4A_102/2016[1]

Judgment of September 27, 2016

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Klett,
Federal Judge Kolly,
Federal judges Hohl, Niquille,
Clerk of the Court: Mr Leemann.

1. _____,
2. _____,
3. _____,
4. _____,
5. _____,
6. _____,
7. _____,
8. _____,
9. _____,
10. _____,
11. _____,
12. _____,
13. _____,
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15. _____,
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23. _____,
24. _____,
25. _____,
26. _____,
27. _____,
28. _____,
29. _____,

[1] Translator's Note: Quote as A._____ *v.* B._____WADA, 4A_102/2016.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

30. _____,
31. _____,
32. _____,
33. _____,
34. _____,

All represented by Dr. Lucien W. Valloni,
Bellerivestrasse 201, Postfach, 8034 Zürich,
Appellants,

v.

World Anti-Doping Agency (WADA),
Represented by Mr. Yvan Henzer,
Respondent,

Australian Football League (AFL),
Represented by Dr. Marc Russenberger,

and

Australian Sports Anti-Doping Authority (ASADA),
Represented by Mr. Philippe Vladimir Boss and Mr. Manuel Bianchi della Porta,
Participants in the proceedings

Facts:

A.
A.a. 1._____, 2._____, 3._____, 4._____, 5._____, 6._____, 7._____, 8._____, 9._____, 10._____, 11._____, 12._____, 13._____, 14._____,15._____, 16._____, 17._____, 18._____, 19._____, 20._____, 21._____, 22._____, 23._____, 24._____, 25._____, 26._____, 27._____, 28._____, 29._____, 30._____, 31._____, 32._____, 33._____, and 34._____ (Appellants 1-34) are professional players of Australian Football, also known as Australian Rules Football. In 2012, they played for A._____ [name of club omitted] in the Australian Football League.

The World Anti-Doping Agency (hereafter WADA; Respondent) is a foundation under Swiss law, based in Lausanne; its head office is in Montreal, Canada. Its goal is the worldwide fight against doping in sport.

The Australian Football League, Docklands, Australia, (hereafter AFL, a participant in the proceedings) is the Australian national association for Australian Rules Football. It is responsible for the

implementation of rules, including anti-doping rules, for the sport. The Australian Sports Anti-Doping Authority (hereafter ASADA, also a participant in the proceedings) is the national Australian anti-doping organization.

A.b. In September 2011, Club A._____ [name of club omitted] decided to introduce a program of supplements for its players, aimed at enhancing the players' performance. The players were administered injections in the program; whilst doing this, a forbidden substance was allegedly used. In September 2012, Club A._____ [name of club omitted] filed a self-denunciation with the AFL and the ASADA, due to the substance that had been administered.

A.c. In February 2013, ASADA started its investigation. On November 14, 2014, it communicated with the players that it had found a violation of the rules.

B.
B.a. The AFL's internal proceedings against the Appellants were initiated on December 15, 2014. By a decision dated March 31, 2015, the AFL Anti-Doping Tribunal (hereafter, the AFL Tribunal) found there was no evidence of a violation of the applicable Anti-Doping Regulations.

B.b. On May 8, 2015 WADA appealed the decision of the AFL Tribunal of March 31, 2015, to the Court of Arbitration for Sport (CAS). By submissions of May 22 and 26, 2015, respectively, the AFL and ASADA requested they be allowed to participate in in the appeal proceedings. While WADA had no objection to ASADA and the AFL participating in the proceedings, Appellants 1-32 did object to the participation of ASADA.

By order of June 9, 2015, the CAS allowed both ASADA and AFL to take part in the proceedings.

On July 6, 2015, the parties were informed of the composition of the Arbitral Tribunal.

On July 8, 2015, WADA submitted its appeal brief.

On July 31, 2015, Appellants 1-32 filed a submission with the CAS as to the jurisdiction and the scope of the appeal brief. On August 28, 2015, the Appellants filed two further submissions with the CAS. The AFL, WADA and ASADA stated their views by submissions of September 2 and 3, 2015, respectively. On September 10, 2015, the Arbitral Tribunal communicated with the participants to the proceedings that, based upon Article R57 of the CAS Code, it would decide on the appeal *de novo*, meaning with full power of review and, if applicable, it would take into account new evidence.

On September 11, 2015, the Appellants submitted their answers to the appeal to the CAS. On the same date, WADA filed an additional submission with the Arbitral Tribunal, with further evidence. The Appellants responded to this in their submission of September 18, 2015. Apart from this, by a separate letter of September 18, 2015, the Appellants asked for the production of additional information and data by WADA, concerning a recently developed laboratory test.

On September 28, 2015, as instructed by the CAS, WADA explained whether the evidence it had submitted on September 11, 2015, had been available to it before the decision under appeal of March 31, 2015, or could reasonably have been discovered.

In a submission on October 1, 2015, the Appellants 1-32 responded to the submission of WADA of September 11, 2015. On October 5, 2015, another answer followed said submission of WADA. By submission of October 12, 2015, the Appellants 1-32 asked for the production of additional information and data by WADA, concerning a specific laboratory test. By order of the same day, the CAS asked WADA to comply with this request. On October 16, 2015, WADA submitted additional information and data concerning the laboratory test in dispute. By submission of October 21, 2015, the Appellants 1-32 asked for the production of further documents from a specific laboratory. On October 23, 2015, the Appellants 33 and 34 submitted additional evidence to the CAS in the form of two new expert reports. Also on October 23, 2015, Appellants 1-32 submitted expert reports of various experts of October 19 and 23, 2015 to the Arbitral Tribunal. On October 24, 2015, WADA answered to the request of October 21, 2015; in particular it declined the production of specific documents, concerning the laboratory in dispute.

By order of October 26, 2015, the CAS required WADA to produce the corresponding documents. On October 28, 2015, WADA submitted the requested documents. On November 9, 2015, each party submitted a list of their essential arguments to the Arbitral Tribunal. On November 13, 2015, WADA, Appellants 33 and 34, and ASADA signed the Order of Procedure. Appellants 1-32 signed the Order of Procedure on November 18, 2015. Between November 16 and 20, 2015, a hearing took place in Sydney, Australia. At the hearing various witnesses named by the participants in the proceedings were heard, among other things.

B.c. By its arbitral award of January 11, 2016, the CAS upheld WADA's appeal, reaching the conclusion that the Appellants could be found in violation of the relevant Anti-Doping Regulations. Accordingly, it annulled the decision of the AFL Tribunal of March 31, 2015 and suspended – effective March 31, 2015 – all Appellants for a two-year-period, with credit for time served under a temporarily-imposed suspension already in place.

C.
In a civil law appeal (filed within the time limit), submitted to the Federal Tribunal, the Appellants seek the annulment of the Award of the CAS of January 11, 2016, and ask that it be determined that the CAS has no jurisdiction to decide WADA's appeal. In the alternative, the award under appeal of January 11, 2016, should be annulled and the matter sent back to the CAS for a new decision. The Respondent submits that the appeal be rejected, insofar the matter is capable of appeal at all. The CAS submits that the appeal be rejected. ASADA submits that the matter is not capable of appeal; in the alternative, it should be rejected. The AFL waived the right to make a submission. The Appellants submitted an answer to the Federal Tribunal on June 30, 2016, ASADA and the CAS submitted their answers on July 19, 2016. The Appellants answered them in a further submission of August 8, 2016.

Reasons:

1.
According to Art. 54(1) BGG,[2] the Federal Tribunal issues its judgment in an official language,[3] as a general rule in the language of the decision under appeal. If the decision was issued in another language, the Federal Tribunal uses the official language chosen by the Parties. The decision under appeal is in English. As this is not an official language, and the Parties used German (Appellants) and French (Respondent) in their submissions to the Federal Tribunal, in accordance with Art. 42(1) BGG in conjunction with Art. 70(1), the Federal Tribunal will, according to its practice, use the language of the appeal (Judgment 4A_386/2015 of September 7, 2016, at 1, to be published).

2.
In the field of international arbitration, a civil law appeal is admissible pursuant to the requirements of Art. 190-192 PILA[4] (SR 291) (Art. 77(1)(a) BGG).

2.1 In the case at hand, the Arbitral Tribunal has its seat in Lausanne. At the relevant time, both Parties had their seat outside Switzerland (Art. 176(1) PILA). As the Parties did not expressly exclude the provisions of Chapter 12 PILA, these provisions are accordingly applicable (Art. 176(2) PILA).

2.2. Only the grievances listed in Art. 190(2) PILA are admissible (BGE 134 III 186[5] at 5, p. 187; 128 III 50 at 1a p. 53; 127 III 297 at 1a, p. 282). According to Art. 77(3) BGG, the Federal Tribunal only reviews the grievances raised and reasoned in the appeal brief; this corresponds to the duty to provide reasons at Art. 106(2) BGG for the violation of constitutional rights and of cantonal and inter-cantonal law (BGE 134 III 186 at 5, p.187, with references). Criticism of an appellate nature is not allowed (BGE 134 III 565[6] at 3.1, p. 567; 119 II 380 at 3b, p. 382).

2.3. The Federal Tribunal bases its judgment on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This comprises both the findings as to the facts forming the basis of the dispute; and those concerning the course of the proceedings, including the findings as to the facts of the case, which include the submissions of the parties, their factual allegations, legal arguments, statements in the case, evidence and offers of evidence, the contents of a witness statement or an expert report, or findings from a visual inspection (BGE 140 III 16 at 1.3.1, with references). The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even when they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (see Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and that of Art. 105(2) BGG). However, the Federal Tribunal may review the

[2] Translator's Note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal RS 173.190.
[3] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[4] Translator's Note: PILA is the more commonly used abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties
[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

factual findings of the award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when new evidence is exceptionally taken into account (BGE 138 III 29[7] at 2.2.1, p. 34; 134 III 565 at 3.1, p. 567; 133 II 139 at 5, p. 141, each with references). The party claiming an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and wishes to rectify or supplement the facts must show, with reference to the record, that the corresponding factual allegations were raised in the arbitral proceedings in accordance with the procedural rules (see BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references; see also BGE 140 III 86 at 2, p. 90).

2.4. The appeal must be fully reasoned within the time limit to appeal, with a fully reasoned appeal brief (Art. 42(1) BGG). If there is a second round of pleadings, the Appellant may not use the reply to supplement or improve its appeal (see BGE 132 I 42 at 3.3.4). The reply can only be used to comment upon the statements made in the answer of another participant in the proceedings (see BGE 135 I 19 at 2.2).

Insofar as the Appellants go further in their reply, their submissions cannot be taken into account.

3.
The Appellants submit that due to its *de novo* assessment, as it unfolded in the arbitration procedure, the Arbitral Tribunal exceeded its jurisdiction (Art. 190(2)(b) PILA); in the alternative, the Appellants submit it violated public policy (Art. 190(2)(e) PILA).

3.1. They argue that the CAS wrongfully examined the appeal with full power of review. The CAS had no jurisdiction for a *de novo* assessment and decided *extra potestatem*. At the relevant time of the acts with which the Appellants were charged, that is the year 2012, the 2010 edition of the AFL Anti-Doping Code was applicable. According to that document, just three grievances could be raised in an appeal: error in law, "unreasonableness" in the spirit of the so-called *Wednesbury* unreasonableness; and manifest disproportionality of the sanction. Furthermore, new evidence was admissible only under limited conditions. In 2015, the AFL Anti-Doping Code (2015 edition) entered into force and it provides that the CAS is entitled to deal with an appeal with full power of review and based upon new findings and new evidence. The transitional provisions (especially Art. 29.2) of the AFL Anti-Doping Code (2015 edition) state that the provisions of the code to be applied were those applicable at the time of the alleged violation of the Anti-Doping-Regulations. There is no exception in the transitional provisions and therefore in the appeal proceedings, the AFL Anti-Doping Code (2010 edition) was applicable. In case Art. 29.2 AFL Anti-Doping Code (2015 edition) would be different, in regard to retroactivity between procedural rights and material rights, one must consider that, according to Australian Law (applicable to the AFL Anti-Doping Codes (2010 and 2015 editions) and to the arbitration clause) the right to appeal is a matter of material right. The question concerning the requirements the reasons on which basis an appeal can be made against a decision, should thus be answered according to the AFL Anti-Doping Code (2010 edition). Thus, the CAS would have wrongly addressed the appeal with full power of review. A limited review, without a *de novo* decision, as foreseen by the AFL Anti-Doping Code (2010 edition), would have resulted in a rejection of the appeal.

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

3.2.

3.2.1. The appeal based on Art. 190(2)(b) PILA is possible when an arbitral tribunal decides claims over which it had no jurisdiction, whether because there was no arbitration agreement or because the latter was limited to certain issues not including those at hand (*extra potestatem*) (BGE 116 II 639 at 3 p. 642). An arbitral tribunal indeed has jurisdiction only if, among other, the dispute is covered by the arbitration agreement (see Judgement 4A_392/2015 of December 10, 2015, at 3.2.1; and Judgement 4A_90/2014[8] of July 9, 2014, at 3.3.2; 4A_386/2010[9] of January 3, 2011, at 5.2).

3.2.2. According to Art. 190(2)(b) PILA, the Federal Tribunal freely reviews jurisdictional claims as to legal issues, including preliminary substantive issues upon which the determination of jurisdiction depends (BGE 140 III 134[10] at 3.1, 477 at 3.1, p. 477). Yet also in the framework of an appeal concerning jurisdiction, the Court reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when some new evidence (Art. 99 BGG) is exceptionally taken into account (BGE 142 III 220 at 3.1, p. 224; 140 III 477[11] at 3.1, p. 477; 138 III 29[12] at 2.2.1, p. 34; each with references).

3.2.3. The arbitration agreement must comply with the requirements of Art. 178 PILA. Concerning the formal requirement (Art. 178(1) PILA) the Federal Tribunal examines the Parties' agreement in sport matters to submit disputes to an arbitral tribunal with some "good will"; this is done for the purpose of encouraging the quick settlement of the dispute by specialized courts like the CAS, which offer enough guarantees of independence and impartiality (BGE 138 III 29 at 2.2.2; 133 III 235 at 4.3.2.3, p. 244 f.). The liberal interpretation which marks the jurisprudence in this field is particularly evident in the assessment of the effectiveness of arbitration clauses via reference (BGE 138 III 29 at 2.2.2, with references).

According to Art. 178(2) PILA, the validity of the content as well as the objective scope of an arbitration agreement must be assessed, according to the law chosen by the Parties and applicable to the matter in dispute, especially the law applicable to the main contract or according to Swiss law (BGE 140 III 134 at 3.1; 138 III 29 at 2.2.2).

3.2.4. An arbitration clause must be understood as an agreement in which two or more determined or determinable parties agree and bind themselves to submit one or several existing or future disputes to an arbitral tribunal to the exclusion of the original jurisdiction of the state, pursuant to a directly or

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[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/court-arbitration-sport-may-decide-merits-even-if-jurisdiction-only-issue

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-survives-termination-its-scope-be-interpreted-liberally

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

indirectly determined legal order (BGE 130 III 66 at 3.1, p. 70). It is decisive that the will of the parties should be expressed to remit the decision of some specific disputes to an arbitral tribunal and not to a state court (BGE 138 III 29 at 2.2.3, p. 35).

Provisions in arbitration clauses which are incomplete, unclear, contradictory, or impossible, are considered to be pathological clauses. Even then they do not necessarily lead to nullity, insofar as they do not relate to a compulsory element of the arbitration clause, namely the compulsory submission of the decision of the dispute to a private arbitral tribunal. One should rather first look for a solution by interpretation and if necessary by the supplementation of the contract, based on the general contract law, which observes the fundamental will of the parties to submit to arbitral jurisdiction (see BGE 138 III 29 at 2.2.3, p. 35).

If, concerning the arbitration agreement, there is no certain, indeed concurrent will of the parties, then this must be interpreted according to the principle of good faith, meaning that the presumable will must be determined in the way it would and had to have been understood, in good faith, by the respective recipient of the declaration. If the result of the interpretation is that the parties wanted to exclude the dispute from state jurisdiction and wanted to submit it instead to the decision of an arbitral tribunal, but there are differences regarding the implementation of the arbitration procedure, it is basically the utility concept that applies: as far possible, the implementation of a contractual understanding should be sought that leaves the arbitration agreement in place (BGE 138 III 29 at 2.2.3, p. 35 f.).

3.2.5. Furthermore, a jurisdictional defense, according to Art. 186(2) PILA, must be raised before the merits phase commences. This is according to the principle of good faith (Art. 2(1) ZGB[13]; see also Art. 52 ZPO [SR 272]), which must also be observed in the field of arbitration. If a specific defense is not raised, jurisdiction is established irrespective of the validity of the arbitration clause, due to the lack of objection. Thus, the party addressing the merits of the case without raising the corresponding objection, recognizes the jurisdiction of the arbitral tribunal and, as a result, can no longer invoke its lack of jurisdiction (BGE 128 III 50 at 2c/aa, with references). In particular the party reserving its grounds for challenge in order to hold and later raise them if the case does not go well, acts contrary to good faith (see BGE 136 III 605[14] *esp.* 3.2.2, p. 609; 129 III 445 at 3.1, p. 449; 126 III 249 at 3c, p. 254).

3.3. The Appellants first raised their position before the Arbitral Tribunal by submissions of July 31, 2015, and of August 28, 2015, according to which the arbitral power of review within the appeal proceedings should be limited to very precise complaints and the matter in dispute should not be decided from scratch (*de novo*). By letter of September 10, 2015, the Arbitral Tribunal informed the Parties that, based upon Art. R57 of the CAS Code, it would decide *de novo* and as the case may be, it would take into consideration new evidence.

The Respondent and the CAS rightly point out the fact that the Appellants did not subsequently question the power of review of the CAS but that, on the contrary, they signed the Order of Procedure on November 13 and 18, respectively, without reservation. In it, the Appellants confirmed, under Section 1,

[13] Translator's Note: ZGB is the German abbreviation for the Swiss Civil Code.
[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

to have no objections to the jurisdiction of the CAS, which the Respondent had based first and foremost on Art. 20 of the AFL Anti-Doping Code (2015 edition) and Art. 13.2.3 of the World Anti-Doping Agency Code (WADA-Code). Furthermore, they expressly recognized, in Section 2, that the Arbitral Tribunal would decide the appeal according to the CAS Code ("[...] the appointed Panel shall decide this matter as an Arbitral Tribunal and render an award in compliance with the Code [*i.e., the Code of Sports-Related Arbitration, 2013 edition*] and the terms and conditions set out in this document"). A reservation in respect of the power of review of the Arbitral Tribunal cannot be found in this document, either (see, for instance, for the making of a reservation in the Order of Procedure, judgements 4A_202/2016 of August 3, 2016, at 3.2; 4A_612/2009[15] of February 10, 2010 at 3.1.2; 4P.105/2006 of August 4, 2006, at 5.1). On the contrary, in Section 9 the Appellants affirmed the applicability of Art. R57 of the CAS Code, which provided in the 2013 edition that the Arbitral Tribunal is free to review the matter in dispute, both in facts and in law ("*The Panel has full power to review the facts and the law*").

Accordingly, the Appellants also requested that various witnesses be heard at the hearing, submitted new pieces of evidence (among others, expert opinions) to the Arbitral Tribunal, and insisted upon extensions concerning the backgrounds of certain laboratory tests, without making any reservation in this regard, which is not consistent with their purported view on the narrow application of the power of review of the appeal (both in facts and in law). Significantly, the Appellants cannot counter the Respondent's argument that the legal representative of Appellants 1-32 himself referred - on the first day of the hearing (November 16, 2015) – to the fact that the Arbitral Tribunal would have to decide *de novo* on the matter in dispute (emphasis added):

> Given the centrality of this evidence, and given that this is an appeal, we would suggest – **we're conscious that it's *de novo* of course**, [...]. WADA exercises a right to bring the players, notwithstanding that outcome, before CAS **by way of a *de novo* appeal**. The complaint we make is, **obviously it's *de novo* so the matter is able to be considered afresh by this panel** [...].[16]

The fact that the Arbitral Tribunal, in the reasons of the decision under appeal, referred to the full power of review and stated, in addition to its consideration of the application of Art. 20.1 of the AFL Anti-Doping Code (2015), why an appeal to the CAS (based upon Art. R57 of the CAS Code (2013 edition)) necessarily implies an unlimited power of review, does not change the fact that the Appellants, irrespective of their initial objections, agreed without reservation to sign the Order of Procedure on November 13 and 18, 2015, respectively; which included the full review of factual and legal matters, according to Art. R57 of the CAS Code (2013 edition). Moreover, contrary to the Appellants' opinion, the Arbitral Tribunal considered the Order of Procedure authoritative and, in respect of the relevant procedural rules – such as Art. 20 of the AFL Anti-Doping Code (2015 edition), which foresees a comprehensive power of review within the appeal – also referred to Order of Procedure that had been signed without reservation.
One would have expected in good faith from the Appellants, who benefitted from the assistance of several lawyers in the arbitration, to raise a reservation in the Order of Procedure with regard to the arbitral power of review, had they wished to persist in their initial point of view – in contradiction with Art.

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[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/limited-judicial-review-of-awards-independence-of-cas-reaffirmed

[16] Translator's Note: Emphasis original. In English in the original text.

R57 of the CAS Code (2013 edition) – of a narrowly limited power of review and therefore a narrowly limited jurisdiction of the CAS to some specific grounds of appeal. The statement in the Reply to the Federal Tribunal, that the signing of the Order of Procedure was done based upon an unlawful coercion on the part of the CAS, is new and thus inadmissible (Art. 99(1) BGG). Thus, the respective submissions, as well as numerous other newly submitted pieces of evidence, must go unheeded.

Furthermore, not convincing is the Appellants' argument that, even if one were to assume the applicability of the procedural clauses of the CAS Code by the signing of the Order of Procedure, according to Art. S1 and Art. R47 of the CAS Code (2013 edition) the national (Association) Special Regulations would have priority. Contrary to what the Appellants assume, these regulations merely foresee that an arbitration procedure before the CAS presumes a valid arbitration agreement; the jurisdiction of the CAS for the assessment of the appeal is not questioned by the Appellants as a matter of principle. The provisions quoted do not imply a general priority of national association regulations to the effect that, with regard to the arbitral power of review, one would first have to review special regulations of the national associations. Furthermore, especially Art. R57 of the CAS Code (2013 edition), which is noted as applicable in the Order of Procedure, does not foresee any reservation of respective national association regulations. As a result, contrary to the view advanced in the appeal, one cannot infer a reservation in favor of internal association regulations with regard to power of review from the CAS Code regulations, which are recognized as applicable.

By signing of the Order of Procedure on November 13 and 18, 2015 – in which they agreed upon the jurisdiction of the CAS expressly and without reservation and, at the same time, agreed upon the applicability of the procedural regulations of the CAS Code (2013 edition), including Art. R57 which foresees the free review of the matter in dispute, both in fact and law – the legally represented Appellants recognized the free power of review of the Arbitral Tribunal to adjudicate the appeal. Thus, they can no longer rely on Art. 190(2)(b) and (e) PILA and claim that the Arbitral Tribunal exceeded its power of review and thus lacked jurisdiction regulations or violated public policy.

Their right to appeal concerning this matter has been forfeited and the matter is not capable of appeal.

3.4. Even if the matter were capable of appeal, it should have been deemed without merit: the formal validity of the arbitration clause (Art. 178(1) PILA) is not being questioned by the Appellants. Nor do they deny that the existing dispute is within the arbitration agreements they signed and that, in principle, the CAS has jurisdiction to decide the Respondent's appeal. They merely claim it wrongfully reviewed the dispute, even though the Parties had limited its power of review as a court of appeal (see concerning this objection, for instance, Judgment 4A_246/2014[17] of July 15, 2015, at 7.2.2; and Judgment 4A_90/2014[18] of July 9, 2014, at 3.3.2). They do not deny they also submitted, upon concluding the arbitration agreement, to the future changes of the association regulations of the Australian Football League, thus especially to those of the AFL Anti-Doping Code. They assume that

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/partial-violation-right-be-heard-leads-partial-annulment-award

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/court-arbitration-sport-may-decide-merits-even-if-jurisdiction-only-issue

the 2015 edition of the AFL Anti-Doping Code, effective of January 1, 2015, was applicable when the AFL Tribunal issued its decision of March 31, 2015, yet they deny the applicability of its Art. 20.1 (unlimited power of review of the CAS) based upon the transitional provision of Art. 29.

Their submissions therefore concern transitional law, in that they maintain that provisions of the AFL Anti-Doping Code (2010 edition) remain applicable upon the appeal procedure, especially Art. 17, and that edition did not yet foresee an unlimited power of review, unlike Art. 20.1 of the 2015 edition. With their submissions in relation to the legal issues of intertemporal law of the association regulations applicable to the appeal, they disregard the fact that the material validity of the arbitration agreement and its objective scope, according to Art. 178(2) PILA, is to be judged according to Swiss law, in the alternative. They do not claim that another legal order – in particular, Australian Law – would be more generous with respect to material validity. As the CAS – reasonably – puts it, based on Art. R57 of the CAS Code (2013 edition) and its own jurisprudence as well as by reference to Art. 13.1.1 of the WADA Code, its review – especially in cases of doping – is mandatorily done without any limitation to the factual and legal matters to be reviewed; it must not merely decide whether the association decision under appeal is justified, but also whether there has been a violation of the relevant anti-doping regulations. This stands to reason, especially due to the fact that, within the worldwide fight against doping, the CAS has the responsibility to ensure that international standards in this field are being observed (see Judgment 4A_640/2010[19] of April 18, 2011, at 3.3.1).

A standard application of the relevant anti-doping regulations could not be variable reviews of doping cases, according to each national association's regulations. If one were to follow the Appellants and assume that the arbitration agreements signed by them, by referring to the AFL Anti-Doping Code (2010 edition), would actually foresee a jurisdiction of the CAS, limited to three narrowly defined grounds for appeal, even though the CAS, according to its compulsory procedural rules, does not admit such a limited appeals, one should have to assume arbitration agreements with partially-impossible content (Art. 20(2) OR) (see BGE 138 III 29[20] at 2.3.2, p. 37 f.). But according to Swiss law, this does not necessarily result in nullification. Nor do the Appellants argue that the power of review of the Arbitral Tribunal was of such decisive importance that the Parties would have decided against CAS arbitration had they been aware of the fact that a procedure limited to certain matters would not have been possible before this institution (*see*, for the interpretation and completion of an arbitration clause with partially-impossible content, BGE 138 III 29 at 2.3). On the contrary, they expressly affirm the jurisdiction of the CAS as a court of appeal in the case at hand and nor do they deny that, by reference in the arbitration clauses, the Anti-Doping Code (2015 edition) is henceforth applicable, which, in Art. 20.1 AFL expressly foresees the unlimited power of review of the CAS. Based upon the Appellants' submissions, one can assume that they would have concluded an arbitration agreement, which would have foreseen the jurisdiction of the CAS, with full review of factual and legal issues, had they been aware of the fact, that the agreement – in their opinion – could not permit a review by the CAS that was limited to certain matters under the rule of the Anti-Doping Code (2010 edition). Even if one were to

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/dismissal-of-an-appeal-to-set-aside-a-cas-award-a-reference-to-a

[20] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

follow the Appellant's interpretation of transitional provisions, according to Art. 29 of the Anti-Doping Code (2015 edition) and to the grounds of appeal under the Anti-Doping Code (2010 edition) in their complaints, according to Art. 190(2)(b) and (e) PILA in the Federal Tribunal by invoking some legal opinions of Australian jurists, it would not lead to the result they seek.

Accordingly, the CAS had jurisdiction and the argument of incompatibility with public policy is unfounded. Consequently, the appeal should have been rejected, if it were capable of appeal.

4.
The matter is not capable of appeal. In view of the outcome of the proceedings, the Appellants must severally pay costs and compensate the other Party (Art. 66(1) and (5), as well as Art. 68(2) and (4) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The matter is not capable of appeal.

2.
The judicial costs, set at CHF 35'000, shall be borne by the Appellants (severally and in equal shares).

3.
The Appellants shall pay the Respondent a total amount of CHF 50'000 for the federal judicial proceedings (severally and in equal shares).

4.
This judgment shall be communicated to the Parties, to the Participants in the proceedings and to the Court of Arbitration for Sport (CAS).

Lausanne, September 27, 2016

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding judge:	The Clerk:
Kiss	Leemann