the decision of the Players’ Status Committee of C and ordering the club to pay USD 1,75 million to the player. The arbitrator’s reasoning regarding his jurisdiction can be summarized as follows: first, the arbitrator considered that in the present case only the second sentence of the arbitration clause contained in the contract between the player and the club was applicable since the dispute arose out of the player’s transfer from his former club to a new club; then, the arbitrator found that the reference to the «Players’ Status Committee» in the second sentence of the arbitration clause was a reference to the Players’ Status Committee of C and not a reference to the FIFA Players’ Status Committee as argued by the club. The arbitrator retained in this respect that the Players’ Status Committee of C was actually competent since the dispute was not international. The arbitrator also considered that the interpretation proposed by the club could result in the player not being able to submit the dispute to any tribunal, which would violate the player’s fundamental rights. Finally, the arbitrator held that, according to the principle in dubio contra proferentem, any ambiguity in the arbitration clause had to be interpreted against the club which had drafted the contract.

The club moved to set aside the CAS award before the Swiss Federal Tribunal, arguing that the CAS lacked jurisdiction both (1) because the arbitration clause contained in the contract between the club and the player allowed an appeal to the CAS only against a decision rendered either by a national arbitral tribunal or by the FIFA, but not against a decision rendered by the Players’ Status Committee of C whose jurisdiction had been excluded, and (2) because the arbitrator had decided extra potestatem by ruling on the merits, whereas the challenged decision had only ruled on jurisdiction. The Swiss Federal Tribunal rejected both arguments.

Concerning the first argument, the Swiss Federal Tribunal recalled first that, under Swiss law (applicable by virtue of Article 178(2) PILA since it had not been alleged or proven that the law of another country possibly chosen by the parties would be more favourable to the substantive validity of the arbitration agreement than Swiss law), arbitration clauses that are incomplete, unclear or contradictory are considered as pathological clauses. Such clauses do not necessarily lead to the nullity of the arbitration agreements in which they are included, provided that they contain the essential elements that must be contained in any arbitration agreement for it to be valid, in particular the binding undertaking to submit the dispute to arbitration. Rather, such clauses have to be interpreted and supplemented in accordance with the general rules of contract law applicable under Swiss law, in order to find a solution that complies with the parties’ fundamental willingness to submit their dispute to an arbitral tribunal.

In the present case, the arbitration clause contained in the contract between the player and the club clearly showed the common intent of the parties to exclude the jurisdiction of state courts in favour of arbitration. It was also clear from the clause that, in any event, the CAS would be the last instance authority to decide over the dispute. The only disputed and, indeed, ambiguous issue concerned the identity of the arbitral tribunal competent for deciding in first instance: the Players’ Status Committee of C according to the arbitrator or the FIFA Players’ Status Committee according to the club. The Swiss Federal Tribunal confirmed that such an ambiguity did not per se lead to the nullity of the clause but could and should be repaired by construing the pathological clause in such a way as to make it effective and enforceable (so-called «Utilitätsgedanke» or «principe de l’effet utile»).

The Swiss Supreme Court noted in this respect that the arbitrator had very carefully interpreted the arbitration clause and that he had carried out a detailed analysis of the parties’ arguments. The club, on its part, had failed to criticize the arbitrator’s reasoning in its challenge; it had only submitted its own interpretation of the relevant wording in dispute. Moreover, it had failed to challenge the application by the arbitrator of the principle in dubio contra proferentem and his finding that the club’s interpretation of the arbitration clause could potentially deprive the player of any possibility to have the dispute adjudicated by a tribunal. The Swiss Federal Tribunal reaffirmed in this respect that the party challenging an award has to challenge and criticize all the arguments, also the alternative ones, relied upon in the award in order to enable the Swiss Supreme Court to review them and to eventually annul the award.
Concerning the second argument raised by the club (extra potentatem), the Swiss Federal Tribunal referred to its previous case law confirming that Article 57(1) of the CAS Code enables the CAS to choose between two options when dealing with an appeal: either issue a new decision replacing the challenged one, or annul the challenged decision and send the matter back to the first instance authority for a new decision. The Swiss Supreme Court confirmed that this principle (free choice) applies also in case of an appeal against a decision denying jurisdiction.

The Swiss Supreme Court finally seized the opportunity to confirm two well-established principles: that public policy does not require a two-tiered court structure and that a party cannot venire contra factum proprium. This was the case in the decision at hand, since the club had actually sought relief on the merits of the case before the CAS. This obviously barred it from complaining about the CAS having indeed decided on the merits of the case.

This decision is interesting insofar as it sheds light on the double degree of jurisdiction in certain sport arbitrations which can often lead to ambiguities and challenges. It is always good to be reminded in this respect that, although the Swiss Federal Tribunal is very strict in admitting the existence of an arbitration in case of doubts as to the actual intent of the parties to waive the jurisdiction of state courts, it is very liberal when it comes to interpret the scope and content of an existing but somehow pathological arbitration agreement.

2.2 Jurisdiction ratione personae and characterisation of CAS awards rendered in appeal proceedings

In a decision dated 28 August 20147, the Swiss Federal Tribunal partially annulled a CAS award for lack of jurisdiction ratione personae, after having clarified that a CAS award setting aside a decision of a lower body and sending it back to the latter for a new decision must be considered as a preliminary or interim decision (décision incidente).

A football club had assigned a player and his new club before the FIFA Dispute Resolution Chamber (DRC), seeking payment of an indemnity exceeding GBP 1,5 million for an alleged violation by the player of his contract with his former club. The DRC had ordered the player to pay GBP 400.000 to his former club, and had held the new club jointly and severally liable for the payment of this amount. Both the player and the new club filed an appeal against the DRC decision before the CAS. The two cases were consolidated. However, the player failed to pay the advance on costs in time. His appeal was thus considered withdrawn in accordance with Article R64.2 para. 2 of the CAS Code.

Relying on the withdrawal of the appeal of the player, the former club challenged the CAS jurisdiction to hear the appeal of the new club, or alternatively to decide upon the principle (as opposed to the amount) of the indemnity the player and his new club had been jointly and severally ordered to pay. However, the CAS upheld the appeal, annulled the DRC’s decision and sent the case back to the DRC for a new decision to be rendered in compliance with the relevant procedural rules.

In essence, the CAS upheld its jurisdiction to decide upon the new club’s argument pursuant to which the DRC had violated its right to be heard, irrespective of the question as to whether the CAS had the power to examine the merits of the DRC’s decision. The CAS further considered that the right to be heard of the new club had indeed been violated since it had not been served with the request filed by the former club. According to the CAS, the importance of the guarantee violated (i.e. the club’s right to be heard) triggered the invalidity of the first instance proceedings vis-à-vis all parties, irrespective of the withdrawal of the appeal of the player. This justified that the DRC’s decision be annulled in its entirety, and the case be sent back to the DRC for a new decision to be rendered in full compliance with the parties’ rights.

The former club moved to set aside the award before the Swiss Federal Tribunal, arguing inter alia that the CAS lacked jurisdiction to annul the DRC’s decision binding the former club and the player.

The Swiss Federal Tribunal started by examining whether the CAS award should be considered as a final award, i.e. an award which terminates the proceedings before the arbitral tribunal on a substantive or procedural ground, as a partial award, i.e. an award which deals only with some of the claims at stake or with part of the total amount of a claim, or which terminates the proceedings against some (but not all) of the respondents, or as a preliminary or interim award, i.e. an award which determines only one or more preliminary questions, whether of procedural or substantive nature. The Swiss Supreme Court admitted in this respect that, while this classification of the different types of awards fits well with commercial disputes opposing two or more parties that have entrusted an arbitral tribunal to decide upon their dispute as sole instance, subject to a possible challenge before a state court, as, in such a case, the final award indeed terminates the arbitral proceedings, said classification does not appear to be particularly suitable to the distinctive features of sports arbitration, namely the seizure of the CAS by virtue of an appeal against decisions rendered

7 Decision 4A_6/2014, published as ATF 140 III 520.
by a sport federation. Indeed, as an appellate court, the CAS admittedly renders a final award, i.e. an award which terminates the proceedings before it, but the proceedings on the merits opposing the relevant parties are not necessarily terminated with the rendering of the award. The proceedings on the merits continue if the CAS annuls the challenged decision and sends back the case to the sport federation for new decision.

Seen from this angle, the proceedings initiated before the sport federation and then continued before the CAS are similar to ordinary proceedings subject to a double instance. Since (as provided for in the Message of 28 February 2001 concerning the revision of the organization of the Swiss federal justice) the criterion of the termination of the proceedings depends not only on the proceedings held before the last instance which precedes the Swiss Federal Tribunal but also on the proceedings held before the previous instance, to the extent that one must examine whether the challenged decision terminates the first instance proceedings, the decision by which an appellate court annuls the challenged decision and sends back the case to the first instance court for a new decision on the merits qualifies as interim award, even if it terminates the appeal proceedings. It is therefore justified, according to the Swiss Federal Tribunal, to apply the same principle to the appeal proceedings before the CAS, the rationale being to ensure that the Swiss Supreme Court deals with a certain case only once, subject to the relevant exceptions admitted by case law8.

The Swiss Federal Tribunal then moved on to examine the admissibility of the grounds invoked by the former club, i.e. lack of jurisdiction of the CAS (Article 190(2)(b) PILA), ultra petita (Article 190(2)(c) PILA) and violation of public policy (Article 190(2)(e) PILA). It confirmed the principle laid down in the decision 4A_74/2014 rendered the same day, i.e. that notwithstanding the wording of Article 190(3) PILA, which provides that an interim award can only be set aside for the grounds set forth in letters (a) and (b) of Article 190(2) PILA (i.e. improper constitution of the arbitral tribunal and incorrect decision on jurisdiction), the grounds set forth in letters (c), (d) and (e) of the same provision (i.e. ultra petita decisions and denial of justice, violations of fundamental principles of procedure and incompatibility with public policy) can also be invoked in order to set aside an interim award provided that they are strictly limited to issues concerning directly the composition or the jurisdiction of the arbitral tribunal.

According to the Swiss Federal Tribunal, this condition was not met in the present case, as the grounds of ultra petita and violation of public policy were not invoked by the former club in the context of Article 190(2)(b) PILA but separately, as self-standing grounds, and were therefore inadmissible. The Swiss Supreme Court thus limited its analysis to the only admissible ground, i.e. the purported lack of jurisdiction of the CAS to annul the decision of the DRC ordering the player to compensate his former club for breach of their contract. According to the former club, the withdrawal by the player of his appeal against the decision triggered the extinction of the arbitration clause binding the parties, and thus of the jurisdiction of the CAS to annul the decision of the DRC insofar as it ordered the player to compensate his former club.

The Swiss Federal Tribunal upheld this argument. It confirmed that the former club and the player formed a so-called «consortie matérielle simple passive», which does not affect either the plurality of the cases and parties or their independence, to the extent that the position of one party, such as withdrawal, failure to appear or appeal, does not have any influence on the legal position of the others. This principle applies also in appeal proceedings, and implies, inter alia, that the res judicata effect of a decision be examined separately for each «consort» in its relationship with the opposing party.

The Swiss Supreme Court concluded from the above that, while the CAS was indeed competent to decide upon the appeal raised by the new club, which could for instance have invoked before the CAS that the DRC had been wrong in considering that the player had breached the contract with the former club in order to challenge the player’s obligation to which the new club was severally joined, irrespective of the fact that such a decision would have been inconsistent with the final and binding decision of the DRC ordering the player to compensate his former club, the CAS was not competent ratione personae to annul the latter decision, which concerned exclusively the case between the player and his former club. Indeed, the withdrawal by the player of his appeal had put an end to the appeal proceedings between the player and his former club, to the extent that the decision of the DRC had become res judicata vis-à-vis the player and his former club.

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8 The Swiss Federal Tribunal recalled in this respect having taken a similar decision in its judgment 4P.298/2006 of 14 February 2007, in which it had qualified as interim award an award in which the CAS had annulled a decision rendered by FIFA by upholding the existence of a breach of contract by a player and sent back the case to FIFA in order for the latter to decide on the consequences of the unjust termination of the contract by the player. The case at hand concerns the same scenario: the annulment by the CAS of the challenged decision and the return of the case to the DRC. The qualification of the award must therefore be the same.
We concur with other commentators that this decision is to be welcomed for two main reasons. First of all, because it shows, once again, that the Swiss Federal Tribunal is willing to take into account the peculiarities of sports arbitration if and when this is appropriate. Second, because it clarifies two important principles, i.e. that a CAS award sending back the matter to the lower instance for a new decision is an interim (and not a final) award – with all the practical consequences this qualification triggers, and that the grounds set forth in letters (c), (d) and (e) of Article 190(2) PILA (i.e. ultra petita decisions and denial of justice, violations of fundamental principles of procedure and incompatibility with public policy) can also be invoked to set aside an interim award provided that they are strictly limited to issues concerning directly the composition or the jurisdiction of the arbitral tribunal – opinion shared by the majority of Swiss legal scholars.

3. Right to be heard (and public policy – ne bis in idem)

In a decision dated 16 October 2014, the Swiss Federal Tribunal dismissed a challenge brought by the Turkish football club Fenerbahçe against a CAS award confirming the decision of UEFA to bar Fenerbahçe from participating in the next two competitions organized by UEFA for which the club would qualify as a result of match-fixing activities.

In Spring 2011, a number of Fenerbahçe’s representatives allegedly bribed representatives of opposing clubs in order to guarantee Fenerbahçe’s success in various matches of the Turkish top football league (the “Süper Lig”). This behaviour continued also after the entry into force, on 14 April 2014, of a new Turkish law providing that the manipulation of matches would from then on be considered as a criminal offense, as well as after Fenerbahçe’s filing, on 5 May 2014, with UEFA, of the “UEFA Club Competitions 2011/2012 Admissions Criteria Form” confirming that, as of 27 April 2007, the club was neither directly not indirectly involved in any manipulation of matches.

On 22 May 2011, Fenerbahçe eventually won the Süper Lig and qualified directly for the 2011/2012 UEFA Champions League. On 3 July 2011, the Turkish police arrested 61 persons for match-fixing, including Fenerbahçe’s President and Vice-President, two members of its board, its coach and its financial director. As a result of an investigation requested by the Executive Committee of the Turkish Football Federation (TFF), the TFF’s Ethics Commission informed UEFA, on 24 August 2011, of its decision to prevent Fenerbahçe from participating in the 2011/2012 UEFA Champions League.

Fenerbahçe appealed against said decision before the Arbitration Commission of the TFF first, which rejected the appeal, and subsequently before the CAS. By decisions of 9 September and 3 November 2011, the CAS dismissed Fenerbahçe’s request for preliminary measures aiming at allowing it to participate in the 2011/2012 UEFA Champions League’s matches. On 25 April 2012, Fenerbahçe eventually withdrew its appeal before the CAS. As a result, the decision of the TFF’s Ethics Commission became final.

In the meantime, in January 2012 the TFF’s Disciplinary Commission initiated disciplinary proceedings against Fenerbahçe, other Turkish clubs and their representatives. On 6 May 2012, the TFF’s Disciplinary Commission imposed, inter alia, a three-year ban from any football-related activity on a member of Fenerbahçe’s board, as well as a one-year ban on Fenerbahçe’s Vice-President and coach.

On 2 July 2012, the High Criminal Court of Istanbul held that a criminal organization had been constituted under the guidance of Fenerbahçe’s President insofar as various Fenerbahçe’s officials had participated in the manipulation of 13 matches of the 2010/2011 season of Süper Lig. Criminal sentences were pronounced against 48 persons, including, among others, Fenerbahçe’s President (sentenced to 2 1/2 years’ imprisonment for building a criminal organization and with 3 years and 9 months plus a fine for manipulating matches), Vice-President, board members, coach and financial director.

On 22 June 2013, after a two-year investigation, UEFA’s Disciplinary Commission decided to bar Fenerbahçe from participating in the next three competitions organized by UEFA. Fenerbahçe appealed against this decision before the UEFA Appeal Chamber first, which eventually reduced the ban to two competitions, and subsequently before the CAS.

On 18 July 2013, i.e. two days after having filed its appeal, Fenerbahçe informed the CAS that the parties (i.e. Fenerbahçe and UEFA) had agreed to adopt a rather
tight timetable providing for the following deadlines: 26 July 2013 for Fenerbahçe to file the reasoning of its appeal; 9 August 2013 for UEFA to reply; 21 – 23 August 2013 for the hearing; and 28 August 2013 for the CAS to render its award. The parties and the CAS followed this timetable. 20 witnesses were heard at the hearing, and Fenerbahçe renounced to hear 13 additional witnesses. Then, on 28 August 2013, the CAS rendered its decision, rejecting Fenerbahçe’s appeal and upholding the decision of the UEFA Appeal Chamber.

Fenerbahçe moved to set aside the CAS award before the Swiss Federal Tribunal, arguing a violation of the principle of equal treatment of the parties, a violation of its right to be heard, as well as a violation of public policy. First of all, Fenerbahçe argued that the CAS had violated the principle of equal treatment of the parties insofar as it had rendered its decision extremely quickly (six weeks after the lodging of the appeal and six days after the hearing, respectively) if compared to the two years that had taken UEFA to carry out its investigations and render its report. This was even more striking, according to Fenerbahçe, since the latter had disposed of only ten days to comment on the report, since the UEFA Appeal Chamber had rendered its decision only five days after the lodging of Fenerbahçe’s first appeal, and since the hearing before the CAS lasted only two days, thereby limiting the opportunity of the parties to properly question witnesses and experts. Fenerbahçe also argued in this respect that it had not voluntarily accepted such expedited proceedings, since the latter were provided for in a document, the UEFA admission form, that Fenerbahçe had to sign in order to participate in UEFA competitions. Fenerbahçe would allegedly not have accepted such expedited proceedings if it had had the possibility to participate in the UEFA competitions without signing the admission form.

The Swiss Supreme Court rejected these arguments essentially because Fenerbahçe had not raised them during the CAS proceedings as it should have done. The Swiss Federal Tribunal confirmed in this respect its long-standing case law pursuant to which a party must object immediately with the arbitral tribunal against any purported violation of due process and cannot wait until the award is rendered before complaining.

Second, Fenerbahçe argued that the CAS had violated its right to be heard by making a surprising application of the law, insofar as it had not reduced the duration of the ban pronounced by the UEFA Appeal Chamber after admitting that Fenerbahçe had manipulated only four matches (and not eight as retained by UEFA) and had not given untrue statements in the admission form (as retained by UEFA). Fenerbahçe argued in this respect that the CAS had applied by analogy the rules of the World Anti-Doping Code concerning the assessment of the sanction, without giving the parties the opportunity to discuss this allegedly surprising analogy.

The Supreme Court rejected this second argument holding that the CAS had taken its decision on the basis of Article 17 of the UEFA Disciplinary Rules, explaining in its award why a two-year ban was justified in casu pursuant to said provision irrespective of the above. The fact that the CAS had also referred to the fact that similar sanctions are common in doping matters did not mean, according to the Supreme Court, that the CAS had based its decision on an analogy with doping matters. Therefore, the CAS was not obliged to give the parties the opportunity to comment on such a purported analogy.

Third, Fenerbahçe argued that the CAS had violated its right to be heard by failing to examine several of its arguments. After confirming its longstanding case law pursuant to which the right to be heard does not oblige the arbitral tribunal to deal expressly with every argument raised by the parties, but merely imposes a minimal duty on the arbitral tribunal to examine the issues material to the outcome of the dispute, the Swiss Supreme Court rejected this third argument by holding that the CAS had actually complied with such a duty insofar as it had addressed all relevant questions in its award.

Fourth, Fenerbahçe argued that the CAS had violated public policy by disregarding the principle ne bis in idem. Indeed, according to Fenerbahçe, the TFF had already excluded the club from the 2011/2012 edition of the UEFA Champions League. The CAS could therefore not exclude Fenerbahçe a second time for the following editions based on the same violation.

The Swiss Supreme Court confirmed in this respect that the principle ne bis in idem forms part of the procedural public policy which encompasses «fundamental and generally recognized procedural principles, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears absolutely incompatible with the values and legal order of a state ruled by law». However, the Swiss Federal Tribunal left open the question as to whether the principle ne bis in idem applies also in sport disciplinary matters. The Swiss Supreme Court simply held that the CAS had addressed this issue in its award and had concluded that the TFF’s decision did not prevent the CAS from excluding Fenerbahçe for further editions of the UEFA Champions League.

Indeed, according to the CAS, Article 50(3) of the 2010 UEFA Statutes as well as Articles 2.05 and 2.06 of the Regulations of the 2011/2012 UEFA Champions League provided for a two-step procedure allowing UEFA to pronounce first a one-year ban as an administrative measure, and then an additional ban as a disciplinary measure. Accor-
due to the CAS, those two sanctions had to be differentia-
ted since they pursued two different goals: the one-year
administrative ban aimed at excluding immediately a club
from the competition without having to wait until the end of
the disciplinary investigation; it could therefore not be con-
sidered as a final decision, but only as a preliminary sanction
aiming at preserving the integrity of the competition; by
contrast, the second sanction, the «disciplinary measure»,
was subsequent to the administrative measure and was not
restricted by a maximum length.

The Swiss Supreme Court upheld this reasoning by con-
fiming on the one hand that the application of the principle
ne bis in idem requires that the tribunal seized with the first
proceedings be able to examine in full the facts of the case
(which was not the case in the present instance), and on the
other hand that the principle ne bis in idem does not prevent
that a same behaviour be sanctioned not only on a criminal
but also on a civil, administrative or disciplinary level.

This decision is certainly helpful insofar as it clarifies that
the principle of ne bis in idem is not applicable in sports
related matters when the two sanctions at stake do not
address and protect the very same good13. However, we
would have welcomed an affirmative decision of the Swiss
Federal Tribunal regarding the question as to whether the
principle ne bis in idem actually applies in sport disciplinary
matters when this condition is met, i.e. when the two
sanctions under scrutiny do indeed address and protect the
very same good. The Swiss Supreme Court had already left
open this question in the Valverde decision14. It decided to
do the same in the decision presently relevant.

4. Public policy

4.1 Substantive public policy (deregistration
of players) and admissibility of a
challenge

The Swiss Federal Tribunal rendered two decisions, on
6 January 201415 and on 3 March 201416 respectively, in
relation to the same dispute involving a Guinean profes-
sional football player, Ismaël Bangoura, the Al-Nasr sports
club of Dubai, and the French club FC Nantes.

In September 2010, Bangoura entered into an employ-
ment agreement with Al-Nasr valid until 30 June 2014. In
October 2011, Al-Nasr deregistered Bangoura from the list
of foreign players authorized to play for the club. Shortly
thereafter, Bangoura left Dubai without Al-Nasr’s authori-
ization and entered into an employment contract with
Nantes.

In the meantime, Bangoura sued Al-Nasr before the
FIFA Dispute Resolution Chamber for payment of
EUR 3,4 million, arguing that Al-Nasr had breached the
employment contract by deregistering him, and had failed
to pay an instalment of EUR 180.000 to which he was
entitled. On its part, Al-Nasr counterclaimed the payment
of EUR 9,7 million by Bangoura and Nantes for unjustified
termination of the contract. The FIFA Dispute Resolution
Chamber partially upheld Bangoura’s claims, ordering Al-
Nasr to pay EUR 180.000 to the player. At the same time,
however, the Chamber partially upheld also Al-Nasr’s
claims, ordering Bangoura and Nantes to pay, jointly and
severally, the amount of EUR 4,5 million plus interest.
Moreover, it banned Bangoura from participating in any official
games for four months, less three months already served.
Finally, it forbade Nantes from registering any new players
during the next two consecutive registration periods.

All three parties challenged this decision before the
CAS, which dismissed the challenges upheld the FIFA
Chamber’s decision.

Both Bangoura and Nantes moved to set aside the CAS
award before the Swiss Federal Tribunal. Both challenges
were dismissed, for different reasons. Bangoura’s challenge
was declared inadmissible because the player did not file it
within 30 days from the notification of the full award (with
grounds). The Swiss Federal Tribunal confirmed in this
respect that, when the petitioner asks the post office to
retain custody of his or her mail (or in case of delivery to a
mailbox or PO box), such mail is deemed to have been
notified on the last day of a seven-day deadline which starts
running from the date of delivery of the mail to the post
office where the recipient is domiciled, provided that the
recipient must have expected to receive such mail. This last
condition is in principle fulfilled when the recipient is in-
volved in ongoing legal proceedings. In the case at hand, the
full award (with grounds) was delivered to the post office
where Bangoura’s counsel was domiciled on 2 August
2013. According to the above principles, the award was
deemed to have been notified on 9 August 2013. The fact
that the player’s counsel had requested the post office to
retain custody of his mail until 26 August 2013 did not allow
him to wait until 25 September 2013 to file the challenge, as
he did.
Nantes, on its part, complied with the 30-day deadline. Its challenge was declared admissible, but was nevertheless dismissed by the Swiss Federal Tribunal on the merits. Nantes argued *inter alia* that the CAS award was incompatible with substantive public policy because it violated Bangoura’s economic freedom and personality rights, as well as the rules concerning the burden of proof and the prohibition of excessive commitments. In particular, Nantes argued that the deregistration, upheld by the CAS, caused the player to be banned lastingly from the competition and deprived him of the very opportunity to work.

In its decision, the Swiss Federal Tribunal recalled first that an arbitral award is contrary to substantive public policy only if it violates certain fundamental principles of the law applicable to the merits to such an extent that it is no longer consistent with the notions of justice and system of values. Among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons.

As confirmed by the Swiss Federal Tribunal, this list is not exhaustive. Indeed, according to the Swiss Supreme Court, it would be a delicate and perhaps even dangerous task to try to list all the fundamental principles that would belong to substantive public policy, at the risk of forgetting one or the other. This being said, if it is not easy to define substantive public policy positively and to set its boundaries with precision, it is easier to exclude some items such as the interpretation of the underlying contract or rules (specifically, the articles of association and regulations of private entities such as international sports federations) or the mere arbitrariness of the decision (the concept of public policy being more restrictive than the one of arbitrariness).

Applying these principles to the case at hand, the Swiss Federal Tribunal admitted that the deregistration of a player from the list of foreign players authorized to play for a club could lead to a violation of the player’s personality rights insofar as it would potentially depreciate his value on the market and harm his future employment prospects. However, the Swiss Supreme Court held that the circumstances of the present case did not allow to draw such conclusion since the deregistration of the player lasted only five matches, and the player continued to train with the Emirati club and to receive his salary during this period.\(^1\)

Despite its positive outcome, this decision should serve as a warning to football and other professional sports clubs that decisions to deregister players should not be taken lightly. Indeed, by deregistering a player, a club may very well violate not only the contract but also public policy if the consequences of the deregistration are such that the player is in fact deprived of the possibility to work and perceive his salary for a relatively long period of time.

### 4.2 Procedural public policy (admissibility of illegally obtained evidence) and standard of proof

In two, almost identical, decisions rendered on 27 March 2014, the Swiss Federal Tribunal held that reliance by an arbitral tribunal on illegally obtained evidence (in casu, a video recording) does not necessarily violate procedural public policy.

Both cases relate to a 2008 match-fixing scandal involving two Ukrainian football clubs, FC Karpaty Lviv («Karpaty») and FC Metalist Kharkiv («Metalist»). Metalist won the match 4-0. One of the best players of Karpaty, Serhiy Lashchenkov, scored an own-goal and was shown a red card. After the match, rumours began circulating that this was a wilful defeat. Therefore, the then honorary president of Karpaty, Peter Dyminskyi, initiated internal investigations.

In the context of the investigations, Mr Dyminskyi videotaped a conversation with Lashchenkov without the latter’s knowledge or consent. During this conversation, Lashchenkov confessed that Metalist’s Sports Director, Yevhen Kraskinok, had called him the night before the match and had offered him money. Lashchenkov had then called other members of the team and convinced them to accept Metalist’s offer.

Relying on the above-mentioned videotape, the Football Federation of Ukraine (FFU) imposed various sanctions on the clubs, their officials and football players. In particular, it pronounced against Lashchenkov and Kraskinok a lifelong ban from engaging in any football-related activities. This sanction was eventually reduced to a five-year period by the CAS.

\(^{17}\) Nantes also argued that the CAS had violated his right to be heard but the Swiss Federal Tribunal rejected this argument holding that the CAS had not failed to take into consideration allegations, arguments or evidence material to the outcome of the case as argued by Nantes.

\(^{18}\) The Swiss Federal Tribunal also rejected Nantes’ argument that the CAS had violated public policy by disregarding the rules concerning the burden of proof by confirming its case law pursuant to which such rules are not part of substantive public policy.

\(^{19}\) Decisions 4A_362/2013 and 4A_448/2013.
Both Lashchenkov and Krasnikov moved to set aside the CAS award before the Swiss Federal Tribunal, arguing inter alia that the CAS had violated procedural public policy by relying on illegally obtained evidence. The petitioners contended in particular that the inadmissibility of illegally obtained evidence is not only recognized by case law and scholarship, but is also entrenched in Article 140 et seqq. of the Swiss Criminal Procedure Code as in Article 152(2) of the Swiss Civil Procedure Code, as well as in other legal orders. According to the petitioners, exceptions should be admitted with great restriction, in particular where it is up to the parties to allege and prove the facts.

Lashchenkov and Krasnikov also invoked the principle in dubio pro reo and the violation of their personality rights (Article 27 of the Swiss Civil Code) in their attempt to persuade the Swiss Federal Tribunal that the CAS award violated not only procedural but also substantive public policy. However, the Swiss Supreme Court dismissed both challenges.

After recalling that procedural public policy is violated only where fundamental and commonly recognized principles are breached, whose non-observance would stand in unbearable contradiction with the sense of justice, in such a way that the award seems utterly incompatible with the set of rules and values prevailing in a law-abiding state, the Swiss Federal Tribunal held that illegally obtained evidence is not inadmissible in all cases. A balancing of the interests at stake must be made, mainly the interest of establishing the truth on the one side and the interest of preserving the legally protected rights that have been infringed in the taking of evidence.

The Swiss Federal Tribunal considered that this requirement had been met by the CAS in the case at hand, insofar as it had indeed balanced the interests at stake in examining the evidence produced, taking into account inter alia the importance of the public and sports interest involved in the fight against match-fixing and the gravity of the sanction. The Swiss Supreme Court further held that, in any event, the petitioners had failed to dispute the admissibility of the videotape during the arbitral proceedings on the one hand, and, on the other hand, the CAS decision was not only based on the videotape but also on the statements made by another player.

The Swiss Federal Tribunal also rejected the other arguments raised by the petitioners, holding that by basing its findings on a standard of «comfortable satisfaction» that Lashchenkov and Krasnikov had indeed committed match-fixing, the CAS had applied the proper standard of proof; that the principle in dubio pro reo does not apply to private law disputes, even when disciplinary sanctions are imposed by sports federations; and that a five-year ban from all football-related activities could not be considered as violating public policy in the case at hand, since it was not only limited in time but also justified in view of the gravity of the violation it had to sanction (match-fixing, and not mere failure to comply with an award as was the case, for instance, in the Matuzalem award).

We can only agree with the reasoning adopted and the conclusions drawn by the Swiss Federal Tribunal. However, we concur with other commentators that the Swiss Supreme Court could have seized the opportunity to provide more clarity as to whether and in which cases a decision exclusively based on illegally obtained evidence or on a too high (or too low) standard of proof, respectively, may violate procedural public policy. These questions were probably neither essential nor material to the outcome of the present case, but they could nevertheless have deserved a closer look and some insights from the Swiss Supreme Court.


24 See FABRICE ROBERT-TISSOT, cited above at footnote 23.

25 See NATHALIE VOSS/BENJAMIN MOSS, cited above at footnote 23.