



Arbitration CAS 2013/A/3395 Anderson Luis de Souza v. Confederação Brasileira de Futebol (CBF) & Fédération Internationale de Football Association (FIFA), consent award of 26 May 2014

Sole Arbitrator: Mr Michele Bernasconi (Switzerland)

Football

Doping

Authority of an arbitral tribunal to issue a consent award under Swiss law

Control of the bona fide nature of the settlement agreement by the arbitral tribunal in a consent award

Legal nature of the Superior Tribunal de Justiça Desportiva do Futebol (STJD)

1. Under Swiss Law, an arbitration tribunal has authority to issue an award embodying the terms of the parties' settlement, if the contesting parties agree to a termination of their dispute in this manner. The panel's ratification of their settlement and its incorporation into a consent award serves the purpose of enabling the enforcement of their agreement.
2. It is the task of the arbitrator to verify the *bona fide* nature of the settlement agreement, to ensure that the will of the parties has not been manipulated by them to commit fraud and to confirm that the terms of the settlement agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.
3. The STJD is a justice body which is an integral part of the organizational structure of the CBF, with no legal personality of its own and (at least) for international purposes the decisions of the STJD, although independently reached, must be considered to be the decisions of the CBF. As a result, the STJD has no autonomous legal personality and may not be considered as respondent on its own in a CAS appeal arbitration concerning one of its rulings; consequently, the procedural position of the STJD before the CAS must be encompassed within that of the CBF. Against this background, the fact that the STJD was not called as a party to the proceedings does not affect the validity nor the enforceability of a subsequent settlement agreement and of a consent award.

A. THE PARTIES

1. Mr. Anderson Luís de Souza (the "Appellant") is a professional football player of Portuguese nationality and is popularly known under the nickname "Deco".

2. The Confederação Brasileira de Futebol (the “First Respondent” or the “CBF”) is the body in charge of running football in the Federative Republic of Brazil and is a member of FIFA.
3. The Fédération Internationale de Football Association (the “Second Respondent” or “FIFA”) is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the governing body of football at worldwide level.

B. BACKGROUND

4. Below is a summary of the factual background of the case, as it has been presented by the Appellant in his statement of appeal, and as it has developed in the course of the present proceedings.
5. On 29 April 2013, the Appellant was informed by the Federação de Futebol do Estado do Rio de Janeiro (the “FFERJ”) of an adverse analytical finding indicating the presence of the substances “*hydrochlorothiazide*” and “*tamoxifen metabolite carboxy-tamoxifen*” in his sample nr. 27845, collected on a match of the 2013 Rio de Janeiro State Championship and analysed by the (former) WADA-accredited laboratory *Laboratório de Controle de Dopagem-LAB DOP do Laboratório de Apoio ao Desenvolvimento Tecnológico* (the “LADETEC”).
6. On 8 May 2013, the Appellant was provisionally suspended by the *Tribunal de Justiça Desportiva do Futebol do Estado do Rio de Janeiro* (the “TJD/RJ”) for a period of 30 days.
7. On 14 June 2013, the 8th Regional Commission of TJD/RJ decided that the Appellant had committed an anti-doping violation and should be suspended for a period of 30 days, less the provisional suspension which, at that time, had already been entirely served.
8. Both the Appellant and the TJD/RJ Prosecutor appealed against this decision. The case was subsequently submitted to the full court of the TJD/RJ.
9. Following a report from the Head of the CBF Doping Commission, alleging an unjustified delay in the resolution of the case, the President of the *Superior Tribunal de Justiça Desportiva do Futebol* (the “STJD”) ordered the case file to be remitted to the STJD.
10. By decision dated 26 September 2013 (the “Appealed Decision”), the appeal of the TJD/RJ Prosecutor was partially upheld by the full court of the STJD and the Appellant was suspended for a period of one year, less the 30-day provisional suspension already served and the period between the sample collection (30 March 2013) and the notification of the adverse analytical finding to the Appellant (29 April 2013).
11. On 7 October 2013, the Appellant lodged an appeal existing in the Brazilian legal system and named *embargos de declaração*, alleging several omissions and contradictions in the Appealed Decision. The purpose of such legal remedy was that the case should once again be submitted

to the full court of the STJD, so that ultimately, the Appealed Decision would be changed. The legal remedy was rejected by the *magistrate rapporteur* of the case on 29 October 2013.

12. On 19 November 2013, the Appellant submitted his Statement of Appeal to the Court of Arbitration for Sport (“CAS”) with the following prayers for relief:

- “a) *That this Court of Arbitration for Sport enforce its jurisdiction over the matter;*
- b) *That the decision passed by the full court of Superior Tribunal de Justiça Desportiva do Futebol on 26 September 2013 (confirmed on 29 October 2013 by the decision that rejected Appellant’s motion to clarification) is set aside;*
- c) *That the player Anderson Luís de Souza is held not guilty for any anti-doping rule violation; or*
- d) *Alternatively, that the period of suspension of the player Anderson Luís de Souza is eliminated pursuant to article 17 of FIFA Anti-Doping Regulations and article 10.5.1 of the World Anti-Doping Code; or*
- e) *Alternatively, that the period of suspension of the player Anderson Luís de Souza is replaced with a reprimand or a warning and no period of ineligibility pursuant to article 16 of FIFA Anti-Doping Regulations and article 10.4 of the World Anti-Doping Code;*
- f) *That the start of any period of suspension might imposed [sic] is established at an earlier date than the date of notification of the award in the present appeal arbitration procedure, pursuant to article 28, par. 2, of FIFA Anti-Doping Regulations and article 10.9.1 of the World Anti-Doping Code; and*
- g) *That any period of delay in the procedures before the Brazilian sports justice is discounted of the period of suspension might imposed; or*
- h) *Alternatively, in case none of the requests for relief above is granted, that decision passed by the full court of Superior Tribunal de Justiça Desportiva do Futebol on 26 September 2013 (confirmed on 29 October 2013 by the decision that rejected Appellant’s motion to clarification) is held null and void and the procedure remitted again for a decision of the full court of Tribunal de Justiça Desportiva do Futebol do Estado do Rio de Janeiro, due to a violation of Appellant’s right to be heard; and*
- i) *In any case, that Respondents shall bear all arbitration and legal costs incurred by the player Anderson Luís de Souza in connection with this appeal arbitration procedure”.*

13. In his Statement of Appeal, the Appellant nominated Mr. Jeffrey G. Benz, attorney-at-law, Los Angeles, United States of America, as arbitrator.

14. By letter dated 26 November 2013, the CAS Court Office acknowledged receipt of the Appellant’s Statement of Appeal, informing the Parties, *inter alia*, that pursuant to Article R51 of the Code of Sports-related Arbitration (the “Code”), the Appellant shall file within ten days following the expiry of the time limit for the appeal, his Appeal Brief.

15. By letter dated 27 November 2013, the Appellant informed the CAS Court Office that he was not in a position to fully make his case, and he therefore requested a suspension of the present proceedings or, alternatively, of the pending deadline for the filing of his Appeal Brief, pursuant to Article R32 of the Code.
16. In justification of his request, the Appellant argued that the decision issued by the STJD was based on an adverse analytical finding indicating the presence of the substances “hydrochlorothiazide” and “tamoxifen metabolite carboxy-tamoxifen” in sample nr. 27845, analyzed by the (former) WADA-accredited laboratory LADETEC, but that there were serious doubts concerning the validity and accuracy of the test itself, as well as with regard to the International Standard of Laboratories (the “ISL”), issued by the World Anti-Doping Agency (the “WADA”).
17. In particular, the Appellant stated that the LADETEC had its accreditation revoked by WADA in August 2013 and that consequently, there was no certainty as to whether the test conducted on the Appellant’s sample was accurate and in respect of the ISL.
18. In addition, the Appellant argued that FIFA had decided, together with WADA, to use the WADA-accredited laboratory in Lausanne, Switzerland, to analyze blood and urine samples, to be taken on the occasion of the upcoming 2014 FIFA World Cup in Brazil, which, according to the Appellant, demonstrated that an analysis conducted by LADETEC may not be considered reliable.
19. Further, the Appellant referred to the CAS proceedings CAS 2013/A/3334 Carlos Alberto de Jesus v. CBF & STJD & FIFA and held that in those proceedings, FIFA had asked Prof. Martial Saugy, Director of the WADA-accredited laboratory in Lausanne, Switzerland, to analyze the documentation package related to the sample there in question. In this respect, the Appellant quoted from a letter, issued by FIFA in said proceedings, according to which “*FIFA is of the opinion that a departure from the International Standard for Laboratories occurred which caused the Adverse Analytical Finding for both reported substances (Carboxy-Tamoxifen and Hydrochlorothiazide)*”. According to the Appellant, in view of the similarities between the two cases, this also casts serious doubts on the correctness of the analysis of the Appellant’s sample in the present matter (sample nr. 27845).
20. In consequence, and referring to further alleged flaws of the analytical findings, the Appellant submitted the following requests:
 - i. *As serious doubts exist as to the accuracy of the adverse analytical finding reported by LADETEC on sample 27845, ask Second Respondent (FIFA) to please submit the documentation packages related to both samples “A” and “B” to the attention of an expert of its choice, possibly the same Mr. Martial Saugy, also in view of the analogies with the Carlos Alberto case;*
 - ii. *In case such an eventual analyses [sic] shall draw such an appointed expert to also report the existence of an adverse analytical finding based on the documentation packages put at its disposal, ask FIFA to request another laboratory of its choice, possibly the WADA-accredited laboratory in Lausanne, for additional sample analysis regarding samples 27845 “A” and “B”;*

- iii. *Suspend the present arbitration proceedings until completion of the procedures and additional evidence requested under “i” and “ii”, all in line with Article R32 paragraph 3 of the CAS Code;*
 - iv. *Subsidiarily, in case of denial of the request under “iii” suspend the deadline for filing of the Appeal Brief, until completion of the procedures and additional evidence requested under “i” and “ii”, all in line with Article R32 paragraph 2 of the CAS Code”.*
- 21. By letter dated 2 December 2013, the CBF agreed with the evidentiary requests filed by the Appellant as well as with the suspension of the present arbitration or, alternatively, with the suspension of the deadline for filing the Appeal Brief.
 - 22. By letter dated 2 December 2013, FIFA stated that it does not fall within FIFA’s scope to request a retesting of the A- and B-sample number 27845. However, FIFA also informed that based on the recent suspension of the LADETEC, FIFA had asked Prof. Martial Saugy, Director of the WADA-accredited laboratory in Lausanne, to analyze the documentation package of the A- and B-sample with the number 27845.
 - 23. The results of the aforementioned analysis were attached to FIFA’s letter dated 2 December 2013. The analysis concluded that “[b]ecause of the non-proved identification of Tamoxifen, we suggest to FIFA Medical Office to be very careful with this adverse analytical finding made by the Rio laboratory. Even if the diuretic hydrochlorothiazide is present in this sample, the lack of scientific ground for the Tamoxifen may be detrimental to a substantial defense of this case in front of the Court of Arbitration. I would suggest first that WADA investigates directly with the Rio lab on the reliability of the results”.
 - 24. Further, FIFA pointed out that nothing in its communication should be construed as an acceptance by FIFA of the jurisdiction of CAS of the Appellant’s appeal, of the admissibility of the appeal or of FIFA’s standing to be sued, and that FIFA reserved all its right in this regard.
 - 25. Finally, in the aforementioned letter, FIFA nominated Mr. Efraim Barak, attorney-at-law in Tel Aviv, Israel, as arbitrator in these proceedings.
 - 26. By letter dated 3 December 2013, FIFA informed the CAS Court Office that it agreed that the current arbitration procedure is suspended in line with the Appellant’s requests. FIFA insisted, however, that the retesting, as requested by the Appellant, is done by the laboratory in Lausanne.
 - 27. By letter dated 3 December 2013, the CAS Court Office informed the Parties that the present proceedings shall be suspended until further notice. FIFA again stated that nothing in its communication should be construed as an acceptance by FIFA of the jurisdiction of CAS of the Appellant’s appeal, of the admissibility of the appeal or of FIFA’s standing to be sued, and that FIFA reserved all its right in this regard.
 - 28. By letter dated 5 December 2013, the CBF agreed to the nomination of Mr. Efraim Barak as an arbitrator to the present proceedings.

29. By letter dated 6 December 2013, the CAS Court Office reminded the Parties that the arbitration is suspended until further notice from the Parties and that, should the procedure resume, the nominations of arbitrators by the Parties shall be taken into consideration and the CAS shall proceed accordingly.
30. By letter dated 6 March 2014, FIFA informed the CAS Court Office that the laboratory in Lausanne had communicated the relevant results of the retesting to FIFA. The attached *"Doping Control Report"* indicated a negative result, stating the following: *"No Prohibited Substance(s) or Metabolite(s) or Marker(s) of a Prohibited Method(s) on the test menu were detected. (...) After further investigations, traces of hydrochlorothiazide were found at level below the limit of detection of the initial testing procedure. (...) The sample was received in unusual container. (...) The chain of custody can not [sic] be guaranteed"*.
31. By letter dated 12 March 2014, the Appellant invited, in view of the aforementioned submission of FIFA, the President of the Appeals Arbitration Division to seek to resolve the dispute by conciliation, and he expressed his intention to sign an agreement between the Parties, which would be incorporated in a Consent Award.
32. By letter dated 12 March 2014, the CAS Court Office informed the Parties that it is possible to have an agreement incorporated in a Consent Award, but that a Panel or a sole arbitrator would be constituted and appointed, respectively, to this effect.
33. By letter dated 13 March 2014, the Appellant reiterated his interest in signing an agreement between the Parties, and he proposed that the Panel be composed of a sole arbitrator.
34. By letter dated 18 March 2014, FIFA informed the CAS to also be in favor of signing an agreement, to be incorporated in a Consent Award. However, FIFA underlined that the costs of the arbitration should be borne by the Appellant and/or by any other parties involved, with the exception of FIFA.
35. Further, FIFA agreed to the appointment of a sole arbitrator, and it suggested Mr. Michele Bernasconi, attorney-at-law in Zurich, Switzerland, as Sole Arbitrator.
36. By letter dated 19 March 2014, the CBF informed the CAS Court Office that it does not object the appointment of a sole arbitrator to render a Consent Award once the Parties conclude an agreement in the present matter.
37. On 20 March 2014, the Parties have reached indeed a Settlement Agreement (see *infra*).
38. By letter dated 25 March 2014, the CBF informed the CAS Court Office that it does not object the nomination of Mr. Michele Bernasconi.
39. By letter dated 25 March 2014, the Appellant agreed to the appointment of Mr. Michele Bernasconi as Sole Arbitrator.

40. On 14 May 2014 the CAS sent a copy of the Settlement Agreement to the STJD for information. With letter dated 21 May 2014 the STJD informed CAS that it did not have anything to object to the Settlement Agreement.
41. On 22 May 2014 the CAS informed the Parties that a consent award would be rendered in due course.

C. JURISDICTION OF THE COURT OF ARBITRATION FOR SPORT

42. Article R47 of the Code states that *“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”*.
43. With regard to the jurisdiction of CAS, the Appellant invoked Article 67, paras. 5 and 6 of the FIFA Statutes, which read as follows:
“Article 67: Jurisdiction of CAS
(...)
5. FIFA is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by the Confederations, Members or Leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations.
6. The World Anti-Doping Agency (WADA) is entitled to appeal to CAS against any internally final and binding doping-related decision passed in particular by FIFA, the Confederations, Members or Leagues in accordance with the provisions set out in the FIFA Anti-Doping Regulations”.
44. Based on the above, the Appellant holds that, *mutatis mutandis* and with attention to the principle of equal treatment and even though not expressly referred to in FIFA Statutes, the Appellant, being the most interested party in the present matter and the only party harmed by the Appealed Decision, should also have the right to appeal to CAS. In support of this position, the Appellant referred to previous CAS jurisprudence.
45. Although FIFA, in its initial correspondences to CAS, stated that nothing in its communications should be construed as an acceptance by FIFA of the jurisdiction of CAS of the Appellant’s appeal, of the admissibility of the appeal or of FIFA’s standing to be sued, the Sole Arbitrator notes that all Parties (the Appellant, the CBF as well as FIFA) eventually agreed that CAS has jurisdiction to at least render a Consent Award, incorporating the terms of the settlement agreement (the “Settlement Agreement”) concluded between the Parties.
46. Therefore, the Sole Arbitrator finds that he has jurisdiction to issue this Consent Award.

D. SETTLEMENT AGREEMENT

47. On 20 March 2014, the Parties have reached the following Settlement Agreement:

Quote

*Agreement to be incorporated in the Award
CAS 2013/A/3395 Anderson Luis de Souza v. CBF & FIFA*

Considering

- a) *The decision issued by the Superior Tribunal de Justiça Desportiva de Futebol (hereinafter “the STJD”) on the 26 September 2013, (hereinafter “the Appealed Decision”) which suspended Mr. Anderson Luis de Souza (hereinafter “the Appellant”) for one year as a result of an alleged anti-doping rule violation;*
- b) *The suspension was the result of an alleged adverse analytical finding indicating the presence of the substances “hydrochlorothiazide” and “tamoxifen metabolite carboxy-tamoxifen” in Appellant’s sample nr. 27845, collected on a match valid for the 2013 Rio de Janeiro State Championship and analyzed by the former WADA-accredited laboratory Laboratório de Controle de Dopagem-LAB DOP do Laboratório de Apoio ao Desenvolvimento Tecnológico-LADETEC;*
- c) *The Statement of Appeal, with evidence enclosed thereto, filed before the Court of Arbitration for Sport – CAS by the Appellant on the 19 November 2013 against the Confederação Brasileira de Futebol (hereinafter “the CBF”) and the Fédération Internationale de Football Association (hereinafter “FIFA”);*
- d) *The remaining written arguments and evidence presented in the course of the above-mentioned proceedings by the Parties, and in particular:*
- e) *On 27 November 2013, as serious doubts existed as to the accuracy of the adverse analytical finding reported by LADETEC on sample 27845, Appellant requested to ask FIFA to please submit the documentation packages related to both samples “A” and “B” to the attention of an expert of its choice, possibly Mr. Martial Saugy, Director of the WADA-accredited laboratory in Lausanne, and to request another laboratory of its choice, possibly the WADA-accredited laboratory in Lausanne, for additional sample analysis regarding samples 27845 “A” and “B”;*
- f) *In the meantime, Appellant requested the suspension of the arbitration proceedings until completion of the procedures and additional evidence requested, all in line with Article R32 paragraph 3 of the CAS Code;*
- g) *On 02 December 2013 FIFA informed the CAS that, based on the recent suspension of the laboratory in Rio de Janeiro, it had asked Mr. Martial Saugy, Director of the WADA-accredited laboratory in Lausanne, to analyse the documentation package related to the A and B-sample with the number 27845;*

- h) The results of the analyses made by Mr. Saugy led him to inform FIFA, on the 18 October 2013 that “Because of the non-proved identification of Tamoxifen, we suggest to FIFA Medical Office to be very careful with this adverse analytical finding made by the Rio laboratory”;*
- i) On the 03 December 2013 all the Parties finally agreed to the suspension of the proceedings pending a retesting of the Appellant’s A and B samples;*
- j) 06 March 2014, FIFA addressed a letter to the CAS informing that the results of such a retesting conducted by the laboratory in Lausanne, according to which “No Prohibited Substance(s) or Metabolite(s) or Marker(s) of a Prohibited Method(s) on the test menu were detected”.*
- k) In addition, the Doping Control Report, signed by Mr. Saugy, further affirmed that “After further investigation, traces of hydrochlorothiazide were found at level below the limit of detection of the initial testing procedure. The sample was received in unusual container. The chain of custody can not be guaranteed”.*
- l) Finally, and particularly in view of said results, all of the Parties have agreed, in the context of the aforementioned CAS proceedings, to sign an agreement which shall be incorporated within a Consent Award; and thus*

it is AGREED between the parties with their CONSENT:

- 1. The Appeal filed by Mr. Anderson Luís de Souza is upheld.*
- 2. The Appealed Decision is set aside.*
- 3. It could not be established that Mr. Anderson Luís de Souza has committed an anti-doping rule violation.*
- 4. The arbitration costs, to be determined and served by the CAS Court Office in due course, shall be borne by the Appellant Mr. Anderson Luís de Souza.*
- 5. Each party shall bear their own legal and other costs incurred in connection with the present proceedings.*
- 6. The parties request the panel to issue a Consent Award reflecting the terms of this agreement.*
- 7. The Consent Award and a press release setting forth the results of the proceedings shall be made public by CAS.*
- 8. With the execution of the present agreement the parties declare themselves reciprocally settled and with no right whatsoever to claim anything against the other party.*

Zurich, Rio de Janeiro, 20 March 2014

*****Quote end*****

E. ENDORSEMENT OF THE SETTLEMENT AGREEMENT

48. Under Swiss Law, an arbitration tribunal has authority to issue an award embodying the terms of the parties' settlement, if the contesting parties agree to a termination of their dispute in this manner. The Panel's ratification of their settlement and its incorporation into a Consent Award serves the purpose of enabling the enforcement of their agreement.
49. The Parties to the dispute at hand have requested that the Sole Arbitrator ratifies and incorporates the Settlement Agreement reproduced under title D. above into a Consent Award. It is the task of the Sole Arbitrator to verify the *bona fide* nature of the Settlement Agreement, to ensure that the will of the Parties has not been manipulated by them to commit fraud and to confirm that the terms of the Settlement Agreement are not contrary to public policy principles or mandatory rules of the law applicable to the dispute.
50. After reviewing the terms of the Settlement Agreement, the Sole Arbitrator finds no grounds to object or to disapprove of the terms of the Settlement Agreement and is satisfied that the Settlement Agreement constitutes a *bona fide* settlement of the present dispute.
51. Finally, in accordance with CAS jurisprudence, it has been recognized that "*the STJD is a justice body which is an integral part of the organizational structure of the CBF, with no legal personality of its own*" (CAS 2007/A/1370 & 1376, para 85) and that "*(at least) for international purposes the decisions of the STJD, although independently reached, must be considered to be the decisions of the CBF. In other words, the CBF is to be considered responsible vis-à-vis FIFA (or other international sports bodies) for the decision adopted by the STJD*" (CAS 2007/A/1370 & 1376, para 88). As a result, it has been established by CAS jurisprudence that "*the STJD has no autonomous legal personality and may not be considered as Respondent on its own in a CAS appeal arbitration concerning one of its rulings; consequently, the procedural position of the STJD before the CAS must be encompassed within that of the CBF*" (CAS 2007/A/1370 & 1376, para 89. Confirmed in CAS 2011/A/2605, at para. 67 et seq.). Against this background, and as confirmed by the STJD itself in its letter of 21 May 2014, the fact that the STJD was not called as a party to the present proceedings does not affect the validity nor the enforceability of the Settlement Agreement and of this Consent Award, respectively.
52. In accordance with the mutual consent of the parties, the Sole Arbitrator hereby directs the Parties to fully comply with all of the terms of the Settlement Agreement as set forth under title D. above. Further, this Consent Award shall terminate the present CAS arbitration CAS 2013/A/3395 *Anderson Luis De Souza v. CBF & FIFA*.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Settlement Agreement executed by Mr Anderson Luís De Souza, the Confederação Brasileira de Futebol (CBF) and the Fédération Internationale de Football Association (FIFA) on 20 March 2014 is hereby ratified by the CAS with the consent of the Parties, and its terms are incorporated into this arbitral award.
2. The terms of the Settlement Agreement dated 20 March 2014 replace the decision of the Superior Tribunal de Justiça Desportiva de Futebol of 26 September 2013.
3. (...)
4. (...)
5. All other or further claims are dismissed.