Arbitration CAS 2017/A/5050 Basketball Club Ticha v. Fédération Internationale de Basketball (FIBA) and Aleksandar Andrejevic, award of 27 October 2017

Panel: Mr Clifford Hendel (USA), Sole Arbitrator

Basketball
Extension of sanction under Article 3-300 FIBA Internal Regulations
De novo principle
Estoppel, venire contra factum proprium and falsa demonstratio non nocet in disciplinary proceedings
Establishment of linkage in the meaning of Article 3-300 FIBA Internal Regulations

1. **The *de novo* review contemplated by Article R57 of the CAS Code (and the similarly expansive review practiced at the level of the FIBA Appeals' Panel) must be understood to cure any violation of an appellant's right to be heard in the first instance proceeding(s).**

2. **The principles of estoppel, *venire contra factum proprium* and *falsa demonstratio non nocet* have (or should have) a much more limited scope of application in a disciplinary proceeding or a dispute involving regulatory interpretation than in matters of contractual interpretation. In the latter situation, clear manifestations of intent and understanding can and should in appropriate circumstances give rise to legitimate expectations which should not be readily defeated when reasonably relied on by the other party; in disciplinary proceedings, especially in a regime of *de novo* review, the scope for the application of these principles is reduced.**

3. **In order to warrant an extension of sanctions under Article 3-300 of the FIBA Internal Regulations, FIBA has the burden of proof to establish sufficient linkage – factually and objectively, either from a legal or a sporting perspective – between the initially sanctioned natural or legal person(s) and the natural or legal person(s) which is directly or indirectly linked to the initially sanctioned person. *E.g.* in circumstances where one basketball club has been sanctioned by FIBA with a registration ban and another, newly registered club appears to be a mere continuation of the banned club, in order to establish a linkage between the two clubs it may be considered of little relevance that a significant number of players of the banned club's roaster played, in the season following the club's ban, in the other club's roaster; this is particularly true in circumstances where the respective players have their origins and roots in the area where both clubs are located. Furthermore *e.g.* different corporate names, licenses and VAT registration numbers of the two clubs may be considered as irrelevant, in particular in circumstances where the public names of the two clubs are almost identical and where elements like the *"impression in the basketball community"* or the *"public impression"* or *"brand"* or *"look and feel"* under which the new club holds itself out create essential elements of linkage.**

I. PARTIES

1. Basketball Club Ticha ("New Club" or "Appellant") is a Bulgarian basketball club with headquarters in Varna, Bulgaria. Appellant is registered with the Bulgarian Basketball Federation (BBF) which in turn is affiliated to Fédération Internationale de Basketball ("FIBA" or "First Respondent").

2. FIBA, an association under Swiss law with its registered office in Mies, Switzerland, is the global governing body of basketball.

3. Aleksandar Andrejevic ("Player" or "Second Respondent") is a professional basketball player of Serbian nationality, who used to play for the club BC Cherno More Port Varna ("Old Club"), a Bulgarian basketball club with headquarters in Varna, Bulgaria and currently in bankruptcy proceedings, and previously a participant in the Bulgaria's first division basketball league.

II. FACTUAL BACKGROUND AND PROCEEDINGS BEFORE FIBA PRIOR TO THE FILING OF THE STATEMENT OF APPEAL WITH THE COURT OF ARBITRATION FOR SPORT

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning of this Award.

5. On 1 March 2016, the Basketball Arbitral Tribunal rendered an award (the "BAT Award") against the Old Club, ordering it to pay certain amounts (in excess of € 20,000) to the Player.

6. Apprised on 17 March 2016 by the Player's representative that the BAT Award had not been honoured, FIBA informed the Old Club of its authority to impose sanctions in the event of non-payment (monetary fine and/or registration ban and/or international competition participation ban), and invited it to make payment or state its position by 18 April 2016.

7. In the absence of payment or response from Old Club, by letter of 26 April 2016, FIBA through its Secretary General imposed a registration ban on Old Club.

8. In July and September 2016, the Player's representative informed FIBA that New Club had been licensed to participate in the Bulgarian first national league, and of certain information suggesting to him that New Club was a mere continuation of Old Club. The letter indicated that the Bulgarian Basketball Federation did not share this opinion but that the explanation of its view was *"vague and incorrect"*, and asked FIBA to *"help us resolve this issue and set an example for future references"*.

9. After having *"conducted research[es] of its own into the matter"*, on 14 December 2016, FIBA's Secretary General issued a decision (the "FIBA Decision") pursuant to the last sentence of Article 3-300 of the FIBA Internal Regulations.

10. Articles 3-300, 3-301 and 3-302 of the FIBA Internal Regulations, contained in the section of Chapter VII ("Basketball Arbitral Tribunal (BAT)") captioned "Honouring of BAT Awards", provide as follows (the last sentence of Article 3-300, at issue in this proceeding and added to the rules in 2014, is underscored below):

> *"300. In the event that a national member federation, club, player, coach or agent participating in a BAT Arbitration (the "first party") fails to honour a final award, order or any provisional or conservatory measures (collectively, the "decision") of BAT or CAS, the party seeking the honouring of such decision award (the "second party") shall have the right to request that FIBA sanction the first party. The sanctions which FIBA may impose are the following:*
>
> *a. A monetary fine of up to CHF 150,000 (see article 3-303); this fine can be applied more than once; and/or*
>
> *b. Withdrawal of FIBA-license if the first party is a player's agent or a FIBA-approved coach; and/or*
>
> *c. A ban on international transfers if the first party is a player; and/or*
>
> *d. A ban on participation in international competitions with his national team and/or club if the first party is a player; and/or*
>
> *e. A ban on registration of new players and/or a ban on participation in international club competitions if the first party is a club.*
>
> *The above sanctions can be applied cumulatively and more than once.*
>
> *The above sanctions can be extended, in FIBA's sole discretion, to natural or legal persons which are directly or indirectly linked to the first party, either from a legal or a sporting perspective (e.g. different entity under a similar name etc.).*
>
> *301. The second party shall send to FIBA with his request for sanctions a copy of the BAT award. The decision on the sanction is taken by the Secretary General. Before taking his decision he shall give the first party an opportunity to state his position and to honour the BAT award. Upon request by FIBA, the national member federation to which the first party is affiliated shall actively and promptly take all necessary measures to ensure that the first party fully honours the BAT award within a time-limit fixed by FIBA. If a national federation fails to comply with the present Article, FIBA may impose disciplinary sanctions on the national federation in accordance with Book 1, Chapter VI.*
>
> *302. The decision to sanction the first party shall be subject to appeal to the FIBA Appeals' Panel according to the FIBA Internal Regulations governing Appeals (see Book 1, Chapter VIII)".*

11. The full text of the FIBA Decision (with the operative sentence underscored) provided as follows:

> *"BC Cherno More PortVarna / BC Cherno More Ticha*
>
> *By email only*

14 December 2016

Dear Sirs,

As you know, the club "BC Cherno More Port Varna" ("Old Club") has failed to honour the BAT Award 0746115 and, as a result, is subject to a ban on registration of new players inflicted by FIBA since 26 April 2016.

We are informing you that FIBA recently received a letter written by Mr. Aleksandar Andrejevic, claimant in the BAT Award 0746115, inviting FIBA to assess whether or not the sanctions against the Old Club related to the aforementioned BAT award could be extended upon "BC Cherno More Ticha" ("New Club"). Please be advised that Article 3-300 of the FIBA Internal Regulations ("Regulations") provides as follows:

"The above sanctions can be extended, in FIBA's sole discretion, to natural or legal persons which are directly or indirectly linked to the first party, either from a legal or a sporting perspective (e.g. different entity under a similar name etc.)".

The jurisprudence of FIBA and of its judicial bodies indicates various criteria that can be taken into account when deciding to extend a sanction as above.

ln the present case, taking into account - among other considerations – also

a) the fact that the name of the club is virtually the same

b) the fact that the external appearance and representation of the club has not changed, giving the impression of continuity of the same team to third parties

c) The fact that many players left the Old Club for the New Club

d) The fact that the New Club plays in the same arena as the Old Club

e) The fact that many sources online, including the official Facebook page of the club are stating that the club has many years of history and that the New Club has been created in 1923

FIBA herewith confirms that the obligations of the losing party under the BAT Award 0746/15 shall apply jointly and severally to: BC Cherno More Port Varna, BC Cherno More Ticha.

The above-mentioned entities are requested to honour the BAT Award 0746115 ***by no later than Friday 13 January 2017****".*

In case the BAT Award is not honoured within this deadline, FIBA reserves the right to impose further sanctions, as provided for in Art. 3-300 of the Regulations.

(…)".

12. New Club appealed the FIBA Decision to the FIBA Appeals' Panel, which dismissed the appeal by decision (the "Appealed Decision") of 27 February 2017. The core reasoning and conclusions of the Appealed Decision are set out below:

"34. In view of the consideration underlying the provision, following an overall assessment of the evidence produced, combined with the fact that it is apparently the general perception of the basketball community that the clubs concerned are effectively one and the same club, the Appeals' Panel finds that the Respondent has discharged the burden of proof to establish that the Appellant is linked to BK CMPY in such a manner that there are sufficient grounds for extending the sanctions on the latter to the Appellant in accordance with Article 3-300 of the FIBA IR.

35. In this connection, the Appeals' Panel attaches importance to various factors, including that the Appellant gives the impression of being effectively a continuation of the sporting skills of BK CMPV after this club, due to financial difficulties, did not apply to participate in the national championship run by the NBL. For instance, the Appellant has chosen to play in basically similar jerseys, except for a different emblem, with a wide range of BK CMPV's previous players on the team. Moreover, it seems that the Appellant has in no way whatsoever made any efforts to try to dissociate itself from BK CMPV in relation to the public perception. Thus, in public databases, the Appellant is apparently listed as a club that has accomplished a wealth of sports achievements before its formal establishment, which gives the general public the impression that, at least from a sporting perspective, it is one and the same club. The Appellant is found not to have made any attempt to change this perception.

36. In the circumstances of the present case, the Appeals' Panel therefore finds that the Secretary General had sufficient grounds for a decision to extend the sanctions on the Appellant in accordance with Article 3-300 of the FIBA IR in order to protect the principle of pacta sunt servanda in the world of basketball and to protect the liability expectations. Furthermore, the Appeals' Panel finds that the General Secretary was under no obligation to await the outcome of the bankruptcy proceedings of BK CMPV before extending the sanction".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

13. On 28 March 2017, Appellant filed its Statement of Appeal with the CAS, requesting that the matter be decided by a Sole Arbitrator. The Statement of Appeal additionally sought a stay of execution of the Appealed Decision.

14. On 10 April 2017, Appellant filed its Appeal Brief, which included a request for the production of documents.

15. On 10 April 2017, First Respondent agreed to the appointment of a Sole Arbitrator. Second Respondent did not provide his position on Appellant's request for the appointment of a Sole Arbitrator.

16. On 27 April 2017, within the period established for the filing, First Respondent submitted its response to Appellant's Request for Provisional Measures.

17. On 10 May 2017, within the period established for the filing, First Respondent submitted its Answer.

18. Second Respondent did not submit, in proper form and time, a response to the Request for Provisional Measures or an answer. By letter of 18 May 2017, he indicated that he had indeed submitted an answer to the CAS by email on 27 April 2017.

19. On 19 May 2017, the President of the CAS Appeals Arbitration Division dismissed the Request for a Stay of the Appealed Decision on grounds of the absence of irreparable harm, and without prejudice to any decision on the merits taken by the Panel, once appointed.

20. Also on 19 May 2017, the Player filed his answer by courier which the CAS subsequently circulated to Appellant and First Respondent.

21. On 23 May 2017, Appellant requested that the Player's answer be deemed inadmissible as untimely filed.

22. On 29 May 2017, the CAS Secretariat informed the Parties that Clifford J. Hendel, attorney-at-law, Madrid, Spain, had been appointed as Sole Arbitrator.

23. On 8 June 2017, the CAS Secretariat advised the Parties that the Sole Arbitrator had determined (a) to declare inadmissible the Player's answer, for having been filed out of the applicable time limit, (b) to consider as moot Appellant's request for the production of documents in light of the documentation and explanation provided in First Respondent's Answer, and (c) to hold a hearing.

24. On 23 June 2017, the CAS Court Office, on behalf of the Sole Arbitrator issued an Order of Procedure which was duly accepted and countersigned by each of the Parties.

25. On 5 July 2017, a hearing was held in Lausanne, Switzerland. The Sole Arbitrator was assisted at the hearing by Mr. Daniele Boccucci, counsel to CAS. The following persons, in addition to the translator David Richerataux assisting Second Respondent, attended the hearing:

(i) for Appellant:	Mr. Vassil Baichev, Counsel
(ii) for First Respondent:	Mr. Andreas Zagklis, Legal Director / General Counsel
	Mr. Benjamin Shindler, Legal Affairs Manager
	Mr. Chris Patterson, Member of the Legal Commission (by videoconference, as an observer)
	Mr. Zoran Radovic, Director of NFs and Sports, witness

(iii) the Second Respondent.

26. At the hearing the Parties made submissions through counsel in support of their respective cases and responded to questions posed by the Sole Arbitrator. At the outset of the hearing, the Parties confirmed their satisfaction with the composition of the Panel, and at the conclusion stated that they had no objection in respect of their right to be heard and to be treated equally in these proceedings.

27. Subsequent to the hearing, at the request of the Parties, the Sole Arbitrator deferred preparation of this Award in order to facilitate settlement discussions during a certain time. Once this time period (as extended) had lapsed, the Award was prepared.

28. Finally, and within the deadline established by the CAS Secretariat by letter of 21 August 2017, the Parties filed their respective statements of costs.

IV. THE POSITIONS OF THE PARTIES

29. The following summary of the Parties' positions is illustrative only and does not necessarily comprise every contention put forward by the Parties. The Sole Arbitrator has however, carefully considered for the purposes of the legal analysis which follows, all the submissions made by the Parties, whether or not specific reference is made to them below.

A. Appellant

30. Appellant asserts that the Appealed Decision is legally invalid, and subsidiarily, even if it is valid, it is wrong on the merits.

31. Appellant's argument regarding the invalidity of the Appealed Decision is twofold.

32. First, Appellant argues that the FIBA Decision (as confirmed without discussion of this particular aspect in the Appealed Decision), read literally and focusing on its operative or dispositive text, imposes on New Club a sanction which is not contemplated in the FIBA Internal Regulations.

33. Concretely, Appellant refers to the following language of the FIBA Decision:

> *"FIBA herewith confirms that the obligations of the losing party under the BAT Award 0746/15 shall apply jointly and severally to BC Cherno More Port Varna, BC Cherno More Ticha.*
>
> *The above-mentioned entities are requested to honour the BAT Award 0746/15 by no later than Friday, 13 January 2017".*

34. Appellant observes that the FIBA Internal Regulations do *"not provide for the possibility of assignment of the obligations of the losing party under a BAT arbitration to a third party but only for the extension of particularly specified sanctions"* (i.e., monetary fines and registration and participation bans), and thus *"[b]y ordering that the Appellant is jointly and severally liable for the obligations of the losing party under the BAT Award, the FIBA Decision in effect imposed upon the Appellant the obligation to pay the ordered amounts … [which] falls outside the scope of permissible legal actions … under Article 3-300 of the FIBA Regulations".*

35. Accordingly, Appellant asserts that application of the principles of legality and predictability and interpretation of ambiguities against the federation in matters of sanctions requires that the

FIBA Decision and the Appealed Decision confirming it be declared invalid and unenforceable as violative of the principle of legal certainty.

36. Second, Appellant asserts that the failure of FIBA to accord Appellant the opportunity to be heard before the issuance of the FIBA Decision is a procedural error not capable of cure by, and not cured by, the FIBA appeals procedure or the CAS proceeding.

37. Appellant notes that Article 3-300 of the FIBA Internal Regulations does not contemplate a right to be heard for a party against whom sanctions are extended before such extension is ordered. But Article 1-127 of the FIBA Internal Regulations (contained in the first section of Chapter VI ("Sanctions") captioned "Basic Principles of Sanctions Imposed by FIBA") provides as a general matter that *"The entity/person concerned shall have a right to be heard"*.

38. Appellant concludes that *"By failing to first hear the position of the Appellant, the Secretary General of FIBA ignored fundamental procedural principles … [in] blatant violation of the universal and fundamental rights and the general equitable principle of natural justice could not have been remedied by the FIBA Appeals' Panel and by the present CAS procedure and can only be sanctioned through the annulment of the vitiated decision"*.

39. As to the merits, Appellant does not question the purpose or validity of Article 3-300 of the FIBA Internal Regulations as a general matter, stating in its Appeal Brief as follows:

> *"The rationale of the rule of Article 3-300 of the FIBA IR is understandable. FIBA sought to find a mechanism to handle situations where a former club fails bankrupt or goes into winding-up procedure or is simply abandoned following which the club becomes reincarnated in a new entity resuming the activities of the old club. In that scenario, under the disguise of a formally new entity, the old one is attempting to avoid its liabilities towards employees, players, coaches, agents, etc. by breaking the corporate identity. This was maintained by the First Respondent within the FIBA appeals procedure and was noted in para. 27 of the Appealed Decision. This is not the case with the Appellant, however"*.

40. Instead, Appellant asserts that the FIBA Decision and the Appealed Decision confirming it are wrong, and that there are no legal or factual links between Old Club and Appellant sufficient to extend any sanction or liability to the latter under Article 3-300.

41. In particular, Appellant asserts that the expression *"Cherno More"* is not part of New Club's name and is *"added only to provide publicity for the sponsor of the club"*, but not with the intent or effect of appropriating for itself or confusing the basketball community as to the brand, goodwill and market recognition of Old Club (BC Cherno More Port Varna).

42. Appellant considers immaterial and irrelevant the facts that New Club plays in the same city and arena as did Old Club, as no other suitable arena exists in Varna, and that several former players of Old Club now play for Appellant (*"it is very natural that local players would be recruited for the team …"*).

43. Appellant further disputes FIBA's assertions that the external appearance of New Club (in terms of its jersey and emblem) is quite similar to that of Old Club and that it claims to be or holds

itself out to be the owner or beneficiary of Old Club's significant and longstanding sporting achievements.

44. Appellant finally rejects the assertion that online basketball sources confuse or blend New Club with Old Club in terms of sporting history and achievements, or that Appellant has any responsibility if such confusion exists.

45. On this basis, Appellant requests that an Award be entered to the effect that:

*"**a.** The CAS has jurisdiction over the dispute and the parties to this arbitration;*

***b.** The appeal of Basketball Club Ticha (Varna, Bulgaria) is upheld;*

***c.** The Decision rendered by the FIBA Appeals' Panel dated 27 February 2017 is set aside;*

***d.** The Decision of the FIBA Secretary General dated 14 December 2016 confirming "that the obligations of the losing party under the BAT Award 0746/15 shall apply jointly and severally to: BC Cherno More Port Varna, BC Cherno more Ticha" is declared invalid for all purposes as being null and void;*

***e.** The Decision of the FIBA Secretary General dated 14 December 2016, if considered as extension of sanction to Basketball Club Ticha, is declared invalid for all purposes as being null and void;*

***f.** Alternatively to **d.** and **e.** above, the Decision of the FIBA Secretary General dated 14 December 2016 "that the obligations of the losing party under the BAT Award 0746/15 shall apply jointly and severally to: BC Cherno More Port Varna, BC Cherno more Ticha", and/or including for extension of sanctions, is set aside as being incorrect and wrong;*

***g.** FIBA is ordered to lift the extended sanction, if such was actually imposed on Basketball Club Ticha (Varna, Bulgaria);*

***h.** The costs of the present arbitration shall be born entirely by the Respondents (in a proportion the Panel deems appropriate);*

***i.** The Respondents (in a proportion the Panel deems appropriate) are ordered to pay a reasonable amount as a contribution towards the costs, legal fees and other expenses sustained by the Appellant in connection with these arbitration proceedings;*

***j.** The Appellant is reimbursed the costs incurred in the FIBA appeals proceedings in the amount of CHF 10,000".*

B. First Respondent

46. First Respondent rejects Appellant's assertions that its right to be heard was violated because it was not invited to state its position before the FIBA Decision was passed, affirming that any such violation would have been cured during the FIBA Appeals' Panel proceedings (*"full-fledged*

adversarial proceedings … in which the Appellant had a full opportunity to make its case, and made extensive use of this opportunity") and also by the present CAS proceedings.

47. First Respondent also rejects for various reasons the assertion that the FIBA Decision lacked legal validity.

48. Initially, First Respondent asserts that Appellant should be estopped from arguing that the FIBA Decision improperly extended to Appellant the monetary obligations of Old Club under the BAT Award when Appellant's procedural behavior before the FIBA Appeals' Panel manifested its understanding that the real effect and intent of the FIBA Decision was to extend the post-BAT Award registration ban (not the monetary obligation under the BAT Award) from Old Club to New Club.

49. Noting Appellant's having benefited from its prior position (First Respondent agreed to and the FIBA Appeals' Panel granted an interim stay of execution of the registration ban during the pendency of the proceedings concluded by the Appealed Decision), First Respondent affirms that for Appellant to now characterize the FIBA Decision as ordering something *"diametrically opposed to what it submitted earlier"* would violate the principle of *venire contra factum proprium* and defeat legitimately-induced expectations of First Respondent in violation of CAS jurisprudence and Swiss law.

50. In this regard, First Respondent further notes that it *"cannot be in the interest of anyone, including Appellant"* for this appeal to be upheld on the basis that it extended or purported to extend the monetary obligations rather than the registration ban, since FIBA could *"in any event order an extension of the registration ban (again) at any time"*.

51. First Respondent additionally asserts that Appellant's interpretation of the FIBA Decision (that it extends the monetary obligation and not the registration ban) is untenable. Specifically, First Respondent characterizes Appellant's interpretation as resting on a decontextualized reading of one sentence of the FIBA Decision. Properly read, in its full context, Appellant affirms that *"no objective reader could have any doubt that what FIBA did in the FIBA Decision was extending the ban"*.

52. First Respondent also posits a possible textual interpretation of the operative sentence of the FIBA Decision which would coincide with its contextual interpretation.

53. Finally, and as a subsidiary argument, First Respondent cites the Swiss legal principle of contract interpretation *"falsa demonstratio non nocet"* to the effect that even if an objective reader might understand the language differently, the Parties' intention and understanding was manifest prior to the CAS proceedings and accordingly they should be bound by that common understanding (and not by a hypothetically different objective interpretation).

54. As to the merits, First Respondent stresses as a preliminary matter that under Article 3-300 of the FIBA Internal Regulations, sanctions imposed on one entity can be imposed on another entity on the basis of direct or indirect legal or factual links that justify the extension. For First Respondent, this reveals two important misconceptions in Appellant's argumentation: (i) that there is a requirement for FIBA to establish not just a sufficient objective link but rather a

subjective intent of the award debtor to avoid its obligations; and (ii) that the essential or principal basis for establishing the requisite link or links between entities involves formal legal criteria rather than the factual links which are at the core of Article 3-300:

"Based on the plain wording of Article 3-300 of the FIBA Internal Regulations, the provision is not limited to legal links, or scenarios of legal succession, or cases in which an arbitration clause could be extended to a third party under Swiss law. Rather, FIBA made use of its autonomy under Swiss law to go a step further and catch cases where factual links exist, because those links are sufficient to create a legitimate liability expectation, the frustration of which would endanger the protection of pacta sunt servanda in the world of basketball".

55. First Respondent then identifies the series of links – essentially of a factual and *"sporting"* character, rather than a strictly legal character – which it asserts establish grounds to extend the sanction, i.e.:

- the *"striking continuity in terms of localities … [which] creates the impression to the basketball community that we are dealing with one and the same club"*;

- the fact that New Club *"is doing business, i.e., is appearing publicly in basketball, under almost the same name"* or holding itself out as the same or a successor entity, the different corporate names being irrelevant, since the mere corporate name is something *"nobody really knows or has an interest in"*;

- the *"continuity in 'look and feel' conveyed to the public by the New Club's playing in literally the same blue jerseys with white stripes"*;

- the continuity in personnel, noting the continuity at coaching and managerial levels and that a higher proportion of players on Old Club's 2015/2016 roster played with New Club in 2016/2017 than with Old Club in 2014/2015;

- the fact that the relevant basketball and sports databases view Old Club and New Club as one and the same;

- the temporal coincidence between Old Club's financial difficulties and bankruptcy and New Club's surfacing and entering (directly, as permitted in Bulgaria, in what First Respondent refers to as a *"direct swap"*) the first national league.

56. First Respondent concludes that:

"All the above-mentioned factors show very clearly that the present case is precisely the type of scenario for which Article 3-300 of the FIBA Internal Regulations was designed: Old Cherno More got into financial difficulties and moved its basketball operations including players, coaches and managers to New Cherno More, while continuing to use the same headquarters, stadium, jersey colours and virtually the same name, all of which leads to the result that the basketball community is regarding them as one and the same club - which is precisely what New Cherno More sought to achieve, i.e., to carry over all the tangible and intangible assets of Old Cherno More while hoping to avoid the latter's debts, which have resulted in a bankruptcy proceeding having been

initiated over Old Cherno More. For all of the above reasons, FIBA had every right to apply Article 3-300 of the FIBA Internal Regulations in the case at hand".

57. First Respondent accordingly requests that CAS grant the following relief:

"I. dismiss all prayers for relief submitted by the Appellant;

II. order the Appellant to pay the entire costs of the present arbitration;

III. order the Appellant to pay the legal fees and expenses of the First Respondent".

C. Second Respondent

58. As noted above, Second Respondent's answer was deemed inadmissible. At the hearing, however, he had the opportunity to briefly address the Sole Arbitrator. His remarks reflected his full agreement with First Respondent's position and requests for relief, and his opinion that the case exemplifies a common practice in Bulgaria professional basketball and requires remedy.

V. JURISDICTION

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

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

60. Article 40 of the FIBA General Statutes provides as follows:

"Subject to articles 14.1.13 and 32.2, any dispute arising from these General Statutes, the Internal Regulations, other rules and regulations, and decisions of FIBA which cannot be settled by the FIBA-internal appeals process shall be definitively settled by a tribunal constituted in accordance with the Statutes and Procedural Rules of the Court of Arbitration for Sport (CAS), Lausanne, Switzerland. The parties concerned shall undertake to comply with the Statutes and Procedural Rules of this Court of Arbitration for Sport and to accept and enforce its decisions in good faith".

61. Article 1-178 of the FIBA Internal Regulations provides as follows:

"A further appeal against the decision by the Appeals' Panel can only be lodged with the Court of Arbitration for Sport in Lausanne, Switzerland, within thirty (30) days following receipt of the reasons for the decision. The Court of Arbitration for Sport shall act as an arbitration tribunal and there shall be no right to appeal to any other jurisdictional body".

62. The Parties do not dispute the jurisdiction of the CAS in the present case, as confirmed in the signed Order of Procedure.

63. Thus, and in accordance with Article R47 of the CAS Code, the CAS has jurisdiction to hear the present dispute.

VI. ADMISSIBILITY

64. The Statement of Appeal complied with the requirements of Articles R48 and R64.1 of the CAS Code and was timely filed. Thus, it follows that the Appeal is admissible.

VII. SCOPE OF THE SOLE ARBITRATOR'S REVIEW

65. According to Article R57 of the CAS Code,

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance …".*

VIII. APPLICABLE LAW

66. The law applicable in the present arbitration is identified in accordance with Article R58 of the CAS Code.

67. Pursuant to Article R58 of the CAS Code, the Sole Arbitrator is required to decide the dispute:

> *"… according to the applicable regulations and, subsidiarily, to 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

68. In the present case the "applicable regulations" for the purposes of Article R58 of the CAS Code are, indisputably, the FIBA regulations, because the appeal is directed against decisions issued by FIBA, applying its rules and regulations.

69. As a result, in addition to the aforementioned regulations, Swiss law applies subsidiarily to the merits of the dispute, given that Switzerland is the country in which FIBA, i.e., the federation which has issued the challenged decision, is domiciled.

IX. LEGAL DISCUSSION

A. Regarding Appellant's Right to be Heard and the Curative Effect of *de novo* Review under Article R57 of the CAS Code

70. The Sole Arbitrator accepts First Respondent's assertion that the *de novo* review contemplated by Article R57 of the CAS Code, and the similarly expansive review practiced at the level of the FIBA Appeals' Panel, must be understood to cure any violation – which violation in this case

First Respondent does not appear to deny – of Appellant's right to be heard occasioned by its not being invited to present its position to FIBA prior to the handing down of the FIBA Decision by the Secretary General.

71. The jurisprudence in this regard is abundant. The discussion in MAVROMATI/REEB, The Code of the Court of Arbitration for Sports, pps. 508 *et seq.*, and the supporting jurisprudence cited, including the observation of a CAS panel to the effect that the *de novo* hearing is:

> *"a completely fresh hearing of the dispute between the parties* [and thus]*, any allegation of denial of natural justice or any defect or procedural error even in violation of the principle of due process which may have occurred at first instance... will be cured by the arbitration proceedings before the appeal panel and the appeal panel is therefore not required to consider any such allegations"* (CAS 2008/A/1574).

72. To similar effect, the same authors observe (on p. 514) that CAS panels regularly reject arguments as to procedural deficiencies in the previous instance on the basis of this curative effect, noting the well-established CAS jurisprudence according to which *"… (…) the virtue of an appeal system is that issues relating to fairness of the proceedings before the authority of first instance fade to the periphery"* (CAS 2010/A/2124).

73. On this basis, the Sole Arbitrator cannot but conclude that the seeming violation of Appellant's right to be heard at the level of the FIBA decision has been cured by the Appealed Decision and by these CAS proceedings themselves.

74. The Sole Arbitrator believes it appropriate to note the apparent (and entirely unexplained and undefended) anomaly in the treatment afforded to the club against which sanctions for failing to honour a BAT award are imposed and the *"new"* or successor club to which they are extended: Article 3-301 of the FIBA Internal Regulations expressly provides for a right to be heard for a club – referred to as the "first party" (here, Old Club) – before sanctions are initially imposed against it for having failed to honour a BAT Award; but no such right is expressly accorded to the club (here, New Club) against whom sanctions are proposed to be extended, beyond the general language of Articles 1-126 and 1-127 providing that violations of the FIBA Internal Regulations may be sanctioned and (as noted above) *"The entity/person concerned shall have a right to be heard"*.

75. To the extent this apparent anomaly is explained by FIBA's eventual understanding that *"new"* and *"old"* clubs are (legally and/or factually) one-and-the-same, this could hardly be a convincing explanation for the absence of an opportunity for New Club to be heard in the first FIBA determination, as it assumes the very conclusion of the inquiry which should be carried out in connection with the application of the rule to the particular circumstances.

76. Especially, in these circumstances, involving a "test case" application of the rule, the Sole Arbitrator cannot conceal certain misgivings as to the appropriateness of what appears to be a rule-based practice or policy of FIBA which appears to fly in the face of good practice, FIBA regulations in general, and Swiss law.

77. Notwithstanding these misgivings, the Sole Arbitrator notes that Appellant was eventually granted a full right to be heard in the FIBA Appeals' Panel proceedings and concludes that, in any case, Article R57 of the CAS Code and consolidated CAS jurisprudence requires that the denial of Appellant's right to be heard at the level of the initial FIBA proceedings be understood to have been cured by the present CAS proceedings.

78. On this basis, the Sole Arbitrator concludes that Appellant's challenge to the Appealed Decision based on alleged violations of its right to be heard (and summarized in paragraphs 36-44 above) must be rejected.

B. Regarding the Validity / Interpretation of the FIBA Decision

79. The proper meaning/interpretation of the FIBA Decision has given rise to significant debate in this CAS proceeding; on the other hand, the point appears not to have raised, or at least not significantly raised, in the FIBA Appeals' Panel proceeding.

80. First Respondent would put an early end to the debate on this issue by application of principles (*estoppel*, *venire contra factum proprium* and *falsa demonstratio non nocet*) which would preclude Appellant raising the issue now when it had not done so earlier.

81. The Sole Arbitrator is not persuaded by these arguments. These principles have, or should have, in the Sole Arbitrator's view a much more limited scope of application in a disciplinary proceeding or a dispute involving regulatory interpretation than in matters of contractual interpretation. In the latter situation, clear manifestations of intent and understanding can and should in appropriate circumstances give rise to legitimate expectations which should not be readily defeated when reasonably relied on by the other party; in the present circumstances, especially in a regime of *de novo* review, the scope for the application of these principles is reduced.

82. First Respondent has further presented a contextual analysis in favour of concluding that the intent behind the FIBA Decision was to extend the sanction (and not impose joint and several liability) and this was the clear understanding of New Club.

83. Taken to its extreme, however First Respondent's position is that the FIBA Decision cannot be understood to make Appellant jointly and severally liable for Old Club's monetary obligations under the BAT Award because that would be impossible in a case involving the extension of sanctions and no objective reader could have understood otherwise.

84. The Sole Arbitrator is not persuaded that no objective reader could have concluded otherwise.

85. After all, notwithstanding what would appear to be some three months of investigation (*"research"*) of the situation by FIBA, the FIBA Decision is scarcely a page-and-a-half long, and the *"isolated"* sentence which First Respondent says (not without some basis) Appellant takes out of context is nothing less than the dispositive or conclusory sentence. And it says what it says: *"FIBA herewith confirms that the obligations of the losing party under the BAT Award 0746/15 shall apply jointly and severally to: BC Cherno More Port Varna, BC Cherno More Ticha"*. A joint and several

obligation is hard, if not impossible, to reconcile, on its face at least, with the extension of a prohibition (a registration ban); the *"losing party"* under the BAT Award was Old Club, and its essential or sole *"obligation"* thereunder was to pay the Player his unpaid salary.

86. While the Player was not able to answer the question when put to him at the hearing, his conduct in this proceeding and (to the extent able to be gleaned from the file) at the level of the FIBA Appeals' Panel, strongly suggests that he understood the FIBA Decision to render Appellant directly (i.e., jointly and severally) liable to him for Old Club's monetary obligation under the BAT Award.

87. Thus, the Sole Arbitrator would be inclined to agree with Appellant that an objective reader would not (or at a minimum, might not) necessarily understand the FIBA Decision to have extended, and only to have extended, the registration prohibition sanction. Yet the Sole Arbitrator cannot go so far as to agree with Appellant that it was *"confronted with unclear or even contradictory rules that can be understood only on the basis of the de facto practice over the course of years of a small group of insiders"*, and this to such an extent that the FIBA Decision *"must be declared invalid and unenforceable against the latter on the basis that it violates the principle of legal certainty"*.

88. Instead, on the basis of the entirety of the facts and circumstances, including in particular the overall text and context of the FIBA Decision containing the unfortunate and infelicitous operative sentence, the posting of the extension on FIBA's website and Appellant's conduct (and the understanding of the purport of the FIBA Decision manifested by its conduct) prior to raising the issue in these proceedings, the Sole Arbitrator concludes that – however an "objective" or "non-insider" reader might have understood the sentence in question – Appellant understood that it involved the extension to it of the registration prohibition initially imposed on Old Club.

89. On this basis, the Sole Arbitrator concludes that Appellant's challenge to the Appealed Decision based on the drafting of the operative sentence of the FIBA Decision (and summarized in paragraphs 32-35 above) must be rejected.

X. MERITS

90. The Parties' respective positions on the merits of this dispute have been succinctly summarized above.

91. So too has the core reasoning and conclusions of the FIBA Appeals' Panel contained in the Appealed Decision, finding that on the basis of all relevant facts and circumstances, FIBA had discharged its burden of proof to establish sufficient linkage – factually and objectively – between New Club and Old Club to warrant the extension of sanctions under Article 3-300 of the FIBA Internal Regulations *"in order to protect the principle of pacta sunt servanda in the world of basketball and to protect the liability expectations"*, and stressing that *"it seems that the Appellant has in no way whatsoever made any efforts to try to dissociate itself from [Old Club] in relation to the public perception … that at least from a sporting perspective it is one and the same club"*.

92. The Sole Arbitrator agrees.

93. Certain of the factual links stressed by First Respondent do indeed seem, as Appellant affirms, deserving of relatively little or no weight.

94. In this category, the Sole Arbitrator would put the fact that a significant number of players on Old Club's 2015-2016 roster played in the 2016-2017 season for New Club. Whether this continuity involves five of eleven players, as First Respondent asserts, or four of seventeen players as Appellant asserts, all (or at least four) of such players are asserted by Appellant (without objection by First Respondent) to be *"local boys born in Varna"* such that *"[i]t is very natural that local players would be recruited for the team irrespective of the fact that once they may have played for another local club"*.

95. This would seem to render this evidence of linkage (together with similar evidence of identity or similarity or overlap at the coaching and management levels) as being of limited relevance to the inquiry at hand.

96. The same can be said as to the fact that New Club plays in the same city and in the same arena as Old Club played. Again, it is common ground that Varna is a receptive market for basketball in Bulgaria and that the arena in which New Club plays is *"the only suitable and licensed hall for basketball events in Varna"*.

97. Thus, this evidence of linkage should not be accorded material relevance either.

98. On the other side of the coin, certain factual elements pointing towards an absence of linkage (or of material linkage) asserted by Appellant and acknowledged by First Respondent similarly do not appear especially relevant to the present inquiry. These include, among others, the different corporate names, licenses, VAT registration numbers and the like of Old Club and New Club.

99. As First Respondent states:

> *"… [I]t is utterly irrelevant for the purposes of the present arbitration whether Old Cherno More is a different legal entity than New Cherno More, whether they hold different licenses, whether they are registered under different registration numbers, whether New Cherno More is a legal successor of Old Cherno More and whether an arbitration clause signed by Old Cherno More could be extended to New Cherno More".*

100. What is left, and what the Sole Arbitrator considers (as did the FIBA Appeals' Panel) to be the essential elements of linkage in this case involve questions as to what First Respondent has referred to as the *"impression in the basketball community"* or the *"public impression"* or *"brand"* or *"look and feel"* under which New Club holds itself out.

101. In this regard, the Sole Arbitrator is persuaded that First Respondent has adequately established that New Club is indeed *"doing business, i.e., is appearing publicly"* under an almost identical name to that under which Old Club appeared. And this, due to the inclusion of *"Cherno More"* – referred to by First Respondent as *"the core part"* of the brand name that *"defines the identity of the Club"* – in the name under which it plays.

102. The Sole Arbitrator takes note of, and accepts, Appellant's explanation that *"Cherno More"* is part of the name of New Club's principal sponsor and that the inclusion of a sponsor's name in a club's name (*"added only to provide publicity for the sponsor"*) is entirely commonplace and expressly permitted under applicable Bulgarian basketball rules. But regardless of the differences in official, corporate names, and the permissibility of the inclusion of *"Cherno More"* in the name or *"brand"* under which New Club plays and presents itself to the market, the fact that *"Cherno More"* was also an essential (or the essential) distinguishing element of Old Club's *"brand"* renders this linkage one of very significant relevance for purposes of the Article 3-300 inquiry.

103. As stated by First Respondent, *"The factual link is … evaluated when comparing the appearance of the club in the public and the name used in the basketball community, not the corporate name which nobody really knows or has an interest in"*.

104. Another element of factual or sporting linkage which points in the same direction is the similarity in the uniform under which New Club plays with that under which Old Club played. First Respondent asserts that both clubs played *"in literally the same blue jerseys with white stripes … [creating a] continuity in the 'look and feel' [which] further strengthens the public impression that [the two] are one and the same club"*. Appellant's response on this point is limited to the unconvincing mention of the fact that New Club uses an *"obviously different"* emblem on its jerseys and thus *"[t]he external appearance of BC Ticha is not the same as that of BC CMPV"*.

105. As to the contents of *"the relevant basketball and sports databases"*, as a reflection of the *"legitimate liability expectations on the part of the basketball community"*, First Respondent asserts that they reflect as *"common ground to virtually everyone in basketball that this is clearly one and the same club, irrespective of whether there have been legal changes in the background"*.

106. Appellant may have a certain basis to question the specifics of First Respondent's allegations in this regard. But its response fails to establish any meaningful action it took to correct or dissociate itself from a perception that it was or might be, on a factual and sporting, if not legal basis, in substantial part a successor of Old Club insofar as public perception in the basketball community – based in large part on the brand name under which it plays and the *"look and feel"* reflected in its jerseys, but also on the other factors of less relevance noted above.

107. Accordingly, the Sole Arbitrator concludes that sufficient linkages exist as to warrant the application of the Article 3-300 sanction extension to New Club.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 28 March 2017 by Basketball Club Ticha against the decision of the FIBA Appeals' Panel dated 27 February 2017 is rejected.

2. The decision taken by the FIBA Appeals' Panel on 27 February 2017 is confirmed.

(…)

5. All other motions or prayers for relief are dismissed.