Arbitration CAS 2012/A/2922 World Anti-Doping Agency (WADA) v. Federaçao Pernambucana de Futebol & Alex Bruno Costa Fernandes, award of 10 December 2013

Panel: Prof. Martin Schimke (Germany), President; Mr Michael Beloff, QC (United Kingdom); Mr Michele Bernasconi (Switzerland)

Football
Doping (norandrosterone)
Applicable law
CAS power of review
Duty of sports federations with regard to athletes' anti-doping results management

1. **If a national legislation itself expressly states that official sports practice in the country is governed by national and international rules, then international sports rules are directly applicable in this country. Accordingly, any athlete registered with a national federation is directly bound by the international rules accepted by that federation, including any provision therein giving jurisdiction to the CAS. It is the case in Brazilian sport.**

2. **Although, under Article R57 of the CAS Code, *"the Panel shall have full power to review the facts and the law"*, it is not its role to rectify the deficiencies displayed by the laboratory or another body in connection with internal procedures during the pre-hearing stage of the disciplinary proceedings. This is particularly true when the authorised disciplinary bodies of the national association concerned decided to exonerate the athlete of all wrongdoings precisely because of those self same deficiencies. In such a specific case, the function of the panel in applying the *de novo* standard as an appellate body is only to determine, on the basis of the evidence submitted, whether the disciplinary bodies' evaluation is soundly based and whether the conclusion consequently derived from those facts by the disciplinary bodies is equally sound.**

3. **It is the responsibility and duty of all sports federations to conduct themselves in a fashion which is beyond reproach and is scrupulously in accordance with their anti-doping rules and policies contained within their organization's rulebook. An athlete has the right to expect his anti-doping results management to be dealt with appropriately at every stage of the process as well as to have access to an expedited and comprehensive hearing on the merits.**

I. PARTIES AND NATURE OF CLAIM

1. The World Anti-Doping Agency (hereinafter referred to as "WADA") is a Swiss private-law foundation. Its seat is in Lausanne, Switzerland, and its headquarters are in Montreal, Canada. WADA was created in 1999 to promote, coordinate and monitor the fight against doping in sport in all its forms.

2. The Federaçao Pernambucana de Futebol (hereinafter "FPF") is the governing body of football in the State of Pernambuco, Brazil, which is affiliated with the Confederação Brasileira de Futebol ("CBF"). It was founded in 1915 and has its registered office in Boa Vista Recife, Brazil. The FPF and its members are subject to the regulations established by CBF and by the Fédération Internationale de Football Association ("FIFA"). The CBF has been affiliated with FIFA since 1923.

3. Mr Alex Bruno Costa Fernandes is a professional football player of Brazilian nationality (hereinafter the "Player"). At the time of the facts giving rise to the dispute under consideration, he was playing for the football club "Sport Club do Recife" (hereinafter the "Club"), which is affiliated to the FPF and the CBF.

4. This is an appeal by WADA against a decision of the Tribunal de Justiça Desportiva de Pernambuco (hereinafter "TJD/PE") dated 4th June 2012, acquitting the Player of a doping offence (hereinafter "the Decision").

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions and evidence adduced. Additional facts and allegations found in the Parties' written submissions and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

II.1 THE EVENTS PRIOR TO THE DECISION RENDERED ON 4 JUNE 2012 BY THE TRIBUNAL DE JUSTIÇA DESPORTIVA DE PERNAMBUCO

6. On 3 April 2011, after an FPF A1 Series Championship match between his Club and Santa Cruz Futebol Clube, the Player underwent an in-competition anti-doping control.

7. The then WADA-accredited *"Laboratorio de Apoio ao Desenvolvimento Tecnologico do Instituto de Quimica"* (hereinafter "LADETEC") in Rio de Janeiro, Brazil, was instructed to conduct the analysis of the Player's A urine sample. In its certificate of analysis dated 1 August 2011, it confirmed that it had identified in the Player's A sample the presence of 19-Norandrosterone

at a level of 5.2 ng/mL with a reported uncertainty of 0,07 ng/ml. In its analytical report, the LADETEC confirmed that *"these results together constitute an [Adverse Analytical Finding]"* and *"are consistent with the administration of exogenous steroids"*.

8. It is undisputed that 19-Norandrosterone is a non-specified substance classified under the category S 1.a Exogenous Anabolic Androgenic Steroids on the WADA 2011 Prohibited List (hereinafter the "Prohibited Substance").

9. On 22 August 2011, the Player was informed via his Club of the adverse analytical finding, which had been notified to the Club by the FPF on a one page document, reading in pertinent parts:

"We hereby communicate that we have received from LADETEC (…) the result of the Doping Control laboratorial analysis made during Sport x Santa Cruz match, held on 3rd April 2011 (…) for Sample A-23157, Container A-23157 which informs: according to the LADETEC's ADAMS report, enclosed, herewith, it shows the substance Norandrosterone, which, according to the Regulations of the [CBF] (CBF) and of WADA, constitutes an adverse analytical finding (AAF).

This sample belongs to player Alex Bruno Costa Fernandes, shirt number 04, of the sport Club of Recife, taken during the above-mention match.

We remain at your disposal for complementation of the tests by conducting the counterproof, in accordance to items 6.3 and 6.4 of the Doping Control Regulations, in case the parties are interested".

10. The following day, namely 23 August 2011, the Club confirmed to the FPF President that the Player requested a confirmatory analysis to be carried out on his B Sample and asked to be *"informed of the cost of the said test, so that [the Player] can pay and evidence it"*.

11. On 12 September 2011, the FPF invited the Club *"to indicate two dates for scheduling the test with LADETEC"*.

12. On 13 September 2011, the FPF Secretary General notified the LADETEC that the Player *"has indicated the dates of 19th or 23rd September in which to conduct the making of the counterproof"* and that *"we have at LADETEC's disposal, the amount of R$ 3.680,00 for the necessary payment, for which orientation is requested for its transfer"*.

13. On 29 September 2011, the FPF Secretary General advised the Player's Club that *"the sample 23157, container 23157, ADAMS report, referring to [the Player], was forwarded by LADETEC to the Laboratory in Cologne, Germany, for additional analyses, where the presence of the substance exogenous Nandrolina was confirmed. LADETEC also informs that, in this special case, the counterproof can only be done in Germany and therefore, all the procedures pertinent to it must be negotiated with the Cologne laboratory. Therefore, we ask this affiliate if the athlete still wants to do the test"*.

14. On 4 October 2011, the Club informed the FPF that the Player was no longer its employee, but that it nevertheless had been able to forward the FPF's communication of 29 September 2011 to the Player by fax, mobile phone and ordinary mail. The Club also confirmed that *"the amount*

received by FPF, for payment of expenses of the counterproof test, is at the athlete's disposal, in this House, in case he decides not to negotiate the test with the Laboratory in COLOGNE – GERMANY".

15. It appears that neither, the FPF, the Club nor the Player took any further action with regard to the confirmatory analysis.

16. On 8 November 2011, the President of the TJD/PE decided on the Player's *"temporary removal from the Pernambuco Championship of Football for a period of 30 (thirty) days as from this date".*

II.2 THE PROCEEDINGS BEFORE THE TJD/PE

17. Between December 2011 and March 2012, the Player lodged various defence papers with the TJD/PE.

18. On 20 April 2012, and with regard to the Player's case, the TJD/PE Prosecutor filed his report, which indicates, in pertinent part, the following:

- It is the Player's case that:
  - -- he should be acquitted due to *"the lack of subpoena to accompany the holding of the counterproof test".*
  - -- the prohibited substance has not been taken or administered intentionally and *"he suffered unwanted contamination by exclusive fault of third party"*;
  - -- he has a clean personal anti-doping history and record;
  - -- during the month preceding the anti-doping control of 3 April 2011, the Player had been tested on 3 occasions, each time with negative results;
  - -- according to the written report of the Player's private doctor, who is also a member of the *"International Anti doping Committee"*, *"it is fully possible and probable that, the level presented is a mere alteration of the substance in the body, without the influence of any exogenous use".* The Player's biological parameters were most likely influenced by the fact that he was recuperating from a recent serious injury and by the stress caused by the birth of his son.
- The TJD/PE Prosecutor enumerated the list of documents filed by the Player in support of his defence.
- The TJD/PE Prosecutor made the following observations:
  - -- The Player was denied his timely request to attend the opening and analysis of his B sample. In this regard, the file does not contain any evidence that the Player was notified of the scheduled date, time and place for the requested B sample analysis.
  - -- *"It so happens that, on 29th September, or say, a later date than the dates which had been indicated [by the Player on 13 September 2011], F.P.F., (…) informed the club that LADETEC had sent the material to the laboratory in Cologne, in Germany, for additional tests and that in this special case, the counterproof could only be done in that country and that the necessary procedures*

had to be negotiated directly with that laboratory, asking if the athlete still wanted to make the counterproof test".

-- *"the records do not contain the report about the counterproof because at first sight this test did not exist".*

-- *"from the above it is understood that additional tests were made to the first but not as the 2nd test, to which the defense claims that it was not present due to lack of notification. Here it must be emphasized that this was informed to the Club and the latter passed the information onwards to the athlete via fax and mobile phone (…). Thus, I believe the notification does not exist, because the dates previously indicated had already gone by when the telegram was sent, also considering that new dates were not indicated besides, if it happened that the additional tests were made in Germany, which fact was not disputed neither before the Federation nor before the National Doping Control Committee and nor before LADETEC".*

-- *"Therefore, I analyse the issue under the view that a notification requesting the athlete or his representative to be present at the 2nd test does not exist because though asked about it, there was no confirmation on this respect, besides which information that additional analyses had already been done in Germany led him to understand that the counterproof had already been done".*

- The TJD/PE Prosecutor also expressed his surprise at the LADETEC unsupported statement according to which *"in this special case, the counterproof can only be done in Germany".*

- In spite of the Player's doctor's report, the TJD/PE Prosecutor held that there was conclusive evidence to accept the exogenous origin of the Prohibited Substance found in the Player's urine sample.

19. As a result, the TJD/PE Prosecutor decided the following:

"Therefore due to all the above, this prosecution submits a complaint against Alex Bruno Costa Fernandes who is subject to sanctions provided in Art. 10.2 of the WADA Code, for proven use of a prohibited substance for the practice of football.

However, I consider there are several bureaucratic factors on LADETEC's part that influenced the fact that the notification requesting the athlete's presence at the counterproof test did not happen.

For example, we can mention the fact that this laboratory could not have sent a sample of the materiel to another country, or even, to another State in Brazil's territory, without the prior knowledge of, in first place of the local Federation, which would have allowed the necessary notification of the athlete and/or his legal representative. On the other hand, I see that the athlete was advised of the procedures for the counterproof, and, if so, after the material was preliminarily analysed in Germany, he, the interested party, should have taken the necessary measures, such as indicating new dates, and thus have his right assured.

Thus, the laboratory was negligent and as was the athlete.

On this understanding, I do not see this as an excluding condition, but as a clearly mitigating condition on the sanction which might be applied.

Therefore, for all the above exposed, I believe 2 measures would be fitting in this case's decision.

I understand that art. 10.3 of the above-mentioned Code must be analysed, as it allows the reduction of the

sanction provided in art. 10.2 and my alternative opinion is that of applying art. 10.3, depending on the evidence that may be presented on the trial session".

20. On 4 June 2012 and after having given an account a) of the facts, b) of the Player's position and c) of the TJD/PE Prosecutor's findings, the *"Auditor-Relator"* of TJD/PE 2nd Disciplinary Commission decided to drop the charges against the Player and entered an acquittal on the following grounds:

- The requirements of article 10.3 of the WADA Code are not met in the present case and the said provision is therefore not applicable to the Player's situation, contrary to the TJD/PE Prosecutor's suggestions. *"Thus, faced with that substance's nature, the sanction to be applied should be, invariably, the two-year suspension foreseen for the athlete's first violation (…) in the terms of article 2.1.1 of the WADA Code".*
- *"The WADA Code is a normative which bears the legal nature of an International Convention, ratified by Brazil and enacted internally by Presidential Decree n° 6.653/2008, being in full force, therefore, in the country, being applied in kind by express reference of article 244-A of the CBJD (Brazilian Sports Justice Code). As a result of the above provision, once patented the substance's presence, punishment is forthcoming, unless the action or causal link is deconfigured (ingestion, as it is a [sic] exogenous anabolic)".* According to the applicable WADA Code, it is the Anti-Doping Organization which bears the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the anti-doping rule violation has been established to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made.
- The Player's right to promptly request the analysis of his B sample as provided under article 7.2 of the WADA Code and to present rebuttal evidence is a component of his fundamental rights. It also has a human rights dimension *"which, on a domestic level, (…) bears a supralegal character.*"
- *"In the case at hand, the National Doping Control Committee, though having notified the accused to indicate dates available to accompany the counterproof, received the indications but conducted the rest of the procedure in the athlete's absence, thus leading to the nullity of the act".*
- *"Differing from the Prosecution, I think that the thesis of nullity is well founded, as it is an offense to a public order norm, which conveys a formality instituted in benefit of a fundamental guarantee of the accused, who when able to accompany the procedure, can verify and point out possible irregularities and inconsistencies in the test, privileged in counting with a specialist's assistance for it".* This finding is consistent with Brazilian court rulings in civil-law and penal-law matters.
- *"In the present case, the harm caused to the athlete is patent, since, if he could have accompanied the making of the test especially if accompanied by Dr. Paulo Cavalcante Muzy, his personal doctor and expert, he would certainly have had more subsidies to challenge the process which was conducted, it should be said, in a very obscure manner, as can be seen by the lapses of information in the files".*

21. As a result, on 4 June 2012, the TJD, the *"Auditor-Relator"* of TJD/PE 2nd Disciplinary Commission, decided the following:

"Thus said, the nullity of the test is patent, which leads to lack of evidence, the reason for which I VOTE FOR THE ACQUITTAL OF THE ACCUSED".

II.3 THE EVENTS FOLLOWING THE DECISION RENDERED ON 4 JUNE 2012 BY TJD/PE

22. On 28 August 2012, a LADETEC representative sent the following e-mail to FIFA:

"Yes we still have the B sample in the laboratory. The remaining A sample was sent to the Cologne laboratory for the IRMS analysts, because this one is not in our scope (as in the majority of the WADA accredited laboratories). The difficulty that this poses is that if the athlete wants a B sample analysis it should be performed at the Cologne laboratory. We have requested a position from the athlete but have received no answer.

What turns this case a little bit more complicated is that it comes from a federation in Brazil and the Federations doesn't [sic] have the same proficiency to deal with doping controls as the CBF itself. We have tried repeatedly to clarify the procedures to the local staff but I'm not sure they already fully understand what has to be done. Unfortunately this is a very rare case in Brazil and had to happen exactly with the least prepared doping control authorities".

23. On 12 June 2013, WADA informed the Player that it had recently contacted the LADETEC with respect to available dates for the opening of his B sample. The dates foreseen were 27-28 June or 4-5 July 2013. The Player was invited to attend the B sample opening and analysis on the set dates or *"to suggest possible alternative sets of dates (bearing in mind that the analysis will require two days) provided that such dates are on or before July 2013".*

24. On 21 June 2013, the Player indicated that he disapproved of WADA's conduct and considered it inappropriate that his B sample should be opened by the LADETEC, which had already been shown to be unable to carry out tests properly. He furthermore submitted that *"WADA is pushing for the opening of the B-Sample, since they are trying to regularize the proceeding, which had several mistakes since its beginning. However, it is important to emphasize that the opening of the B-Sample will not validate all the faults and mistakes that happened in this proceeding. The Player informs that it will not express his opinion concerning the opening B-Sample and regarding the date for the opening and analysis. However, the player requests to be notified about the date of the opening of the B-Sample, in order to allow him to supervise the test".*

25. On 28 June 2013, WADA advised the Player that the opening of his B sample would take place at the LADETEC on 4 and 5 July 2013 and that he was entitled to be present or represented at the confirmatory analysis. *"In any case, WADA will arrange with the LADETEC laboratory for an independent witness to verify the opening of the B sample".*

26. On 8 July 2013, the Player's legal counsel received an email from the LADETC, which reads as follows (as translated from Portuguese into English by the Player): *"(…) as anticipated the opening of the above-mentioned sample to perform the analysis of the counterproof, there are cases where it is necessary to repeat the analysis. Thus, the sample was re-sealed in the presence of a representative of the athlete, being guarded*

in the laboratory. We will contact you when we have new date for accomplishment of the same".

27. On 16 July 2013, the LADETEC sent the following letter to the Player's legal counsel:

"The sample was opened and witnessed by your representative and sealed again if another analysis would be needed. His words against mine. I, personally, informed the athlete representative that among other reasons, the B sample was being properly sealed because sometimes a reanalysis would be needed.

While performing the quantitative analysis, the controls were not adequate.

Final results will only be accepted if all controls are correct.

(…)

We would have immediately suggested other days for the continuation of the analysis, but the laboratory ran out of stock of the necessary standards to produce the "new controls" (see above).

We are presently procuring the standards trying the fastest routs to import them.

Therefore we sent you a note stating that we would suggest the new dates as soon as possible.

We were waiting for the export dealer to define the arrival of the standards.

Unfortunately something that we thought would take a couple of days is suffering an enormous delay. It seems they will become available only from next Tuesday (July 23 2013).

Last, but not least, next week is the Jornada Mundial da Juventude (JMJ, "World Youth Journey") and a decree of the Mayor of Rio de Janeiro established three holydays, because it will be impossible to go around the city, surcharged by the millions of people expected and their displacements to follow the Pope's activities.

We are indeed very sorry that this has happened but we are doing our best to overcome this situation".

28. On 9 August 2013, WADA published the following press release:

"[WADA] *has revoked the accreditation of [LADETEC] in Rio de Janeiro, Brazil due to non-compliance with the* International Standard for Laboratories *(ISL) and the related Technical Documents.*

The revocation will enter into force September 25, 2013 and means that the laboratory – which is currently suspended – will no longer be authorized to carry out the testing of doping control samples on behalf of WADA or any testing authority.

In the meantime, the suspension remains applicable and LADETEC is therefore ineligible to perform analysis of doping control samples for any testing authority.

The decision was taken by WADA's Executive Committee following a thorough review of the status of the laboratory by WADA's Disciplinary Panel. WADA suspended the Rio laboratory accreditation on August 8, 2013 before a decision on revocation was taken by the Executive Committee.

(…)

The decision made by WADA's Executive Committee marks the second time the Rio laboratory has fallen below the required standards set by WADA. The laboratory was also suspended for nine months in January 2012, before being reinstated following a WADA site visit that ensured the proper corrective actions had been implemented.(…)*".*

29. On 10 October 2013, WADA informed the Player that his B sample analysis would take place on 15 October 2013, at the facilities of the WADA-accredited laboratory in Cologne, Germany (hereinafter the "Cologne Laboratory"). It invited the Player to inform the laboratory as to whether he would be present or represented for the opening and/or analysis of the sample.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

30. On 14 September 2012, WADA filed a statement of appeal with the Court of Arbitration for Sport (hereinafter "CAS").

31. On 18 September 2012, the CAS Court Office acknowledged receipt of WADA's statement of appeal, of its payment of the CAS Court Office fee, of its nomination of Prof Massimo Coccia as arbitrator and of its requests a) to stay *"the CAS proceedings in this matter until such time as WADA has confirmed that either (i) the Player does not request the analysis of the B-sample or (ii) the relevant analyses have been performed"* and b) to extend *"the time limit for WADA to file its Appeal Brief (…) until the date falling ten days after the resumption of the CAS proceedings"*. The CAS Court Office invited the Respondents to express their views on WADA's requests.

32. On 23 November 2012, within the granted deadline, the Player filed a lengthy brief with the CAS laying out the history of the case, the procedural mistakes made by the LADETEC, the Cologne Laboratory and the FPF. He also submitted his comments on several aspects raised by WADA in its statement of appeal, appointed Mr Michele Bernasconi as arbitrator and filed the following requests:

"Within this context, before deciding whether the player agrees or not with the opening of the B-Sample, he asks CAS:

a) to determine that the appellant must attach all essential documents that were mentioned on topic I and II, in order to allow the player to be aware of at least the essential evidences in order to decide if he intends to open the B-Sample;

b) to ask to the appellant if he agrees to send back the matter for the [TJD/PE], if the result of the B-Sample confirms the doping offence;

c) to include the [TJD/PE] as a respondent in the present case.

33. On 28 November 2012, the CAS Court Office observed that the Player had not submitted his position vis à vis WADA's requests and granted him a final deadline within which to do so.

34. On 3 December 2012, in a timely manner, the Player explained that he was not in a position to comment on WADA's requests as long as his own requests remained unanswered. Therefore, he was of the view that his requests should be addressed by CAS prior to WADA's.

35. On 5 December 2012, the CAS Court Office invited WADA and the FPF to take positions on the Player's requests within a week. It also informed the Parties that the deadline to file an

appeal brief and to designate an arbitrator remained suspended.

36. On 12 December 2012, WADA informed the CAS Court Office that:

- it disagreed *"with the player contention that the B sample should only take place after he has received a full documentation package on the A sample" and, therefore, requested the CAS "to set an ultimate deadline for the player to request the B analysis [of his sample]"*;
- it would ask the relevant laboratories to provide the A sample's documentation package;
- it did not agree *"that the matter to be sent back to the TJD. CAS will review the matter de novo and all evidence, existing and new, will be reviewed within the framework of the CAS proceeding"*.

37. On 31 January 2013, WADA confirmed that it had forwarded to the Player the A sample's laboratory documentation package.

38. On 14 February 2013, the Player informed the CAS Court Office that the information sent by WADA was incomplete as he was still missing a) *"LADETEC letter informing to the Federation/athlete about the adverse analytical finding"* and b) *"LADETEC letter to the Federation/athlete updating that the samples were sent to the Cologne laboratory and informing how the athlete could contact the Cologne Laboratory and the next steps of the proceeding"*. In connection therewith, the Player filed the following new requests:

- *"WADA must bring [the missing documents] to the proceeding"* and
- *"in the event that the appellant declines to exhibit these documents, the athlete will have another procedural request for the Panel, which will be «to determine that the appellant must attach the documents that are still missing, which were requested by the athlete on his communication dated 14 February 2013»"*.

39. On 5 and 15 February 2013 respectively, the CAS Court Office invited WADA/the FPF and the TJD/PE, to comment on the Player's request seeking the participation of the TJD/PE in the present arbitration as a co-Respondent. WADA submitted that the TJD/PE lacked autonomous legal personality and, therefore, could not be considered *ratione personae* as a Respondent in CAS proceedings. The FPF and the TJD/PE both failed to communicate their positions within the given time limit or at all.

40. On 20 February 2013, WADA stated its position as regards the Player's assertions of 14 February 2013. WADA submitted that the Player was notified of the adverse analytical finding on or around 22 August 2011 and therefore *"the LADETEC Adverse Finding Notification would add nothing to these proceedings as it is already evident from the document on record that both Respondents were notified of the adverse analytical finding"*. Regarding the second document requested by the Player on 14 February 2013, WADA claimed that the *"A sample was sent for IRMS analysis to Cologne in June 2011 (…). The Cologne analysis, therefore, constituted a further investigation of the A sample prior to the notification of the adverse analytical finding* (…). *It is entirely normal that neither the Second Respondent (nor his club or federation) were notified of the adverse analytical finding prior to the conclusion of the Cologne IRMS analysis on the A sample. As a consequence, the LADETEC Cologne Laboratory Notification simply does*

not exist". In light of this, WADA asked the Panel to set an ultimate deadline for the Player to request the confirmatory analysis of his B sample.

41. On 27 February 2013, the CAS Court Office informed the Parties that Prof. Massimo Coccia had declined his appointment as arbitrator in the present procedure due to lack of sufficient availability. Consequently, WADA appointed the Hon. Michael J. Beloff QC, Barrister, London, England as arbitrator.

42. On 10 April 2013, CAS informed the Parties that the Panel to hear the Appeal was constituted as follows: Prof Martin Schimke, President of the Panel, the Hon. Michael J. Beloff, QC Arbitrator designated by WADA and Mr Michele A. R. Bernasconi, Arbitrator jointly appointed by the Player and, by tacit consent, the FPF. The Panel has been assisted by Mrs Pauline Pellaux, Counsel to the CAS and Mr Patrick Grandjean, *ad hoc* clerk.

43. On 16 May 2013, the CAS Court Office informed the Parties of the following:

"I refer, inter alia, to the CAS letter of 12 December 2012 and WADA's procedural request of the same day to set a final deadline for the Player to require the analysis of the B sample 23157 and inform you that the Panel has decided as follows on such request:

Since WADA is bringing an action to set aside the decision rendered by the [TJD/PE] on June 4, 2012 (on the premise that the case is closed internally as far as the association is concerned) and is seeking a sanction in the form of a 2-year ban, the Panel is of the opinion that any requirement by the Player for analysis of the B sample 23157 or the result of such analysis is not a necessary precondition for the filing of the appeal brief. Therefore the Panel dismisses this request and therefore invites ***WADA*** *to submit its appeal brief* ***within 10 days as from receipt of the present letter****.*

In view of the above, the Panel considers that it is not necessary presently to rule on the Player's requests (i) to be granted the two allegedly missing LADETEC letters in order to allow him to decide if he intends to open the B sample and (ii) to send the case back to the [TJD/PE] if the analysis of the B-sample were to confirm a doping offense".

44. On 28 May 2013, the CAS Court Office acknowledged receipt of WADA's appeal brief dated 27 May 2013 and invited the Respondents to submit their respective answer within 20 days.

45. On 4 June 2013, the CAS rendered a decision on Joinder, whereby it dismissed the Player's request for the participation of TJD/PE as a Respondent in the present CAS proceedings.

46. On 20 June 2013, the Player filed his answer.

47. On 5 July 2013, the Parties were invited to inform the CAS Court Office whether their preference was for a hearing to be held.

48. On 16 July 2013, the Player confirmed to the CAS Court Office that his preference was for a hearing to be held. He also indicated that the confirmatory analysis on his B sample had been performed on 4 July 2013 but that he had not received any result yet. In addition, he notified the CAS Court Office that he had been informed by the LADETEC that, for some unknown

reason, the laboratory would have to repeat the analysis carried out on his B sample, which had to be re-sealed. In light of this, the Player asked the Panel *"to request LADETEC and WADA to inform the results of the analysis of the B-Sample and to provide the reasons for the reanalysis of the B-Sample"*.

49. On 17 July 2013, the FPF filed its answer.

50. With the exception of its answer filed on 17 July 2013, the FPF failed to submit any response or document to the CAS Court office, despite the fact that it was consistently notified of the correspondence exchanged in these proceedings and was privy or party to all the procedural steps carried out by the CAS Court Office in connection with this Appeal.

51. On 24 July 2013, WADA informed the CAS Court Office that if a hearing should be held, it should take place *"only after the results of the B Analysis have been communicated to CAS and the parties to this arbitration"*. It further referred to section IV of the Player's statement of defence, whereby he asserted that his case had been reopened and was currently pending with the TJD/PE. WADA asked CAS to obtain information regarding the state of such alleged proceedings.

52. On 31 July 2013, the Respondents were invited by the CAS Court Office to submit their respective positions vis à vis WADA's requests of 24 July 2013.

53. On 19 August 2013, the Player confirmed to the CAS Court Office that according to the information he had received from the CBF and the FPF, his case had been or would be reopened by the TJD/PE. He further expressed his preference again for a hearing to be held and requested that WADA explains the reasons behind LADETEC's suspension.

54. On 6 September 2013, WADA informed the CAS Court Office of the fact that it had received assurances from the CBF and FIFA that the Player's case had not been re-opened by the TJD/PE. In this context, WADA made the following proposal:

> *"As a result of the suspension of the accreditation of the LADETEC laboratory, WADA will shortly arrange for the B sample to be transported to, and tested at, the WADA-accredited laboratory in Cologne.*
>
> *Assuming that the B sample analysis confirms the presence of the prohibited substance in the Player's sample, the CBF will take the necessary measures to re-open the matter before the relevant instance in Brazil.*
>
> *On the basis of the above, WADA requests in accordance with R32 of the Code of Sports-related Arbitration that the CAS proceedings be suspended until a new decision has been rendered by the relevant Brazilian instance or, alternatively, 31 December 2013 if proceedings have not been re-opened in Brazil by that time"*.

55. On 9 September 2013, the CAS Court Office invited the Respondents to state their respective positions vis à vis WADA's proposal of 6 September 2013.

56. On 16 September 2013, the Player confirmed to the CAS Court Office that he disagreed *"with the suspension of the proceeding requested by WADA, and before continuing with the case we would like to request CAS to order WADA the following:*

    a) To disclose the results of the analysis of the B-Sample performed by LADETEC, even if it was partial;

b) To inform which controls failed in the analysis of the B-Sample performed by LADETEC;

c) To inform all the motivations that made WADA suspend LADETEC's accreditation".

57. On 4 October 2013, the CAS Court Office sent the following letter to the Parties:

"This is to inform you as follows regarding the Appellant's request for suspension of the CAS procedure:

In view of the Second Respondent's objection to this request, the Panel considers that it should review the challenged decision on the basis of the facts at the time of that decision's issuance and that accordingly the case is ready for decision. Accordingly the Panel has decided to dismiss the Appellant's request for a suspension of the CAS procedure.

Furthermore, please note that that the Panel deems itself sufficiently informed to decide this matter based on the parties' written submissions".

58. On 11 October 2013, both WADA and the Player sent to the CAS Court Office a duly signed copy of the Order of Procedure. At this time, the Player reaffirmed once more his preference for a hearing to be held.

59. After having consulted the Player regarding possible dates for the analysis of the B-sample, WADA informed the Player, by letter of 10 October 2013, that such analysis would take place in the WADA-accredited Cologne Laboratory on 15 October 2013.

60. On 25 October 2013, WADA sent to the CAS a copy of the laboratory analysis and underlined that such report confirmed the detection of 19-norandrosterone consistent with the administration of nandrolone.

IV. THE PARTIES' WRITTEN SUBMISSIONS

IV.1 THE APPEAL

61. WADA submitted the following requests for relief:

"WADA hereby respectfully requests CAS to rule that:

1. The Appeal of WADA is admissible.

2. The decision rendered by the TJD/PE on 4 June 2012, in the matter of [the Player] is set aside.

3. [The Player] is sanctioned with a two-year period of ineligibility starting on the date on which the CAS award enters into force. Any provisional suspension served by the Player before the entry into force of the CAS award, shall be credited against the total period of ineligibility to be served (…).

4. WADA is granted an award for costs".

62. WADA's submissions, in essence, may be summarized as follows:

- Its appeal is admissible.

- It has been successfully established that the Player committed an anti-doping rule violation as laid down in the applicable FIFA Anti-doping Regulations, given that
  -- (i) The exogenous origin of the Prohibited Substance found in the Player's A sample was confirmed by the IRMS analysis conducted by the WADA-accredited laboratory in Cologne.
  -- (ii) The presence of the Prohibited Substance in the Player's urine sample constitutes a violation of article 6 of the FIFA ADR.
- *"The standard sanction for a violation of article 5 and/or article 6 of the FIFA ADR is a two year period of ineligibility".*
- The Player had failed to explain how the Prohibited Substance entered his body.
- Consequently, there was no reason to reduce the standard period of ineligibility. *"There can therefore be no question that a mere claim to innocence (or perhaps ignorance) can allow athletes to avail themselves of art. 10.5.1 and 10.5.2 WADC which pre-require exceptional circumstances".*

IV.2 THE ANSWER OF THE FPF

63. The FPF filed an answer, with the following requests for relief:

"REQUESTS

- *With the considerations above we request to the Panel to reject WADA's appeal.*
- *In case the Panel accepts the appeal we request to close the case once the proceeding needs to be reopened on the TJD/PE.*
- *If the Panel accepts the appeal and does not send the case back to TJD/PE, we request that the previous decision is maintained.*
- *Finally, we request that the costs of the proceeding to be imposed to WADA or be exempted due the nature of the appealed".*

64. The FPF's submissions, in essence, may be summarized as follows:

- The TJD/PE acted in an independent and impartial manner and its decision must be respected.
- The decision of the TJD/PE appears to be fair in light of the LADETEC's numerous failures to comply with the required anti-doping testing standards as well as with the Player's due process rights.

IV.3 THE PLAYER'S ANSWERS

65. The Player filed an answer, with the following requests for relief:

"Within this context the respondent requests the Panel to:

a) to fully reject WADA's appeal, upholding the decision of the [TJD/PE] acquitting the player Alex Bruno Costa Fernandes;

b) In case the Panel doesn't understand in this sense, the player alternatively requests:

b.1) To close the present case, since the appealed decision was not final and binding, once WADA already requested for the reopening of the case at the [TDJ/PE]; or

b.2) To send the case back to the [TDJ/PE], in case that the B-Sample is opened, in order to allow the first instance to issue a decision, based on the new evidence, following the Law principle of double degree of jurisdiction;

c) In case the panel doesn't understand in the sense of the requests, which were above described the player requests the panel to impose a lower sanction in comparison to the one requested by the appellant, taking into account all the procedural mistakes of the proceedings and the goodwill of the player;

d) To impose to WADA to pay the total costs of this arbitration and a contribution towards the fees of the player's attorneys for an amount of CHF 20.000".

66. The Player's submissions, in essence, may be summarized as follows:

- *"This entire proceeding is a completely mess since the beginning of the proceeding until now".*
- The International Standards for Laboratories were not respected and the results management was affected by a series of irregularities and delays, which irretrievably prejudiced the Player's fundamental rights of defence:
  -- The Player was notified of the adverse analytical finding on 22 August 2011, *i.e.* more than four and a half months after the sample collection on 3 April 2011.
  -- Albeit, the Player was, as described, belatedly notified of the adverse analytical finding the LADETEC did not comply with the majority of the requirements listed under article 7.2 of the WADA Code.
  -- In his mail of 28 August 2012 to FIFA, the LADETEC representative conceded that the FPF results management had been identified as problematic and associated with errors. In this regard, the Player underlined LADATEC's assertion according to which *"We have tried repeatedly to clarify the procedures to the local staff but I'm not sure they already fully understand what has to be done. Unfortunately this is a very rare case in Brazil and had to happen exactly with the least prepared doping control authorities".*
- Another problem relates to the absence of communication between the LADETEC and the FPF. *"For example, (…) the [FPF] sent a letter to LADETEC in which it informed that the athlete had indicated his agreement with the opening of the B-Sample (probably in response to a previous letter from LADETEC, which asked this information). The next document (…), however, is a letter from the Federation to the club which stated that according to LADETEC's information, the sample was sent to the laboratory in Cologne, reason why the opening of the B-Sample would only can be dealt with the German laboratory".*
- *"The athlete, since the anti-doping exam, acted according to the rules, which means, after receiving the incomplete notification of the adverse analytical finding, he asked for the opening of the B-Sample and, even, paid for the counterproof. He was a victim of the bad communication between [FPF], LADETEC*

and the Cologne Laboratory. All three parties acted with fault, giving wrongly information to the player, which was always seeking for the resolution of this issue".

- The Player only received the copy of the A sample's laboratory documentation package on 31 January 2013, *i.e.* once the case was brought before the CAS. Until then, the Player was not in a position to review how the results management process was conducted.
- As far as the B sample is concerned, the Parties are unable to affirm that no breach of the chain of custody has occurred.
- *"Furthermore, the athlete has never been informed by [FPF] about how to contact the Cologne Laboratory, and has never received any letter or communication from the German laboratory granting him the right to request the opening of the B-Sample".*
- *"The entire proceeding, since the notification of the adverse analytical finding until now, was not transparent for the player and not dealt in the correct way, as it is recommended by WADA. The player was a victim of the lack of knowledge of the Federation, the unwillingness of LADETEC and the Cologne Laboratory, and right now the lack of common sense of FIFA/WADA".*
- The situation was so unclear that even the TJD/PE wrongfully assumed that the B sample had been analysed by the Cologne Laboratory without the Player having been given the opportunity to attend and/or be represented at such analysis.

V. JURISDICTION

67. Article R47 of the Code of Sports-related Arbitration (hereinafter the "CAS Code") provides as follows:

"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 sports-related body".

68. The Player's Club is affiliated with the FPF, which is the governing body of football in the State of Pernambuco, Brazil. The FPF is the organiser of the A1 Series Championship at which the Player underwent the in-competition anti-doping control on 3 April 2011.

69. While the Panel has been shown no provision of the FPF regulations expressly granting jurisdiction to CAS, it is undisputed that the FPF is a member of the CBF, which has been affiliated with FIFA since 1923 and, consequently, has a) to comply fully with FIFA Statutes, regulations, directives and decisions of FIFA bodies at all times and b) to ensure that their own members comply with the Statutes (article 13 par. 1 lit. a) and d) of the FIFA Statutes).

70. The jurisdiction of CAS derives from articles 62 *et seq.* of the applicable FIFA Statutes.

71. By reason thereof and according to article 63 par. 5 and 6 of the applicable FIFA Statutes, FIFA as well as WADA are entitled to appeal to CAS against any internally final and binding doping-

related decision passed by FIFA, the Confederations, Members or Leagues. A similar provision is contained in the applicable FIFA Anti-Doping Regulations (see their article 62).

72. In any event, the jurisdiction of CAS is not disputed by the Parties and is further confirmed by the order of procedure duly signed by WADA and by the Player. According to this document, WADA *"relies of Article 62 of the FIFA ADR as conferring jurisdiction on the CAS. The Jurisdiction of the CAS is not contested by the Respondents and is confirmed by the signature of the present order"*.

73. It follows that the CAS has jurisdiction to decide on the present dispute.

74. Under article R57 of the Code, the Panel has the full power to review the facts and the law.

VI. APPLICABLE LAW

75. Article R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

76. It is undisputed that at the time of the facts giving rise to the dispute, the Player was playing for the football club "Sport Club do Recife", which is affiliated to the FPF and the CBF.

77. According to its Statutes, FPF as well as its members are subject to the regulations established by the CBF and by FIFA.

78. The following provisions of the FPF statutes should be emphasised

- Article 4 par. 1 provides that, in order to be affiliated with the FPF, members must file a statement whereby they undertake always to comply with the laws, rules, regulations and decisions of the FPF, FIFA and the CBF.
- Article 56 par. 4 states that the FIFA Disciplinary Code is of universal application and must be observed under all circumstances.
- Pursuant to article 60, FPF affiliates must comply at all times with the Statutes, regulations, directives and decisions of FIFA, CONMEBOL and the CBF and make sure that these regulations are respected by their members.

79. In addition, pursuant to article 1 par. 4 of its Statutes, the FPF recognizes that the formal practice of football is governed by national and international rules. Under such circumstances and according to CAS Jurisprudence, *"If a national legislation itself expressly states that official sports practice in the country is governed by national and international rules, then international sports rules are directly applicable in this country. Accordingly, any athlete registered with a national federation is directly bound by the*

international rules accepted by that federation, including any provision therein giving jurisdiction to the CAS" (CAS 2007/A/1370 & 1376).

80. In this regard, article 1 par. 2 and article 5 (V) of the CBF Statutes expressly provide that the CBF (and those directly or indirectly affiliated to it) will comply with the FIFA rules. These provisions respectively read as follows (as translated in CAS 2010/A/2307, par. 97):

"All members, bodies and components of CBF, as well as clubs, athletes, referees, trainers, physicians, and other officers belonging to clubs or leagues of the affiliated federations must comply and enforce the compliance, in Brazil, with the Statutes, regulations, guidelines, decisions and the Code of Ethics of the Federation Internationale de Football Association — FIFA and the Confederacion Sudamericana de Futbol — CONMEBOL"

"The CBF has the following basic purposes: [...] V - respect, comply with and enforce compliance with the statutes, regulations, guidelines, decisions and other acts issued by the FIFA, CONMEBOL and other international entities to which CBF is affiliated".

81. CAS precedents have established that *"the status of international sports rules within the Brazilian sports system are strengthened by article 1 of "Lei Pelé" which expressly states that official sports practice in Brazil is governed by national and international rules and by sporting practice rules of each type of sport, accepted by the respective national federations"*. As a result, international sports rules are directly applicable to Brazilian sport (cf. CAS 2007/A/1370 & 1376, par. 71 *et seq*. and par. 102). Hence, any athlete registered with a Brazilian federation is directly bound by the international rules accepted by that federation (CAS 2010/A/2307, par. 98 and 99; CAS 2010/A/2072, par. 97 *et seq*.).

82. Finally, the Panel observes that the TJD/PE Prosecutor, the *"Auditor-Relator"* of TJD/PE 2nd Disciplinary Commission and the Player expressly invoked the application of the WADA Code. It can be observed that the Player even made reference to Swiss law.

83. By participating in the FPF championship, the Player has also clearly agreed to abide by the FPF Rules and consequently those of the CBF and FIFA. Moreover, in compliance with article 1.2 of the CBF Statutes, all athletes must comply with the applicable FIFA Regulations (CAS 2010/A/2072, par. 98).

84. Based on the foregoing and as far as the applicable law is concerned, the Panel finds no reasons to depart from the position expressed previously by the CAS in similar circumstances (CAS 2007/A/1370 & 1376, par. 36):

"In light of the foregoing, the Panel is of the opinion that the "applicable regulations" under Article R58 of the CAS Code are primarily the rules of FIFA – accepted by all parties – and, subsidiarily, the rules of the CBF. In other words, in case of inconsistency between a CBF provision and a FIFA provision, the FIFA provision must prevail. Otherwise, the deference to international sports rules proclaimed in Brazilian legislation and the obligation assumed by CBF in its own Statutes (and accepted by its clubs, players, etc.) to comply with FIFA rules would become mere lip service. The compliance with and enforcement of FIFA rules is even indicated in Article 5, para. V, of the CBF Statutes as one of the CBF's basic purposes".

85. In conclusion, the various regulations applicable to this case are the FIFA Statutes and regulations and, subsidiarily, the CBF / FPF rules and Brazilian law.

86. The relevant facts which form the basis of the present case arose after 1 January 2009, 1 April 2010 and 10 August 2010, which are the dates when, respectively, the revised 2009 FIFA Disciplinary Code (hereinafter "FDC"), the 2010 FIFA Anti-Doping Regulations (hereinafter "ADR") and the FIFA Statutes (2010 edition) came into force. In accordance with the principle of non-retroactivity, these are the editions of the rules and regulations pursuant to which the Panel must adjudicate upon this appeal.

87. The WADA 2011 Prohibited list came into effect on 1 January 2011 and is an integral part of the ADR (see article 15.1 ADR; FIFA Circular letter no. 1221, March 2010).

VII. ADMISSIBILITY

88. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".

89. WADA's right to appeal is provided for under article 62 ADR (*"Appeals against decisions reached at national level*"). Par. 4 of this provision states that *"FIFA and WADA shall have the right to appeal to CAS against any internally final and binding doping-related decision in accordance with art. 63 par. 5 and 6 of the FIFA Statutes".*

90. Pursuant to article 62 par. 5 ADR, *"Any internally final and binding doping-related decision shall be sent immediately to FIFA and WADA by the body passing that decision. The filing deadline for an appeal to CAS shall be twenty-one (21) days after receipt of the reasoning of the internally final and binding decision in an official FIFA language".*

91. In the present matter, it is not disputed that the decision issued on 4 June 2012 by the TJD/PE is final and that there is no internal appeal mechanism. In this regard, the Panel observes that the Player did not offer any evidence to support his assertion that the TJD/PE intended to re-open his case, except for a letter of the FPF President dated 11 March 2013 that mentions that *"even with his negative, the* [TJD/PE] *will start a new trial reviewing the earlier decision".* Furthermore, the Panel notes that the re-opening of the case would in any event be distinct from an appeal and that only other possible appeals would impede the admissibility of an appeal to CAS for lack of exhaustion of the available legal remedies.

92. WADA has established that the latest documents relating to the case were received by WADA on 24 August 2012. This is accepted by the Player (see page 2 of his answer), who has never challenged the admissibility of WADA's appeal.

93. As a result, the appeal is admissible as WADA submitted it within the deadline provided by article R49 of the Code as well as by article 62 par. 5 ADR. It complies with all the other requirements set forth by article R48 of the Code.

VIII. MERITS

94. Moving to the substance of the matter, the Panel observes that there is a general consensus that the management process of the Player's in-competition testing of 3 April 2011 was flawed in various ways and to various degrees.

95. Even the LADETEC admitted on 28 August 2012 that *"What turns this case a little bit more complicated is that it comes from a federation in Brazil and the Federations doesn't have the same proficiency to deal with doping controls as the CBF itself. We have tried repeatedly to clarify the procedures to the local staff but I'm not sure they already fully understand what has to be done. Unfortunately this is a very rare case in Brazil and had to happen exactly with the least prepared doping control authorities".*

96. In this context, WADA challenged the decision taken by the TJD/PE and is requesting a sanction in the form of a 2-year ban to be imposed upon the Player. At the same time and in its statement of appeal, WADA requested that the present procedure to be stayed *"until such time as WADA has confirmed that either (i) the Player does not request the analysis of the B-sample or (ii) the relevant analyses have been performed".*

97. On 12 December 2012, WADA informed the CAS Court Office that it objected to the referral of the case to the TJD/PE as it was expecting the CAS to review *"the matter de novo and all evidence, existing and new, will be reviewed within the framework of the CAS proceeding".*

98. Considering WADA's various submissions/requests filed during this procedure (stay the CAS proceedings until the Player has confirmed that he does not request the analysis of the B sample; if a hearing should be held, it should take place *"only after the results of the B Analysis have been communicated to CAS and the parties to this arbitration"*; etc.) and the arrangements made in order to open/re-open the Player's B sample (the last time in October 2013), it appears to the Panel that WADA expects the CAS power of review to heal the various departures from the ADR which occurred during the Player's results management process.

99. In view of the above, the Panel has identified the following issues for analysis in order to determine the dispute:

- Can the Panel heal the mistakes which occurred during the Player's results management by claiming to review the case *de novo*?
- Were the failures in the Player's results management serious enough to lead to his acquittal, in spite of the fact that his A sample tested positive?

A. Can the Panel heal the mistakes which occurred during the Player's results management by claiming to review the case de novo?

100. Article R57 of the CAS Code provides that *"the Panel shall have full power to review the facts and the law"*.

101. According to the long-standing jurisprudence of the CAS, under this provision the Panel has the full power to review the facts and the law and may even request ex officio the production of further evidence. In other words, the Panel not only has the power to establish whether the decision of a disciplinary body being challenged was lawful or not, but also to issue an independent decision (TAS 99/A/252, p. 22; TAS 98/211, p. 19; TAS 2004/A/549, p. 8; TAS 2005/A/983 & 984, par. 59; CAS 2012/A/2912, par. 87).

102. It follows from this wide scope of review enjoyed by the CAS that, generally speaking, the procedural deficiencies which may have affected the procedures in the first instance can be cured by virtue of the *de novo* proceedings (TAS 2004/A/549, par. 31; CAS 2003/O/486, par. 50; CAS 2006/A/1153, par. 53; CAS 2008/A/1594, par. 109; TAS 2008/A/1582, par. 54; TAS 2009/A/1879, par. 71; CAS 2011/A/2440, par. 37).

103. However, the present case falls outside that general rule given that the TJD/PE bodies acknowledged the mismanagement of the Player's results:

- In his report the TJD/PE Prosecutor raised a number of issues pertaining to procedural and investigation deficiencies related to the Player's samples. In this regard, he made several assumptions some of which have proven to be right (the B sample analysis did not take place; the tests carried out by the Cologne Laboratory were apparently performed on the A sample and not on the B sample; the Player did not receive any notifications after 29 September 2011) others of which have proven to be wrong (the Cologne Laboratory's tests took place in June 2011 and not after 29 September 2011 ; the B sample has never been sent to Germany). It struck the TJD/PE prosecutor as strange that *"in this special case, the counterproof can only be done in Germany"*. Finally, he considered as a mitigating factor the *"bureaucratic factors on LADETEC's part that influenced the fact that the notification requesting the athlete's presence at the counterproof test did not happen"*.
- Based on the file, the *"Auditor-Relator"* of the TJD/PE 2nd Disciplinary Commission came to the conclusion that the B sample had been analysed by the Cologne laboratory without the Player having been given the opportunity to attend and/or be represented at such analysis. He held that *"In the case at hand, the National Doping Control Committee, though having notified the accused to indicate dates available to accompany the counterproof, received the indications but conducted the rest of the procedure in the athlete's absence, thus leading to the nullity of the act"*.

104. In spite of all these errors and uncertainties, the TJD/PE bodies – at their respective level – considered themselves to be sufficiently well informed to be able to take a position and they deliberately decided against investigating the matter further. In short, the TJD/PE found that

the results management contained such grave errors that the Player's acquittal was the only fair and proper verdict.

105. Under these very unusual circumstances, it is not, in the Panel's view, the role of the CAS to rectify the deficiencies displayed by the laboratory or another body in connection with internal procedures during the pre-hearing stage of the disciplinary proceedings. This is particularly true when the authorised disciplinary bodies of the national association concerned decided to exonerate the Player of all wrongdoings precisely because of those self same deficiencies. In such a specific case, the Panel conceives its function in applying the *de novo* standard as an appellate body is only to determine, on the basis of the evidence submitted to the Panel, whether the TJD/PE's evaluation is soundly based and whether the conclusion consequently derived from those facts by the TJD/PE is equally sound.

106. The above is consistent with the information provided to the Parties by the CAS Court Office, on behalf of the Panel:

- on 15 May 2013 *"Since WADA is bringing an action to set aside the decision rendered by the [TJD/PE] on June 4, 2012 (on the premise that the case is closed internally as far as the association is concerned) and is seeking a sanction in the form of a 2-year ban, the Panel is of the opinion that any requirement by the Player for analysis of the B sample 23157 or the result of such analysis is not a necessary precondition for the filing of the appeal brief. (…) In view of the above, the Panel considers that it is not necessary presently to rule on the Player's requests (i) to be granted the two allegedly missing LADETEC letters in order to allow him to decide if he intends to open the B sample and (ii) to send the case back to the [TJD/PE] if the analysis of the B-sample were to confirm a doping offense"*.
- On 4 October 2013: *"the Panel considers that it should review the challenged decision on the basis of the facts at the time of that decision's issuance and that accordingly the case is ready for decision"*.

B. Were the failures in the Player's results management serious enough to lead to his acquittal, in spite of the fact that his sample A tested positive?

107. The question is whether the analysis of the Player's urine sample was correctly carried out and whether any administrative errors affected the results.

1. The Burden of proof – in general

108. According to article 2 par. 4 of the ADR, *"It is the responsibility of each association to collect samples for doping control at national competitions (…) as well as to ensure that all national-level testing on its players and the results management from such tests comply with these regulations. In respect of this schedule of responsibilities, reference in these regulations to FIFA shall, where appropriate, be understood as meaning the association concerned"*.

109. Article 13 ADR reads as follows:

> *"[The association] shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether [the association] has established an anti-doping rule violation to the comfortable satisfaction of the Disciplinary Committee bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*
>
> *Where the FIFA Anti-Doping Regulations place the burden of proof upon the player or other person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided under art. 47 par. 1 and art. 51, under the terms of which the player must satisfy a higher burden of proof".*

110. *"WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories. The player or other person may rebut this presumption by establishing that a departure from the International Standard for Laboratories occurred that could reasonably have caused the adverse analytical finding"* (article 14 par. 1 ADR).

111. Article 24 par. 1, first sentence and par. 2, ADR states that *"Analysis of the samples shall be carried out in WADA-accredited laboratories or as otherwise approved by WADA or as otherwise approved by WADA. (…). Samples shall be analysed to detect prohibited substances and prohibited methods identified in the Prohibited List and other substances as may be directed by WADA pursuant to its monitoring programme".*

2. The sample collection procedure and the adverse analytical finding – first anomaly

112. It is undisputed that the sample collection procedure was correctly carried out on 3 April 2011. Neither of the Respondents complained about any irregularities or anomalies with the potential to compromise the reliability of the tests results. The Panel sees no reason to come to any other conclusion.

113. It is also undisputed that, at the moment of the facts giving rise to the dispute, the LADETEC was a WADA-accredited laboratory.

114. On 1 August 2011, the LADETEC submitted its report confirming the presence of the Prohibited Substance in the Player's A sample.

115. It appears that the Player's A sample had been first analysed by the LADETEC and then by the Cologne Laboratory. The reasons why the A sample had to be re-analysed and submitted to IRMS testing were undocumented at the time. In particular, there is no indication that the additional testing by the Cologne Laboratory was made in compliance with the WADA Technical Document TD2010NA; notably, this document makes clear that additional IRMS-analysis would only be required in certain exceptional cases.

116. However, and according to WADA's letter of 20 February 2013, the Player's *"A sample was sent for IRMS analysis to Cologne in June 2011 (…). The Cologne analysis, therefore, constituted a further investigation of the A sample prior to the notification of the adverse analytical finding".*

117. Nevertheless, on 29 September 2011, the Player was informed for the first time that *"the sample 23157, container 23157, ADAMS report, referring to [the Player], was forwarded by LADETEC to the Laboratory in Cologne, Germany, for additional analyses, where the presence of the substance exogenous Nandrolina was confirmed".*

118. It can be observed here that, contrary to the notification dated 22 August 2011, the letter of 29 September 2011 does not specify whether only the *"container A-23157"* is concerned.

119. The purpose of sending the information contained in the letter of 29 September 2011 is not clear, given that the A sample had been sent to the Cologne Laboratory over three months earlier. In addition, this information arrived just after the Player had confirmed that a) he requested to attend in person the confirmatory analysis, b) he had made available the funds to cover the costs and c) he was awaiting to be informed of the scheduled date, time and place of the B Sample analysis.

120. Under these circumstances, the Panel has no difficulty accepting that the Player was (wrongly) led to believe that, in spite of his request, his B sample had been sent to Germany, opened and analysed in his absence. Consistently, he submitted before the TJD/PE that he should be acquitted due to *"the lack of subpoena to accompany the holding of the counterproof test"*.

3. The Player's notification – second anomaly

121. Article 30 par. 2 and 4 ADR reads, in pertinent parts:

> *"2. If the initial review of an adverse analytical finding does not reveal an applicable TUE or entitlement to a TUE or departure that caused the adverse analytical finding, the FIFA Anti-Doping Unit shall at once confidentially notify (…) the player's association and/ or club of the positive result of the "A" sample. The player shall be notified simultaneously in the manner set forth under art. 30 par. 4. (…)*
>
> *4. In the case of an adverse analytical finding, the player has to be promptly notified, as set forth under art. 73, of:*
>
> *a) the adverse analytical finding;*
>
> *b) the anti-doping rule violated;*
>
> *c) his right to promptly request the analysis of the "B" sample and, failing such request within the time limit set by the FIFA Anti-Doping Unit (cf. art. 31), of the fact that the "B" sample analysis may be deemed waived. The player shall be advised at the same time that, if the "B" sample analysis is requested, all related laboratory costs shall be borne by the player, unless the "B" sample fails to confirm the "A" sample, in which case the costs shall be borne by FIFA;*
>
> *d) the fact that analysis of the "B" sample analysis may be conducted at the request of FIFA*

regardless of the player's decision in this respect;

e) the scheduled date, time and place for the "B" sample analysis if the player or FIFA chooses to request an analysis of the "B" sample;

f) the opportunity for the player and/or the player's representative to attend the "B" sample opening and analysis;

g) the player's right to request copies of the "A" and "B" sample laboratory documentation package, which includes information as required by the International Standard for Laboratories;

h) the player's right to provide an explanation in response to the antidoping rule violation asserted within a time limit set by the FIFA Anti- Doping Unit".

122. On 22 August 2011, the Player was informed via his Club of the adverse analytical finding i.e. more than four months after the in-competition anti-doping control was performed and more than 20 days after the LADETEC submitted its certificate of analysis. In view of all the other deficiencies which occurred in this case, the Panel does not need to address whether the notification to the Player was made *"at once"* although they note that the phrase carries connotation of immediacy.

123. It is indisputable that the notification received by the Player on 22 August 2011 does not meet, in full or in part, the requirements specified under letters b) to h) of article 30 par. 4 ADR.

124. The Panel observes too that the Player received the A sample's laboratory documentation package in January 2013, almost two years after the collection of his samples.

4. The Player's prompt request for the confirmatory analysis – third anomaly

125. The day following the above notification, i.e. on 23 August 2011, the Club wrote to the FPF's President in order a) to request the confirmatory analysis on the Player's B sample and b) to be *"informed of the cost of the said test, so that [the Player] can pay and evidence it".*

126. According to article 25, first sentence ADR, *"Laboratories shall analyse samples and report results in conformity with the International Standard for Laboratories".*

127. Pursuant to article 5.2.4.3.2.1 of the applicable International Standard for Laboratories (version 6.0, effective as of 1 January 2009) (hereinafter "ISL"), *"The "B" Sample analysis should occur as soon as possible and shall take place no later than seven (7) working days starting the first working day following notification of an "A" Sample Adverse Analytical Finding by the Laboratory. If the Laboratory is unable to perform the "B" analysis within this time frame for technical or logistical reason(s), this shall not be considered as a deviation from the ISL susceptible to invalidate the analytical procedure and analytical results".*

128. In spite of the Player's timely request, the confirmatory analysis was (unsuccessfully) performed for the first time on 4 and 5 July 2013 and, apparently, a second time on 15 October 2013, i.e. over two years after the notification of the *"A Sample Adverse Analytical Finding by the Laboratory".*

5. The scheduled date for the "B" sample analysis – fourth anomaly

129. On 12 September 2011, the FPF invited the Club *"to indicate two dates for scheduling the test with LADETEC".*

130. On 13 September 2011, the FPF Secretary General notified the LADETEC that the Player *"has indicated the dates of 19th or 23rd September in which to conduct the making of the counterproof"* and that *"we have at LADETEC's disposal, the amount of R$ 3.680,00 for the necessary payment, for which orientation is requested for its transfer".*

131. On 29 September 2011, the FPF Secretary General advised the Player's Club that *"the sample 23157, container 23157, ADAMS report, referring to [the Player], was forwarded by LADETEC to the Laboratory in Cologne, Germany, for additional analyses, where the presence of the substance exogenous Nandrolina was confirmed".*

132. It appears that the Player complied immediately with his obligations at all times. When asked, he suggested the confirmatory analysis be carried out within the ten following days, which seems to constitute a reasonable time-frame. In any event, the LADETEC did not assert otherwise and did not even suggest that (or why) the proposed dates were, for one reason or another, unsuitable.

133. In spite of this and the Player's clear desire for a confirmatory analysis to be performed, the suggested dates passed without any acknowledgement from the FPF or the LADETEC. On the contrary and without any explanation, the FPF Secretary General (i.e. the same person who communicated the Player's availability for the B sample analysis to the LADETEC), informed the Player that *"the sample 23157, container 23157"* had been sent to Germany.

134. In this regard, it was not clear until much later where the Player's B sample actually was.

135. It was only on 28 August 2012 and in reply to FIFA's request, that the LADETEC confirmed that the B sample was still in its possession.

6. The place for the "B" sample analysis – fifth anomaly

136. Pursuant to article 5.2.4.3.2.2 ISL, *"The "B" Sample confirmation shall be performed in the same Laboratory as the "A" Sample confirmation".*

137. On 29 September 2011, the FPF Secretary General advised the Player's Club that *"LADETEC also informs that, in this special case, the counterproof can only be done in Germany and therefore, all the procedures pertinent to it must be negotiated with the Cologne laboratory. Therefore, we ask this affiliate if the athlete still wants to do the test".*

138. The ISL does not provide any exception to the above-mentioned provision 5.2.4.3.2.2. The

Panel finds that any deviation from the International Standards requires to be substantially justified and the Player should have been given the opportunity to make relevant representations. This is particularly true as the costs for a Brazilian Player to attend and/or be represented at the Cologne Laboratory in Germany would be much higher and disproportionate to the costs entailed if the confirmatory analysis had been performed by the LADETEC.in Brazil. In short, the Player was presented with a *fait accompli*.

139. Not only did the Player receive confusing information regarding what test had actually been carried out by the German laboratory, but he received no explanation whatsoever on a) why his case was *"special"* and b) why *"the counterproof can only be done in Germany"*.

7. Conclusion

140. *"The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule-appliers must begin by being strict with themselves"* (CAS 94/129). The provisions of regulatory framework must be properly applied if sanctions are to be administered to an athlete. It should always be borne in mind that such sanctions would seriously impact his – by definition – relatively short career, and it is because of the brevity of an athlete's career, that he has the right to expect his anti-doping results management to be dealt with appropriately at every stage of the process as well as to have access to an expedited and comprehensive hearing on the merits. It is the responsibility and duty of all international sports federations to conduct themselves in a fashion which is beyond reproach and is scrupulously in accordance with their anti-doping rules and policies contained within their organization's rulebook.

141. As a national federation which represents the interests of all its members in general and of the Player in particular, the FPF should have dealt with his situation in a far more diligent manner than in fact occurred. Between the moment the Player underwent the in-competition anti-doping control on 3 April 2011 and the moment he was invited to make his defence before the TJD/PE (beginning of December 2011), more than 8 months passed by. After the expiry of such a lengthy period of time, the Player was entitled to expect to be provided with all the necessary information to enable him fully to exercise his right to be heard. In the present case, the management of the Player's was impaired by so many significant flaws that he was disabled from preparing an effective defence by reason of denial of sight of the relevant documents.

142. In the present matter, it is undisputed that the presence of the Prohibited Substance in the Player's urine was established by a WADA-accredited laboratory. Therefore, the burden of adducing exculpatory circumstances should, under normal circumstances, be shifted to the Player. However, the Player was in truth deprived of the any possibility of establishing how the Prohibited Substance – if any – entered his system. Given not only this fact but also the number of deficiencies which occurred from the Player's notification up to the opening of the B sample coupled with the revocation of the LADETEC's WADA accreditation, the Panel cannot reasonably rely on the presumption set forth in article 14 ADR, according to which *"WADA-accredited laboratories are presumed to have conducted sample analysis and custodial procedures in accordance*

with the International Standard for Laboratories"; any such presumption is rebutted for reasons already explained.

143. It follows inexorably that the commission by the Player of the anti-doping rule violation with which he was charged has not been established to the comfortable satisfaction of the Panel.

144. The TJD/PE was aware of all the above mentioned anomalies when it issued the decision, 15 months after the Player's sample was collected. It considered that the multiple administrative errors affected the results beyond repair. Even if the TJD/PE appears wrongly to have assumed that the B sample was opened and analysed in the Player's absence, cannot alter the fact that, in that it correctly identified fatal flaws in the analytical procedure and results management applied to the Player so, depriving him *"more subsidies to challenge the process which was conducted, it should be said, in a very obscure manner, as can be seen by the lapses of information in the files"*.

145. Based on the foregoing, the Panel finds that the TJD/PE's evaluation is soundly based in primary facts, and its consequent conclusion was soundly derived from those facts. Hence, the fact that the TJD/PE wrongfully assumed that the B-sample was analyzed by the Cologne Laboratory is irrelevant and WADA's appeal must be dismissed and the decision of the TJD/PE must be upheld.

146. Given that the Panel has reached that conclusion without the need for a hearing as requested by the Player, the Player has lost nothing by the absence of such hearing.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. WADA's appeal against the decision of the *"Tribunal de Justiça Desportiva de Pernambuco"* dated 4 June 2012 is dismissed.

2. The decision issued by the *"Tribunal de Justiça Desportiva de Pernambuco"* on 4 June 2012 is upheld.

(…)

5. All other or further claims and counterclaims are dismissed.