Arbitration CAS 2017/A/5205 FC Koper v. Football Association of Slovenia (NZS), award of 6 March 2018

Panel: Mrs Svenja Geissmar (United Kingdom), President; Mr Rui Botica Santos (Portugal); Mr Dominik Kocholl (Austria)

Football
Denial of club license to participate in the domestic professional football competitions
Scope of the appeal and standing to be sued
Admissibility of new evidence
Discretion of the licensing authority

1. **If a club's primary request for relief is solely aimed at obtaining a license for participation in the first domestic professional football league, but doesn't comprise a request to be reinstated in such competition as one of the clubs participating in it if it were to be granted such license, the scope of the appeal is limited to whether or not the authority granting the license should have issued it to the club. The absence of the club that could potentially be replaced in the competition by the club requesting the license does not prevent the CAS from potentially ruling that the club should be granted a license, for the issuance of such license is a matter between the club requesting it and the authority granting it.**

2. **Pursuant to Article R57 of the CAS Code, new evidence may in principle be submitted for the first time in the proceedings before CAS. However, pursuant to Article R57.3 of the CAS Code, CAS Panels also have the *"discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered"*. Moreover, for cases falling under their scope, the scope of review provided under the applicable regulations will supersede the general procedural provision of Article R57 para. 3 CAS Code as *lex specialis*. Therefore, if the applicable regulations regarding issuance of license are clearly stating that no new evidence can be presented if it had not been presented in the proceedings before the deadline to appeal at domestic level the first instance decision, such new evidence cannot be taken into account by a CAS panel. In any case, such prohibition to file new evidence serves a legitimate purpose in the context of a licensing system, because allowing a party to file new evidence for the first time before CAS would undermine the authority of the domestic licensing bodies and create unequal treatment of the clubs, while at the same time putting the desired certainty of knowing which clubs will participate in the relevant domestic competitions some time before the start of such competition at risk.**

3. **If considerable leeway is granted by the applicable regulations to the licensing authority in deciding whether or not to issue a license, the task of the CAS panel is limited to**

reviewing whether or not such authority made correct use of its discretion and could reasonably come to the conclusion that it reached.

I. PARTIES

1. FC Koper (the "Appellant" or the "Club") is a multi-disciplinary football club with its registered office in Koper, Slovenia. The Club is registered with the Football Association of Slovenia.

2. The Football Association of Slovenia (*Nogometna zveza Slovenije* – the "Respondent" or the "NZS") is the national governing body of football in Slovenia with its registered office in Kranj, Slovenia. The NZS is affiliated to the *Union des Associations Européennes de Football* ("UEFA"). The NZS has a dual licensing system in place and is therefore responsible for the issuance of licenses to Slovenian clubs that are to participate in the domestic professional football competitions and to Slovenian clubs that are to enter into UEFA competitions.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence examined in the course of the proceedings and at the hearing. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

A. Background facts

4. On 1 February 2017, following a proposal submitted by the Club on 3 November 2016, the District Court in Koper issued a decision to initiate the proceedings of compulsory settlement against the Club.

5. Also on 1 February 2017, the District Court in Koper published a notice to all the creditors to declare their claims to the Club.

B. Proceedings before the NZS Committee for Club Licensing

6. On 31 March 2017, the Club, in accordance with the NZS' Club Licensing Regulations (the "NZS CLR"), filed an application for a license to participate in UEFA competitions as well as in the Slovenian first division for the competitive season of 2017/2018. According to the Club, and as part of this application, it filed an independent audit report dated 31 March 2017[1].

[1] According to the NZS, the independent audit report was only submitted between 14 and 20 April 2017.

7. On 10 April 2017, the NZS informed the Club via email that the documentation submitted with the license application was incomplete and requested missing documents and information to be filed by 20 April 2017. The Club was, *inter alia*, informed as follows:

> *"In the written presentation, the applicant must also indicate whether, for them or their related legal person or any person, that is included in the reporting entity, in the last twelve months prior to the licensing season, a proposal for the introduction of a compulsory settlement, a final decision to initiate the compulsory settlement, a compulsory settlement procedure is being carried out or a final decision on the completion of compulsory settlement has been issued".*

8. During the process of the application for the license, two meetings were held between representatives of the NSZ Licensing Department and the Club.

9. According to the Club, on 14 April 2017, it filed an extended independent audit report with the NZS Licensing Department[2].

10. According to the Club, on 21 April 2017, the Club concluded a contract with the Municipality of Koper, pursuant to which funds in an amount of EUR 350,000 were allocated to the Club[3].

11. On 27 and 28 April 2017, the two biggest creditors of the Club were said to have deferred the Club's payment obligations (of EUR 2,120,000 and EUR 936,380.47 respectively) until 31 May 2018 and, according to the Club, statements confirming these commitments were delivered to the NZS[4].

12. On 3 May 2017, the NZS Committee for Club Licensing (the "NZS CCL") issued its decision (the "First Instance Decision") with the following operative part:

> *"The application of FC Koper* […] *for:*
>
> *1. granting a license for competing in 1. Champions League in Competitive year 2017/2018,*
> *2. granting a license for UEFA competition in Competitive year 2017/2018,*
>
> *is denied".*

C. Proceedings before the NZS Appellate Licensing Committee

13. On 15 May 2017, the Club challenged the First Instance Decision before the NZS Appellate Licensing Committee (the "NZS ALC").

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[2] According to the NZS, the extended independent audit report was only submitted with the Club's appeal against the First Instance Decision on 15 May 2017. The NZS also argues that the fourth page of the extended report (an appendix with an "emphasis of matters") was only submitted with the Club's Appeal Brief in the present proceedings before CAS on 3 July 2017.

[3] According to the NZS, this contract was only submitted with the Club's Appeal Brief in the present proceedings before CAS on 3 July 2017.

[4] According to the NZS, these deferrals were only submitted with the Club's request for revision before the NZS CCL on 5 June 2017.

14. On 23 May 2017, the Club concluded a contract with a company, pursuant to which the company purchased the Club's claim in an amount of EUR 500,000 against a debtor originating from a sponsorship contract.

15. On 29 May 2017, the Club's creditors are submitted by the Club to have voted in favour of a compulsory settlement agreement for the Club's debts towards several creditors[5].

16. On 29 May 2017, the Club filed with the NZS ALC both the contract concluded with the company on 23 May 2017 and a statement of the administrator confirming that *"we can reasonably conclude that the legally required majority of creditors voted IN FAVOUR of the compulsory settlement"*.

17. On 1 June 2017, the NZS ALC rendered its decision (the "Appealed Decision") which was notified to the Club on 2 June 2017, with the following operative part:

> *"1. The appeal of the FC Koper* […] *against the decision of the NZS commission for football club licensing* […]*, is in disputed part rejected.*
>
> *2. The plea tax is not refunded to the Appellant".*

18. According to the Club, on 1 and 2 June 2017, the Club submitted the documents confirming the deferral of debts by the Club's two main creditors again[6].

19. The grounds of the Appealed Decision (the original is in Slovenian language) determine, *inter alia*, as follows:

> *"After a careful analysis of the allegations of the appellant and all the prepositioned documents, the Committee finds that the appeal is unfounded. For such a decision to be taken, careful consideration of the actual situation was needed and the whole documentation in the sense of meeting the condition F.01 from The Regulation.*
>
> *Key concern from the contested decision has referred to the report of the authorized auditor, which contains emphasized matters regarding unlimited duration of the club's functioning that indicate that the licence applicant is not able to function as a functional legal person until the end of the season, for which the licence is being granted. A key circumstance regarding the assessment of the fulfilment of the criteria F.01, the body of first instance has taken into account the fact that the appellant is insolvent, because the debt settlement proceedings is in progress towards him.*
>
> […] *In the report of the authorized reviewer for the procedure of the debt settlement proceedings of the society (date of the report is 24.1.2017), which was annexed in the complaints procedure, it is visible that on the 30.9.2016 the combined amount of the common claims, for which the confirmed debt settlement proceedings will take place, in the amount of 3.713.743 €. From the proposal of the debtor, the creditors*

[5] According to the NZS, the vote only took place between 7 July and 7 August 2017.
[6] According to the NZS, these deferrals were only submitted with the Club's request for revision before the NZS CCL on 5 June 2017.

will be repaid in the amount of 4,5% of the claims, in instalments in the period of three years from the definitive confirmation of the debt settlement proceedings.

The above stated per se does not prevent or preclude the licence granting body to grant the licence for the following competition season, if there is possible to positively assess all the submitted documents until the decision of the body of first instance and newly presented documents from appellant or the licence seeker. For reaching a decision that the appeal is rejected as unfounded, several factors are important. Firstly, the licence committee for appeal has evaluated the evidential value of the new, additionally supplied report of the independent auditor.

[…]

The committee has concluded, firstly, that the new report was made by the same authorised auditor of the accounting statements, this is the audit company Valuta d.o.o., same as the first report, which is a part of the primary licence documentation; secondly, that the new report is dated with the same date as the first one, that is 31.2.2017[7], *which is very important considering the fact, that the final conclusion from the second report importantly differs from the final conclusion, which the same independent auditor had adopted in his first report.* […]

The committee is of the opinion that from the second report still arises the so called emphasized matter- with connection to the ability of the appellant to operate as a functioning society-, which imposes a greater care on the licence granting organ regarding the documentation analysis and taking the final decision. The auditor has pointed out also in the second report the negative society fund in the amount of 3.719.572 €, which "can indicate uncertainty, which can raise doubt in the ability of the society to continue long term operating as a functioning society". The Committee estimates the statement of long term solvency of the club, which is justified in the auditor report by the appellant with the estimated value of the professional players in the amount of 3.875.000,00 €, as misleading and as such legally irrelevant. The Committee estimates that no football club can justify its solvency on the estimated value of its players, as registered players are an essential condition and reason for the functioning of the club. […] *Regarding the justification of the solvency on the estimated value of contracts with professional players, which is pointed out by the auditor regarding the planned accounting information, reasonable doubt exists about the credibility of the new report of the auditor, which importantly lowers the evidential value of this second report, which is otherwise with regard to the opinion of the appellant of crucial importance for the decision in the appeal.*

In the planned accounting information the appellant, among other, foresees on the yearly basis of around 500.000 € of income from the sponsorship contract with the main sponsor, Luka Koper d.d. At the same time the appellant in the written presentation of the management (dated 20.4.2017) also states the one-sided termination of the sponsorship contract from the main sponsor Luka Koper d.d., about which the appellant is of the opinion that there are no contractual reasons. However at the same time he states, that the creditors' meeting had decided, that they will on the session of the creditors' meeting (26.4.2016) decided to suggest to the court, to concur with the extension of the deadline for the allowed change in the plan of financial restructuring, for two months. In this time the appellant would obtain a new opinion of a suitable reviewer, that in spite of this circumstance there will be a sufficient degree of probability, that

[7] The Panel observes that the initial audit report is dated 31 March 2017 instead of 31 February 2017 and considers this to be an obvious typo.

the execution of the plan of the financial restructuring in such circumstances will allow short and long term solvency of the society.

Because the withdrawal of the main sponsor from the ongoing monthly financing of the club (regardless of the reasons) is concerned, in this moment this represents the inability of the realisation of the announced accounting information for the following season, for which the licence is being granted. The assessment of the ability of the club's operation until the end of the season, for which the licence is being granted, is strongly characterized also by the fact that it is necessary to conclude the licencing procedure until 31.5.2017. The Committee can therefore as relevant take into account only the facts and documents, which are available on the day of the decision making. For licence granting the Committee cannot take into account the more or less uncertain estimations about the possible confirmation of debt settlement proceedings, and it cannot foresee that it will and when the confirmation of the debt settlement proceedings become definite. Also under the material insolvency law, the situation of the insolvency of the debtor ceases with the definite decision on the confirmation of the debt settlement proceedings. The submitted documentation from the appellant does state, that his estimation, that the definite decision on the confirmation of the debt settlement proceedings will probably occur in the last quartile of the year 2017, therefore also the announced accounting information and the estimate of the execution of the plan of the financial restructuring of the appellant base on two assumptions: that the debt settlement proceedings in the proposed content will be confirmed in the current year and that in this year the decision of the court will be definite. Also the estimated situation of the negative society fund on the 31.12.2017 is based on these starting points. By the opinion of the Committee, the submitted documents and further procedures of debt settlement proceedings are unpredictable to the point, which at no terms allow and do not enable the licence granting body to accept a positive motion.

The committee has on the basis of the D 16. article of the Appendix V of The Regulation, after it assessed that the additional auditor opinion does not represent a proper basis for the justification of the appeal and the grant of the licence (restricted evidential value and emphasized matter in it), focused its attention on the assessment of the ability of the club's operation until the end of the season, which is being licensed. From the mentioned article of the The Regulation it arises that the licence can be granted if the granting body has received and positively assessed the additional documentary evidence, which show that the applicant for the licence can proceed as a functional legal person at least until the end of the season, for which the licence is being granted. With this the key assessment holds at least the announced accounting information. After the assessment of these, which are as stated above, in the appeal process, remained the same as in the first instance procedure, there is justifiable impossible to assess the ability with enough certainty that the club will be able to operate for the whole upcoming competitive season. With the adoption of this assessment the Committee has taken into consideration the above stated and the fact that the club is still insolvent. On the basis of the publically available official records mostly regarding the direction of the debt settlement proceedings and the uncertainty of its confirmation, the Committee concludes, that the risk that the club will not be able to operate through the whole upcoming competitive season, is too big.

Therefore, the Committee has rejected the unfounded appeal and with this confirmed the decision of the committee of the first instance, where there was rejected the demand for the grant of the licence for the competition in 1. SNL".

D. Request for revision before the NZS Committee for Club Licensing

20. On 5 June 2017, given the rejection of the license by the NZS ALC and due to the fact that allegedly several crucial documents were not taken into account at the moment of rendering the decision, the Club filed before the NZS a "Proposal for Revision against the decision of the NZS Committee for Club Licensing".

21. On 19 June 2017, the NZS CCL rejected the aforesaid request.

22. On 20 June 2017, the NZS Executive Board adopted a resolution, following the proposal communicated by the NZS Secretary General on 19 June 2017 and pursuant to Article 27 of the NZS Articles of Association, determining the 10 participants for the 1.SNL in the 2017/2018 sporting season.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

23. On 23 June 2017, the Club filed a Statement of Appeal with CAS in accordance with Article R48 of the Code of Sports-related Arbitration (2017 edition) (the "CAS Code"). In this submission, the Club requested the matter to be referred to a sole arbitrator and that the proceedings would be expedited in accordance with Article R52 of the CAS Code.

24. On 28 June 2017, the NZS informed the CAS Court Office that it did not agree with the appointment of a sole arbitrator and objected to the implementation of an expedited procedure.

25. On 29 June 2017, the CAS Court Office informed the parties that in light of the NZS' objection, no expedited procedure would be implemented and requested the NZS to state whether it intended to pay its share of the advance of costs.

26. On 3 July 2017, the Club filed an urgent Request for Provisional Measures, requesting the President of the CAS Appeals Arbitration Division to *"admit the present request for provisional and conservatory measures and grants the stay of the execution of the decision notified to the Club on 2 June 2017 by the NZS Appellate Licensing Committee"*. Furthermore, the Club requested the CAS Court Office to *"inform the club that was promoted to the 1.SNL once the Appealed Decision was implemented – KLUB NK ANKARAN – about the initiation of the present arbitral proceedings"*.

27. Also on 3 July 2017, the Club filed its Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments. The Club challenged the Appealed Decision, submitting the following requests for relief:

> *"a. To annul and leave without effect the decision rendered by the NZS Appellate Licensing Committee in the matter of reference, and to render a new decision in which FC Koper shall be granted a license for competing in 1.SNL (the highest division under NZS) for the Competitive year 2017/2018.*
>
> *b. Condemn the Football Association of Slovenia to pay all legal costs and other expenses incurred by the Appellant with regard to the present procedure".*

28. On 4 July 2017, the CAS Court Office invited the club NK Ankaran-Hrvatini to:

- Indicate whether it wishes to intervene in these proceedings;
- In the affirmative:
  - file an application to this effect, together with the reasons thereto; and
  - file its position regarding the Appellant's request for provisional measures.

29. On 4 July 2017, the NZS indicated that it intended to pay its share of the advance of costs for the present matter.

30. On 6 July 2017, further to a request for confirmation from the CAS Court Office, the Club indicated that it maintained its position regarding the appointment of a sole arbitrator.

31. On 10 July 2017, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division had decided to submit the present procedure to a Panel composed of three arbitrators.

32. On 13 July 2017, the NZS filed its Answer to the Request for Provisional Measures filed by the Club, requesting it to be rejected and that the costs and expenses were to be charged to the Club and that the Club shall also pay a contribution to the expenses of the NZS.

33. On 14 July 2017, the President of the Appeals Arbitration Division issued an Order on Request for Stay, with the following operative part:

> *"1. The request for a stay filed by FC Koper on 3 July 2017 in the matter CAS 2017/A/5205 FC Koper v. Football Association of Slovenia, is dismissed.*
>
> *2. The cost of the present Order will be settled in the final award or in any other final disposition of this arbitration".*

34. Also on 14 July 2017, the club NK Ankaran-Hrvatini informed the CAS Court Office as follows:

> *"We note that the club FC Koper lodged an appeal against Football Association of Slovenia. In the appeal we are not named Respondent. Therefore, we don't want to participate in the case.*
>
> *We consider that the request of FC Koper of 3 of July 2017, mentioned in your letter, is late and abusive. FC Koper cannot force us to appear in a case in which they filed an appeal solely against the Football Association of Slovenia.*
>
> *Therefore, we don't believe that CAS can issue any kind of decision to the detriment of NK Ankaran-Hrvatini".*

35. On 17 July 2017, the Club nominated Mr Rui Botica Santos, Attorney-at-Law in Lisbon, Portugal, as arbitrator.

36. On 20 July 2017, the NZS nominated Dr Dominik Kocholl, Attorney-at-Law in Innsbruck, Austria, as arbitrator.

37. On 10 August 2017, the NZS filed its Answer in accordance with Article R55 of the CAS Code. The NZS submitted the following requests for relief:

> *"1. Rejecting in full the Appeal, insofar as it is admissible;*
>
> *2. Ordering Appellant to (i) pay all arbitration costs in full and (ii) pay a contribution towards the legal fees and other expenses incurred by Respondent in connection with these proceedings at an amount of no less than CHF 50,000.00, considering the expenses created by Appellant's request for provisional measures, duly rejected by CAS".*

38. On 17 and 18 August 2017 respectively, further to a request of the CAS Court Office, the NZS indicated that it did not consider it necessary to hold a hearing, whereas the Club indicated its preference for a hearing to be held.

39. On 21 August 2017, pursuant to Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the Panel appointed to decide the present matter is constituted as follows:

- Ms Svenja Geissmar, General Counsel of Arsenal FC, London, United Kingdom, as President;
- Mr Rui Botica Santos, Attorney-at-Law, Lisbon, Portugal; and
- Dr Dominik Kocholl, Attorney-at-Law, Innsbruck, Austria, as arbitrators.

40. On 28 August 2017, the CAS Court Office informed the parties that the Panel had decided to hold a hearing.

41. On 25 August 2017, the Club informed the CAS Court Office that it had mistakenly filed the Slovenian version of a different contract together with an English translation of the correct contract concluded with the Municipality of Koper, pursuant to which funds in an amount of EUR 350,000 were assigned to the Club. The Club therefore requested the Panel to admit the Slovenian version of this contract, bearing in mind that the English version had already been submitted properly.

42. On 12 September 2017, the Club and the NZS returned duly signed copies of the Order of Procedure to the CAS Court Office. The NZS however indicated in the accompanying letter that it maintained all its reservations, notably with respect to the admissibility of the Club's appeal.

43. On 11 October 2017, a hearing was held in Lausanne, Switzerland. At the outset of the hearing, both parties confirmed that they had no objection to the constitution and composition of the Arbitral Tribunal.

44. In addition to the Panel, Mr José Luis Andrade, Counsel to the CAS, and Mr Dennis Koolaard, *Ad hoc* Clerk, the following persons attended the hearing:

For the Appellant:

- Mr Lucas Ferrer, Counsel;
- Mrs Matilde Costa Dias, Counsel;
- Mr Dušan Korošec, Counsel;
- Mr Franci Matoz, Counsel;
- Mr Boris Popovič, Appellant's Business Advisor and major of the city of Koper;
- Ms Klaudija Pravdič, Interpreter.

For the Respondent:

- Mr Lukas Stocker, Counsel;
- Mr Mladen Čičmir, Counsel;
- Mr Siniša Mitrovič, Head of the Respondent's Licensing department.

45. The Panel heard evidence from the following persons, in order of appearance:

- Mrs Alexandra Adorjan, certified author of both audit reports from the company Valuta d.o.o., expert witness called by the Appellant;
- Mr Darko Branilovič, certified auditor and senior partner at the company Valuta d.o.o., expert witness called by the Appellant;
- Ms Andreja Bajuk Music, professional adviser with the Federation of Accountants, Finance and Auditors of Slovenia (RFR Association), expert witness called by the Respondent.

46. All expert witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury under Swiss law. Both parties and the Panel had the opportunity to examine and cross-examine the expert witnesses. The parties then had ample opportunity to present their case, submit their arguments and answer the questions posed by the Panel.

47. Although the Appellant initially also called Mr Boško Županovič, Sports Director of the Appellant and President of one of the main creditors of the Appellant (DELONA d.o.o.), and Mr Matjaž Trebše, certified appraiser who participated in the restructuring plan of the Appellant, and the Respondent initially called Dr. Matjaž Prusnik, Director of Technical Services of the Federation of Accountants, Finance and Auditors of Slovenia (RFR Association), such expert witnesses were withdrawn by the respective parties.

48. At the start of the hearing, the Panel informed the parties that it had decided to admit the Slovenian document filed by the Club on 25 August 2017, but that the former document that had allegedly been filed by mistake would not be deemed withdrawn.

49. Furthermore, during the hearing the Club presented two new documents that it requested to be admitted into to the case file. The first document is a decision issued by the district court of Koper on 28 August 2017, pronouncing the compulsory settlement of the Club. The second document is a decision issued by the Slovenian Supreme Court, ruling that the appeal filed by

the Republic of Slovenia (one of the Club's creditors) against the approval of the compulsory settlement pronounced on 28 August 2017 was partially granted.

50. The NZS did not explicitly object to the admissibility of these documents, but argued that such documents could not lead to any hindsight bias, as the Panel needs to assess the case based on the evidence available before the NZS committees at the relevant time.

51. The Panel decided to admit the two documents and their translations into English to the case file.

52. Before the hearing was concluded, both parties expressly stated that they did not have any objection with the procedure adopted by the Panel and that their right to be heard had been respected.

53. On 19 October 2017, following settlement talks that took place between the parties during the hearing, and upon the joint request of the parties, the CAS Court Office granted the parties a deadline until 4 December 2017 to inform it of a possible settlement agreement.

54. On 4 December 2017, the NZS informed the CAS Court Office that the parties had been unable to find a settlement solution and requested the Panel to render its decision.

55. The Panel confirms that it carefully heard and took into account in its decision all of the submissions, evidence and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

56. The submissions of the Club, in essence, may be summarised as follows:

- The Club maintains that the arguments used by the NZS ALC to consider the appeal filed by the Club as unfounded in the Appealed Decision are mainly that i) it considered the content of the independent audit report to be questionable and not sufficient to grant the license; and ii) it considered that the Club was not short-term solvent to be granted a license. The Club disagrees with the content and the considerations of the Appealed Decision.

- As to the content of the independent audit report, the Club submits that there are neither *"two different reports"*, as is maintained in the Appealed Decision, nor is it true that *"the conclusion from the second report importantly differs from the final conclusion which the same independent auditor has adopted in his first report"*. The *"second"* or *"new"* audit report – as it is referred to in the Appealed Decision – is simply an expanded version of the independent audit report dated 31 March 2017 that was extended by the same auditor at the request of the NZS. Upon the request of the NZS and in accordance with Article 15 NZS CLR, the auditor issued a further and more detailed opinion, whereby the only added information is an *"EXPLANATION REGARDING EMPHASIS OF MATTERS"*.

- Insofar the NZS ALC casts doubt over the value of the extended version of the audit report because it bears the same date as the first audit report, the Club maintains on the basis of witness statements that it is common practice within the certified auditor's environment to maintain the date of the original reports whenever a clarification or further explanations of the content to the latter occurs. As the second audit report complied with the requirements of Article 13 and 14 NZS CLR, the doubts about the credibility of the report are completely unfounded and shall be disregarded by the Panel. To the contrary, the extended version of the audit report is clear in its analysis and confirms that *"THE CLUB WILL BE ABLE TO PERFORM SHORT-TERM AND LONG-TERM SOLVENCY"*.

- The Club furthermore maintains that the decisive element pursuant to the NZS CLR is *"whether the applicant can proceed as a functional legal person at least until the end of the season for which the license is being granted"*. According to the Club, the NZS ALC exclusively focussed on the fact that the auditor disclosed a negative balance of EUR 3,719,572, without even trying to understand all the circumstances and evidence presented surrounding this figure that clearly show the club is solvent both short and long-term.

- The mere fact that the compulsory settlement proceedings are initiated does not mean that the Club is insolvent and therefore does not prevent the Club then being granted a license to compete in the 1.SNL, which is confirmed in the Appealed Decision. According to the Club, the principal mistake of the NZS ALC was to focus on long-term solvency of the Club, while this is not relevant for the purposes of the application made to obtain a license for the 2017/2018 season. The basis for the auditor's conclusion that the Club's negative financial balance is not an obstacle to consider the Club long-term and short-term solvent is that a restructuring plan was voted and accepted by the Club's creditors.

- The Club maintains that the estimated value of the players under contract with it can be considered as an asset of the Club. This consideration in the audit report is however only relevant for the long-term solvency of the Club.

- The Club submits that the NZS ALC disregarded or did not consider other documents that allegedly prove the short-term solvency of the Club:

    - A contract on assignment dated 23 May 2017, which allegedly proves that GRAFIST d.o.o. took over the claims held by the Club against LUKA KOPER d.d. and that it will fully meet the obligations of the main sponsor – which means an annual revenue of EUR 500,000;

    - A statement of the Compulsory Settlement Administrator dated 29 May 2017, which shows the withdrawal of the objection to the plan of financial reorganisation by the creditors;

- The statements of the Club's two main creditors, by virtue of which the payment of their corresponding credits amounting to EUR 3,056,270.47 was deferred until 31 May 2018;

- An offer in the amount of EUR 350,000 was made by Kapaz Professional Football Club LLC for the player Mr Marijan Antolovič on 3 May 2017.

57. The submissions of the NZS, in essence, may be summarised as follows:

- The NZS highlights that it remained undisputed by the Club that it was (and still is) over-indebted and that it was subject of a compulsory settlement procedure – a procedure which is still open and pending today. Furthermore, both audit reports contain a statement highlighting a risk to going concern, *i.e.* raising doubts on the Club's ability to operate as a functioning entity. Additional information provided by the Club throughout the process could not remove these legitimate doubts. The information provided by the Club in the present appeal proceedings before CAS was either already provided before and thus carefully analysed by the NZS committees, or this information cannot be taken into account because it was either provided late or because it is false.

- The NZS refers to CAS jurisprudence in arguing that deadlines for license application procedures are fundamental for the smooth running of competitions and must be applied consistently. All Slovenian 1.SNL clubs had to submit reliable evidence of their financial stability by 31 March 2017 to the NZS CCL and by 15 May 2017 to the NZS ALC. As such, no new evidence could be presented after 15 May 2017.

- The NZS maintains that there is a specific process which must be adhered to when new facts and circumstances come to light following the issue of an auditor's report. This process was however not complied with in respect of the second audit report.

- Pursuant to Article 12 of Annex V to the NZS CLR, costs of players are expensed in the profit and loss account and not entered in the balance sheet. Players can therefore not be deemed as assets. An auditor is also not suited and competent to assess the value of football players on the market. An auditor is also not allowed to calculate the value of assets of the company that is the object of the auditing. In any event, this does not help the Club in reducing its negative financial balance because it only plans to sell one player until the end of 2017 for an alleged amount of EUR 100,000 and, in 2018, players for an alleged amount of EUR 150,000.

- Insofar as the second audit report is modified it is incorrect. The financial restructuring plan has not been approved by a final court decision yet, nor is this foreseeable. In fact, two appeals have been launched against a first decision issued by the competent Slovenian court on 26 July 2017. When the NZS ALC had to take its decision, the Club was insolvent and since the court's final decision is still outstanding, the Club's status is one of an insolvent entity that could disappear any day.

- As to the modified paragraph in the second audit report concluding that the Club is able to continue as a going concern in the short-term, the NZS submits that this statement is unreliable. Since the conclusion is based on the same facts as in the first audit report, it is inexplicable why the conclusion in the second report is different.

- In respect of the documents that were allegedly not taken into consideration by the NZS committees, the NZS maintains the following:

  - As to the contract on co-financing concluded with the municipality of Koper on 21 April 2017, pursuant to which funds in the amount of EUR 350,000 were allocated to the Club, the NZS argues that this document was not disclosed to the NZS Committees.

  - As to the contract on assignment dated 23 May 2017, the NZS maintains that this document was presented to it only on 29 May 2017, *i.e.* well after the expiry of the relevant deadline. This document was also not referred to in the appeal before the NZS ALC. Even if the document could be taken into account, it is unclear whether the assignment is permitted and enforceable. Since the main sponsor of the Club withdrew itself from its sponsorship agreement, the main source of funding disappeared.

  - As to the statement of the Compulsory Settlement Administrator dated 29 May 2017, the NZS argues that also this document was presented to it only on 29 May 2017 and thus late. Although the Slovenian court issued a first decision on 26 July 2017, this decision is not final, since at least two appeals have been lodged against it.

  - As to the statements of the Club's two main creditors, the NZS maintains that these documents were received late, *i.e.* only with the proposal for revision which was filed on 5 June 2017. On the basis of documents presented by the Club, the NZS concludes that it was not possible for the Club to file these two statements to the NZS on 27 and 28 April 2017.

  - As to the offer of EUR 350,000 dated 3 May 2017 for the Club's player Mr Marijan Antolovič and the offer of EUR 500,000 dated 10 May 2017 for the Club's player Mr Niko Bičič, the NZS maintains that these offers were not presented to the NZS ALC. It was in fact disclosed to the NZS ALC that the Club planned to sell one player for an amount of EUR 100,000 by the end of 2017.

- As to the debt settlement proceedings, the NZS argues that the Club is clearly insolvent, because insolvency is a prerequisite for compulsory settlement proceedings. This conclusion is supported by a certified assessor, following the Club's proposal to initiate the proceedings of a simplified compulsory settlement in June 2016. According to the NZS, one creditor is in strong opposition towards the solution of writing off

95.5% of the due claims by means of a court ruling and is constantly filing appeals, which makes it very difficult to predict when such court decision will be final.

V. JURISDICTION

58. The jurisdiction of CAS derives from Article 17 NZS Articles of Association (version dated 21 April 2016), determining as follows:

> *"3. In any case, the last instance for resolving a dispute with a national element, arising from or related with the application of the Articles of Association or other NZS regulations, shall be an independent and impartial arbitration whose decision on the dispute shall be final.*
>
> […]
>
> *5. The composition of the arbitration body and the arbitration procedure shall be set by the NZS IO in rules of procedure.*
>
> […]
>
> *7. The NZS, members of the NZS and their respective members, leagues, club association, officials, players and licenced agents of the NZS as well as agents at FIFA and UEFA matches shall, based on the respective articles of association of FIFA and UEFA, comply with the exclusion of regular courts, recognise the competence of CAS and abide by its decisions".*

59. The NZS confirmed that the independent arbitration body to be constituted by the NZS IO (*i.e.* the NZS Executive Committee) in accordance with Article 17(5) NZS Articles of Association has not been established yet.

60. Article R47 of the CAS Code establishes the following:

> *"An appeal against the 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 it prior to the appeal, in accordance with the statutes or regulations of that body".*

61. The Panel observes that the NZS CLR does not explicitly provide for the possibility of lodging an appeal against decisions of the NZS ALC. As set out above, the jurisdiction of CAS does not derive from the NZS CLR, but from the NZS Articles of Association. In the absence of an independent and impartial arbitration body having been established by the NZS, it remained undisputed between the parties that CAS shall fill this gap.

62. The jurisdiction of CAS is further confirmed by the Order of Procedure duly signed by both parties.

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

VI. ADMISSIBILITY

64. The NZS submits that the appeal filed by the Club is inadmissible, because the NZS lacks standing to be sued (alone). The NZS argues that, because the Club did not involve NK Ankaran-Hrvatini as a party to the proceedings, CAS cannot issue an award against this third club. Involving NK Ankaran-Hrvatini in the proceedings was necessary because only in case NK Ankaran-Hrvatini would be withdrawn from 1.SNL, there would be a place for the Club in such competition, because Article 1 of the Resolutions for Senior Competitions organised by NZS determines that 10 teams shall compete in a four round system. Moreover, NZS submits that the Club failed to appeal against the decision of the NZS Executive Board dated 20 June 2017, determining the participants of the 1.SNL for this season's competition (2017/2018). Since this decision became final and binding, it is not possible to change the names of the 10 clubs that participate in the 1.SNL when the championship is in full force.

65. No deadline for the filing of an appeal with CAS has been set in the NZS Articles of Association.

66. Article R49 of the CAS Code determines the following in case no time limit has been adopted in the statutes or regulations of the federation:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against".*

67. The appeal was filed within the deadline of 21 days and complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

68. The Panel finds that the NZS' argument that the Club's appeal shall be declared inadmissible because it lacks standing to be sued alone must be dismissed, for the plea relating to the lack of standing to sue and be sued, is – according to settled jurisprudence of the CAS (cf. CAS 2009/A/1869; CAS 2015/A/3959; CAS 2015/A/4131) and the SFT (see SFT 128 II 50, 55) – a question related to the merits of the case.

69. The Panel fully endorses this view and, applying this principle to the current procedure, finds that the alleged lack of standing to be sued alone of the NZS does not prevent the Panel from declaring the appeal admissible, even in the event that NZS' argument that it lacks standing to be sued alone, an issue that will be addressed separately below, were upheld.

70. It follows that the appeal is admissible.

VII. APPLICABLE LAW

71. Article R58 of the CAS Code provides the following:

> *"The Panel shall 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 the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

72. It remained undisputed between the parties that the NZS CLR are primarily applicable to the matter at hand and, subsidiarily, Slovenian law. In addition, regarding the necessity for strict adherence to deadlines in the context of national (and subsequently confederational) licensing issues as well as equal treatment of clubs in relation to those deadlines, UEFA regulations are also to be considered as applicable regulations in accordance with Article R58 CAS Code.

VIII. MERITS

A. The Main Issues

73. In view of the above, the main issues to be resolved by the Panel are:

i. Does the NZS lack standing to be sued alone?
ii. Can the evidence submitted for the first time before CAS be taken into account in assessing whether the Club fulfilled the NZS licensing requirements?
iii. What evidence is to be taken into account by the Panel to assess whether the Club should be granted a license to participate in the 2017/2018 sporting season of the 1.SNL?
iv. Should the Club be granted a license to participate in the 2017/2018 sporting season of the 1.SNL?

i. Does the NZS lack standing to be sued alone?

74. The NZS maintains that, because the Club did not involve NK Ankaran-Hrvatini as a party to the proceedings, CAS cannot issue an award against this third club. Involving NK Ankaran-Hrvatini in the proceedings was necessary because only in case NK Ankaran-Hrvatini would be withdrawn from 1.SNL, there would be a place for the Club in such competition, because Article 1 of the Resolutions for Senior Competitions organised by NZS determines that 10 teams shall compete in a four round system. Moreover, NZS submits that the Club failed to appeal against the decision of the NZS Executive Board dated 20 June 2017, determining the participants of the 1.SNL for this season's competition (2017/2018). Since this decision became final and binding, it is not possible to change the names of the 10 clubs that participate in the 1.SNL when the championship is in full force.

75. The Panel observes that the Club phrased its primary request for relief as follows:

"To annul and leave without effect the decision rendered by the NZS Appellate Licensing Committee in the matter of reference, and to render a new decision in which FC Koper shall be granted a license for competing in 1.SNL (the highest division under NZS) for the Competitive year 2017/2018".

76. The Panel finds that the argument of the NZS related to its standing to be sued makes sense if the Club had requested to be reinstated in the 1.SNL competition, for the Panel would be prevented from deciding that the Club could participate in the 2017/2018 sporting season and possibly to replace NK Ankaran-Hrvatini, because the latter club is not named as a respondent in the matter at hand.

77. This is also the position held by another CAS panel in a matter that is not related to licensing, but that nonetheless succinctly clarifies the situation:

> *"The Panel noted that it was ultimately the choice of the Appellant against whom it appealed, but by not including the Burkina Faso FF as a party, the Panel has determined that its scope of review is limited to a review of the Appealed Decision alone. In the event that, on the merits, it is determined to overturn the Appealed Decision, then this Panel would be unable to go further and issue an award that would have the effect of replacing Burkina Faso with Namibia at AFCON 2012"* (CAS 2011/A/2654, para. 8.9).

78. However, the Panel finds that the Club's primary request for relief is solely aimed at obtaining a license for participation in the 1.SNL, but does not comprise a request to be reinstated in such competition if it were to be granted a license.

79. Furthermore, and as argued by the NZS, the Panel finds that if the Club would have desired to be reinstated in the 1.SNL it should also have challenged the decision of the NZS Executive Board whereby the participants of the 2017/2018 sporting season of the 1.SNL were determined.

80. Since the Club does not request the Panel to consider it being reinstated as one of the 10 clubs participating in the 1.SNL, the scope of the present appeal is however limited to whether or not the NZS ALC should have issued a license to the Club. The absence of NK Ankaran-Hrvatini as a party in the present arbitration does not prevent the Panel from potentially ruling that the Club should be granted a license, for the issuance of a license is a matter between the Club and the NZS which does not necessarily concern NK Ankaran-Hrvatini.

81. Consequently, the Panel finds that the NZS does not lack standing to be sued alone.

ii. *Can the evidence submitted for the first time before CAS be taken into account in assessing whether the Club fulfilled the NZS licensing requirements?*

82. Before examining whether the Club complied with the criteria to be granted a license to participate in the 2017/2018 sporting season of the 1.SNL, the Panel will first assess which documents were (i) at the disposal of the NZS CCL and the NZS ALC when these committees rendered their decisions and (ii) filed before the end of the deadline of each of those procedural stages, and (iii) which documents were presented only in the present proceedings before CAS.

83. This is of crucial importance, because the licensing procedure is conducted under a specific timetable and important deadlines for the clubs, *i.e.* the decision on whether or not a license

is to be issued should normally be taken before the commencement of the competition concerned and the ultimate deadlines which are required to be the same for all the clubs.

84. This is also contemplated for in the NZS CLR, for instance in the following provisions:

Article 14 NZS CLR:

"The CCL decides on whether a licence should be granted to an applicant on the basis of the documents provided by the submission deadline set in these Regulations and on whether a licence should be withdrawn and in other procedures in accordance with the provisions of the NZS Club Licensing Regulations".

Article 21 NZS CLR:

"The ALC makes its decision based on the decision of the CCL and all the evidence provided by the appellant or licensor with its written request for appeal and by the set deadline".

Article 28 NZS CLR:

"[…] *The core process starts in December each year with the* [license applicant] *preparing the pack of licensing documents and ends on submission of the list of licensing decisions to the UEFA administration by the deadline communicated by the latter (31 May in principle)".*

Article 29 NZS CLR:

"All deadlines of decision-making procedures are defined in the core process (Annex VI)".

Article 43 NZS CLR:

"[…] *The licensing season for NZS competitions beings, for: 1.SNL on 1 June,* […] *and ends for: 1.SNL on 31 May the following year,* […]*".*

Article 46 NZS CLR:

"Only clubs which fulfil the club licensing criteria set out in the NZS Club Licensing Regulations at the set deadlines must be granted by the licensor the relevant license necessary to enter the UEFA and/or NZS club competitions during the licence season".

Article 40(A) of Annex V (Financial Criteria) to the NZS CLR:

"The licence must be refused if future financial information is not submitted in due time to the licensor".

Article 17(E) of Annex VI (Core Licensing Process) to the NZS CLR:

> *"The licence applicant lodges an appeal. The ALC is notified and the meeting date is set (if possible by mutual agreement).*
>
> *The pleading must be in writing. The statement of appeal must mention the decision appealed against, the grounds of the appeal, the pleadings, any new facts or evidence held by the appellant, as well as the motion to give evidence. No additional evidence can be submitted by the applicant before ALC after the deadline determined in the appeal procedure".*

85. Finally, the Panel observes that the diagram enclosed to Annex VI (Core Licensing Process) to the NZS CLR determines that the deadline to appeal a decision of the NZS CCL expires on 15 May 2017 and that the NZS ALC shall issue a decision by 31 May 2017.

86. Pursuant to Article R57 of the CAS Code, CAS Panels have *"full power to review the facts and the law"*. As such, CAS proceedings are generally conducted on a *de novo* basis. Newly presented evidence may therefore in principle be submitted for the first time in the proceedings before CAS. However, pursuant to Article R57.3 of the CAS Code, CAS Panels also have the *"discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered"*.

87. Indeed, in respect of provisions in the WADA Code regarding the exclusion of evidence, the following has been said:

> *"This means that Article R57 paragraph 3 CAS Code will not apply to cases conducted under the WADA Code, because the WADA Code must be considered as lex specialis and, specifically for cases falling under its scope, the scope of review provided under Article 13.1 WADA Code will supersede the general procedural provision of Article R57 para. 3 CAS Code"* (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport: Commentary, Cases and Materials, p. 521).

88. The Panel finds that this interpretation can be applied by analogy to the NZS CLR, as a consequences of which the Panel does not deem it necessary to determine whether any newly presented evidence by the Club in the present proceedings before CAS is to be excluded on the basis of Article R57.3 of the CAS Code, because it finds that the NZS CLR – which is thus to be considered as a *lex specialis* of the CAS Code – is sufficiently clear in stating that no new evidence can be presented if it had not been presented in the proceedings before the NZS ALC by 15 May 2017.

89. The Panel finds that such prohibition to file new evidence serves a legitimate purpose in the context of a licensing system, because allowing a party to file new evidence for the first time before CAS would undermine the authority of the NZS CCL and the NZS ALC, while at the same time putting the desired certainty of knowing which clubs will participate in the relevant domestic competitions some time before the start of such competition at risk. Indeed, the licensing system implemented by the NZS is aimed at providing UEFA in principle with a list of licensing decision on 31 May 2017. Allowing a license applicant to file "new evidence" after the deadline to appeal the first instance decision, *i.e.* 15 May 2017 would create unequal treatment of the clubs as well as uncertainty, not only for the organiser of the competition (*e.g.* because a competition schedule needs to be prepared, a process that can only be done as soon

as all participants of the competition are confirmed), but also for competitors, because they also need to know some time in advance whether they will be promoted to a higher level as a consequence of the denial of a license to another club such as in this case the license applicant.

90. As argued by the NZS, the Panel finds that the strict adherence to deadlines is also justified because all Slovenian 1.SNL clubs had to submit reliable evidence of their financial soundness by 31 March 2017 to the NZS CCL and by 15 May 2017 to the NZS ALC. Allowing the Club to file new evidence of its ability to act as a going concern for the entire 2017/2018 sporting season after 15 May 2017 would give the Club an undue advantage which would distort the level playing field and smooth running of the relevant competition.

91. Consequently, the Panel finds that the newly presented evidence cannot be taken into account in assessing whether the Club should be granted a license to partake in the 2017/2018 sporting season of the 1.SNL.

iii. What evidence is to be taken into account by the Panel to assess whether the Club should be granted a license to participate in the 2017/2018 sporting season of the 1.SNL?

92. The Panel observes that the parties disagree on certain factual circumstances, in particular whether certain documents that are submitted in the present proceedings before CAS had also been submitted in a timely manner to the NZS CCL and/or the NZS ALC.

93. A number of inconsistencies can be identified, which will be addressed separately below.

(a) The independent audit report

94. Whereas the Club submits that it filed an independent audit report to the NZS CCL on 31 March 2017, the NZS maintains that this report was only submitted in the period between 14 and 20 April 2017.

95. The Panel finds that, regardless of the exact date on which the report was submitted, it remained undisputed that it was at least filed and could be taken into account by both the NZS CCL and the NZS ALC. As such, this report is to be taken into account by the Panel.

(b) The extended independent audit report

96. Whereas the Club submits that it filed an extended version of the independent audit report with the NZS CCL on 14 April 2017, the NZS maintains that this report was only filed on 15 May 2017.

97. Again, regardless of the exact date when the report was submitted, it remained undisputed that it was at least filed before the NZS ALC. As such, also the extended independent audit report is to be taken into account by the Panel.

98. However, the NZS also argues that the relevant part of the extended audit report (emphasis of matters) was not attached to the version submitted to the NZS, but only in the version submitted together with the Appeal Brief in the proceedings before CAS on 3 July 2017.

99. During the hearing, the Club admitted that the fourth page of the extended audit report (an attachment titled "Explanation regarding emphasis of matters") had indeed mistakenly not been submitted to the NZS due to a human error.

100. In view of the fact that the fourth page of the extended audit report was not made available to the NZS ALC, the Panel finds that this part of the extended independent audit report cannot be taken into account in the present proceedings before CAS.

(c) Contract concluded between the Club and the municipality of Koper

101. The Club submits that it concluded a contract with the municipality of Koper on 21 April 2017. The NZS maintains that this contract was only submitted together with the Appeal Brief in the proceedings before CAS on 3 July 2017.

102. Although there was initially some confusion about the dates of the original contract in the Slovenian language and the translation into English, this issue was resolved by the Club's admission that the original version of the contract in Slovenian submitted to CAS with its Appeal Brief was in fact a different contract that was submitted by mistake.

103. The Panel observes that the NZS did not object to the Club's explanation and is therefore satisfied to accept that the contract originally submitted before CAS in the Slovenian language was indeed submitted by human mistake and that the contract in the Slovenian language filed on 25 August 2017 was the correct version.

104. Notwithstanding the above, the Panel notes that although this contract may have been concluded on 21 April 2017, there is no evidence on file suggesting that it was brought to the attention of either the NZS CCL or the NZS ALC. In view of the fact that it cannot be established that this contract was made available to these committees at the relevant time, the Panel finds that it cannot be taken into account in the present proceedings before CAS.

(d) Assignment of claim against a debtor of the Club

105. The Club claims that it had concluded a contract with a company, pursuant to which the company purchased the Club's claim in an amount of EUR 500,000 against a debtor originating from a sponsorship contract on 23 May 2017. The NZS maintains that this document was only presented to the NZS ALC on 29 May 2017, *i.e.* well after the deadline of 15 May 2017.

106. The Panel notes that it remained undisputed that this document was presented to the NZS ALC before it rendered a decision, but after the deadline to file new evidence expired. Indeed, pursuant to Article 21 NZS CLR in conjunction with Article 17(E) of Annex VI (Core

Licensing Process) to the NZS CLR, evidence submitted after 15 May 2017 was not to be taken into account by the NZS ALC.

107. The Panel therefore finds that this assignment should not be taken into account in the present proceedings before CAS.

(e) Deferral of payment obligations by the two biggest creditors of the Club

108. Whereas the Club submits that on 27 and 28 April 2017 the two biggest creditors of the Club agreed to defer the Club's payment obligations until 31 May 2018 and delivered these statements to the NZS, the NZS submits that these documents were only submitted to the NZS CCL with its request for revision filed on 5 June 2017.

109. The Panel notes that, pursuant to Article 32 NZS CLR, *"the burden of proof falls upon the club"*.

110. The Panel observes that, besides the statement in the Club's Appeal Brief, there is no evidence on file suggesting that these two agreements were filed with either the NZS CCL or the NZS ALC. The NZS provided full copies of the Club's license application dated 31 March 2017, and of the Club's appeal to the NZS ALC dated 15 May 2017, the content of which remained undisputed by the Club. The Panel observes that neither of these two documents contains the relevant deferral agreements.

111. Although it appears that the deferrals were indeed signed by the two creditors on 27 and 28 April 2017 respectively, in the absence of any evidence that such deferrals were also presented to the NZS, the Panel finds that the Club failed to prove that it made the NZS CCL and the NZS ALC aware of the two deferrals. Insofar as the pertinent documents have been submitted to the NZS CCL in the context of the Club's request for revision filed on 5 June 2017, the Panel finds that this is of no avail to the Club because the fact remains that the NZS ALC could not take these documents into account in rendering the Appealed Decision.

112. In view of the fact that these documents were not made available to these committees at the relevant time, the Panel finds that they cannot be taken into account in the present proceedings before CAS.

(f) Creditors vote in favour of a compulsory settlement agreement

113. Whereas the Club maintains that its creditors voted in favour of a compulsory settlement agreement on 29 May 2017 and that based on such vote it informed the NZS ALC on 29 May 2017 that *"we can reasonably conclude that the legally required majority of creditors voted IN FAVOUR of the compulsory settlement"*, the NZS maintains that a vote only took place between 7 July and 7 August 2017 and that a final decision by the competent court is in any event still pending as a consequence of which the Club is still insolvent.

114. During the hearing, the Club presented two decisions issued by the Slovenian Supreme Court and the district court of Koper. As alluded to above, whereas the district court of Koper

initially approved the compulsory settlement agreement, the Slovenian Supreme Court partially annulled the decision of the district court.

115. The Panel notes that the NZS did not object to the admissibility of these decisions, but argued that they could not lead to any hindsight bias, as the Panel is required to assess the case based on the evidence available before the NZS committees at the relevant time.

116. The Panel finds that regardless of what may have happened in front of the competent Slovenian court after 1 June 2017, the fact remains that the NZS ALC was required to issue a decision without having any such knowledge.

117. In view of the above, the Panel finds that the declaration that it was likely that the competent Slovenian court would confirm the compulsory settlement agreement cannot be taken into account because it was filed after the deadline of 15 May 2017. In any event, even on the day of issuance of the Appealed Decision it was not certain whether the compulsory settlement procedure would be confirmed and would become final and binding. As such, the decisions issued by the Slovenian courts cannot be taken into account in the present proceedings before CAS.

iv. Should the Club be granted a license to participate in the 2017/2018 sporting season of the 1.SNL?

118. Turning its attention to the actual merits of the case, the Panel will assess whether the NZS ALC should have issued a license to participate in the 2017/2018 sporting season of the 1.SNL on the basis of the evidence that was available to it at the relevant moment in time.

119. Article 16(d) of Annex V (Financial Criteria) of the NZS CLR determines the following:

> *"If the auditor's report has, in respect of going concern, either an emphasis of matter or a qualified 'except for' opinion, the licence must be refused, unless either:*
>
> *i) a subsequent audit opinion without going concern emphasis of matter of qualification is provided, in relation to the same financial year; or*
>
> *ii) additional documentary evidence demonstrating the licence applicant's ability to continue as a going concern until at least the end of the licence season has been provided to, and assessed by, the licensor to its satisfaction. The additional documentary evidence includes, but is not necessarily limited to, the information described in criterion F.05 (Future financial information)".*

120. In the matter at hand, since both the initial as well as the extended version of the independent audit report included an "emphasis of matter", the Club breached indicator IND.01 (Going concern) set out in Article 38 of Annex V (Financial Criteria) of the NZS CLR, as a consequence of which the Club was required to provide future financial information.

121. The Club indeed provided additional information, and it is not disputed that the Club followed the required procedure in this respect.

122. Ultimately, the relevant provision based on which the NZS CCL and the NZS ALC were required to decide whether the Club was to be granted a license was Article 40(B) of Annex V (Financial Criteria) of the NZS CLR, which determines as follows:

> *"The licence must be refused if, based on the assessed historic financial information and future financial information, in the licensor's judgment, the applicant may not be able to continue as a going concern until at least the end of the licence season".*

123. Accordingly, the judgment to be made by the NZS CCL and the NZS ALC was whether it could be established that the Club may or may not have been able to continue as a going concern until the end of the 2017/2018 sporting season. No absolute certainty was required that the Club would be able to continue as a going concern until the end of the season in order to be granted a license, but any reasonable doubts in this respect should be taken away. This discretion is exemplified by the word "may" in the above-mentioned provision. Accordingly, the NZS CCL and the NZS ALC are provided with considerable leeway in deciding whether or not to issue a license.

124. Pursuant to Article 40(B) of Annex V (Financial Criteria) of the NZS CLR, this leeway is afforded to the "licensor". As such, the task of the present CAS Panel is limited to reviewing whether the "licensor" could reasonably come to the conclusion that no license was to be issued to the Club.

125. According to the Appealed Decision, the main reasons for the NZS CCL and the NZS ALC to deny a license to the Club was that they had serious doubts as to whether the Club would be able to continue as a going concern until at least the end of the 2017/2018 sporting season. The mere fact that the Club was insolvent at the relevant moment in time was not considered decisive in whether or not a license was to be issued.

126. As to the First Instance Decision, the Panel finds that the NZS CCL could indeed reasonably come to the conclusion that the Club had provided insufficient evidence that it would be able to act as a going concern for the full 2017/2018 sporting season. The main reason therefore is that the independent audit report concludes as follows:

> *"Without any reservations, we find that as at December 31, 2016, the company shows a negative fund balance in the amount of EUR 3,719,572. Due to this, the company's long-term solvency is questionable. These circumstances indicate an uncertainty that can raise doubts in the club's going-concern ability. Further business of the club depends on the possibility of repayment or change in the callability* [sic] *of short-term liabilities. On November 10, the club submitted a proposal for the initiation of compulsory settlement procedure at the District Court in Koper. We believe that in the case of initiating compulsory settlement proceedings, the club has the possibility of reacquiring going-concern abilities".*

127. As such, the independent auditor found that there were doubts about the Club's going concern ability, but that these doubts could be taken away in case of initiating compulsory settlement

proceedings, because only then the Club would be able to reacquire its going concern abilities. At the moment of rendering the First Instance Decision, it was however not clear whether the compulsory settlement proceedings would be approved by the Slovenian court and therefore the going concern abilities remained doubtful. The mere fact that compulsory settlement proceedings were initiated does not change this.

128. Under such circumstances, the Panel finds that the NZS CCL could indeed reasonably come to the conclusion that the Club had presented insufficient evidence that it would be able to complete the entire 2017/2018 sporting season.

129. In view of the fact that the "emphasis of matters" (page 4 of the extended independent audit report) had not been provided to the NZS ALC, the latter could only consider the amended conclusion of the extended independent audit report in the Appealed Decision:

> *"Club shows the negative equity (negative club's funds) in amount of 3.719.572 EURO at the balance sheet date (31st December 2016). Those circumstances can apply at the certain uncertainty and can raise doubts at the club's ability to perform its operation as going concern on a long term period. On the other hand we would like to point out that the Club signed contracts with professional players amount at the point estimate at the market value of 3.875.000 EUR at the balance sheet date (31st December 2016) which applies to the long term solvency of the club. Based on a possible confirmed financial restructuring plan performed by certified appraiser Mr Matjaž Trebše the Club will be able to perform short term and long term solvency. Short term operating ability and going concern ability of the club until the end of licencing period is presented in appendix regarding planed financial information".*

130. The Club submits that the conclusions of the initial independent audit report and the extended independent audit report remain the same, but that the extended version only contained additional information.

131. The Panel finds that the conclusions indeed do not significantly differ. Indeed, whereas the initial independent audit report states that *"[t]hese circumstances indicate an uncertainty that can raise doubts in the club's going-concern ability"* and that *"[w]e believe that in the case of initiating compulsory settlement proceedings, the club has the possibility of reacquiring going-concern abilities"*, the extended independent audit report concludes that *"[b]ased on a possible confirmed financial restructuring plan performed by certified appraiser Mr Matjaž Trebše the Club will be able to perform short term and long term solvency"*.

132. As such, also the extended independent audit report refers to a confirmed financial restructuring plan – which is considered to be the same as a compulsory settlement procedure by the Panel – as a requirement to *"perform short term and long term solvency"*. At the time of issuing the Appealed Decision, however, no evidence was available that such compulsory settlement procedure was approved by the competent Slovenian court.

133. The Panel finds that the Club's statement in its appeal brief that *"the extended version of the audit report is clear in its analysis and confirms that "THE CLUB WILL BE ABLE TO PERFORM SHORT-TERM AND LONG-TERM SOLVENCY""* does not reflect what is actually stated in the extended independent audit report. Indeed, as paraphrased above already, the full

sentence reads as follows: *"Based on a possible confirmed financial restructuring plan performed by certified appraiser Mr Matjaž Trebše the Club will be able to perform short term and long term solvency"*. As such, also according to the extended independent audit report, the short term solvency would only be evidenced if a compulsory settlement procedure would be concluded by the competent court granting compulsory settlement. This was not the case.

134. The Panel also finds that the reference in the extended independent audit report to the market value of the Club's players in an amount of EUR 3,875,000 is of limited value. Although it is already disputable whether such information should be taken into account at all according to accounting standards, and that it is doubtful whether the amount mentioned is indeed an appropriate estimation of the market value of the players, the Panel agrees with the NZS that insofar as this information is considered relevant, it is mainly relevant for the long-term solvency of the Club and does not provide evidence for the Club's ability to act as a going concern in the short-term.

135. The Panel finds that regardless of whether one relies on the initial independent audit report or the extended version, neither report provides sufficient evidence that the Club is able to act as a going concern until the end of the 2017/2018 sporting season. Particularly since the extended independent audit report provided to the NZS ALC was not complete, the fact that the missing part cannot be taken into account and because the accounting information remained the same as in the initial report, the Panel finds that the NZS ALC could legitimately come to the conclusion that the extended independent audit report in itself did not provide sufficient evidence for the Club's ability to act as a going concern in the short term (until the end of the 2017/2018 sporting season).

136. During the hearing, it was widely debated between the parties and their respective expert witnesses whether and to what extent the independent auditor was allowed to change the conclusions in the extended independent audit report while maintaining the same date (31 March 2017) as mentioned in the initial independent audit report. The Panel finds that this issue is finally not decisive, because the added information in any event did not alter the fact that the Club's ability to act as a going concern until the end of the 2017/2018 sporting season was doubtful.

137. The mere fact that the Club breached indicator IND.01 because an emphasis of matter was included in the initial as well as in the extended independent audit report, indeed *"imposes a greater* [duty of] *care on the licence granting organ regarding the documentation analysis and taking the final decision"*, as was held by the NZS ALC in the Appealed Decision. Indeed, Article 16(d) of Annex V (Financial Information) to the NZS CLR indicates that if the independent audit report contains an emphasis of matter, *"the license must be refused, unless* […]*"*, which clarifies that if the Club is not able to convince the NZS ALC of its going concern ability, the license must be refused.

138. Furthermore, shifting to the other documentary evidence submitted, in view of the fact that the contract that was concluded between the Club and the municipality of Koper, the deferrals of the Club's payment obligations by the two biggest creditors of the Club, and the assignment of the Club's claim against its main sponsor in an amount of EUR 500,000, were not made

available to the NZS ALC, the Panel finds that these documents cannot be taken into account in assessing whether these documents would increase the likelihood of the Club being able to compete in the 2017/2018 sporting season as a going concern.

139. The Panel notes that the Club itself submits that these documents are *"crucial to prove the solvency and economic stability of the Appellant"*, from which it may be inferred that also the Club is of the view that if such documents are not taken into account, the decision to refuse the license may be considered justified. However unfortunate this may be, the Panel finds that the Club has only itself to blame for the fact that these documents cannot be taken into account, by having failed to make them available to the NZS before the relevant deadlines, or at the very least, by failing to provide evidence that it did.

140. Finally, the Panel finds that the offer of EUR 350,000 made by another football club for the transfer of a player of the Club on 3 May 2017 does not lead the Panel to any other conclusion, as even if such transfer would indeed be concluded – of which no evidence has been presented – this would only reduce the debts of the Club from EUR 3,875,000 to EUR 3,525,000, which is still a significant amount.

141. In view of all the above, in essence, the Panel finds that the Club did not provide the NZS ALC with much more evidence than was previously presented to the NZS CCL and that especially because an "emphasis of matter" was included in the independent audit reports – which legitimately incites a higher duty of care on the NZS ALC –, because of the Club's uncontested debts in the amount of EUR 3,875,000, and because there was no certainty about whether the Slovenian courts would approve the debt rescheduling agreement, the NZS ALC had justified doubts about the Club's going concern ability until the end of the 2017/2018 sporting season.

142. Consequently, the Panel finds that the NZS ALC legitimately refused to issue a license to the Club to partake in the 2017/2018 sporting season of the 1.SNL.

B. Conclusion

143. The Panel concludes that as the Appellant in its prayers for relief did not ask to be reinstated into the 1.SNL for the 2017/2018 sporting season, in doing so the Panel would (i) decide ultra petita, would (ii) curtail the rights of the club NK Ankaran-Hrvatini (not named as respondent and therefore not a party to these proceedings) and (iii) act against the decision of the NZS Executive Board dated 20 June 2017, determining the participants of the 1.SNL for this season's competition (2017/2018), a decision which has already become final and binding.

144. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

i. The NZS does not lack standing to be sued alone.
ii. The newly presented evidence cannot be taken into account in assessing whether the Club should be granted a license to partake in the 2017/2018 sporting season of the 1.SNL.

iii. The NZS ALC legitimately refused to issue a license to the Club to partake in the 2017/2018 sporting season of the 1.SNL.

145. Any other and further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 23 June 2017 by FC Koper against the decision issued on 1 June 2017 by the Appellate Licensing Committee of the Football Association of Slovenia is dismissed.

2. The decision issued on 1 June 2017 by the Appellate Licensing Committee of the Football Association of Slovenia is confirmed.

3. (…).

4. (…).

5. Any other and further prayers or requests for relief are dismissed.