



Arbitration CAS 2016/A/4416 Fédération Internationale de Football Association (FIFA) v. Confederación Sudamericana de Fútbol & Brian Fernández, award of 7 November 2016 (operative part of 8 July 2016)

Panel: Prof. Ulrich Haas (Germany), President; Prof. Luigi Fumagalli (Italy); Mr José Juan Pintó (Spain)

Football

Doping (cocaine)

Determination of the standard period of ineligibility for a non-intentional ADRV

Impossibility to eliminate the period of ineligibility based on No Fault or Negligence

Reduction of the standard sanction based on Non-Significant Fault

Assessment of the appropriate period of ineligibility

- 1. Art. 19 (1) of the FIFA Anti-Doping Regulations (ADR), which provides for a period of ineligibility of four years, is not applicable where the offence is not intentional. According to the rule, anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited in-competition shall not be considered intentional if the substance is not a specified substance and the player can establish that the prohibited substance was used out-of-competition in a context unrelated to sport performance. Art. 19 (2) ADR (Art. 10 (2) (2) WADC) provides for a (standard) period of ineligibility of two years in case an athlete has acted negligently.**
- 2. Where a player admitted having taken a substance which is not a specified substance and which is only prohibited In-Competition voluntarily, the otherwise applicable period of ineligibility of two years cannot be eliminated on the ground that the player bore No Fault or Negligence.**
- 3. In order to establish whether or not an athlete acted with Non-Significant Fault (NSF), the athlete's behaviour must be compared to the standard of care that can be expected from a "reasonable person" in the athlete's situation. CAS jurisprudence has found that the threshold of NSF is met if the athlete observes the clear and obvious precautions which any human being would take in the specific set of circumstances. Obviously, a reasonable person would never have consumed drugs to begin with, in particular drugs like cocaine the addictive character of which is well known. However, when assessing whether or not an athlete acted with NSF, the athlete's level of fault must be assessed in relationship to the anti-doping rule violation. In light of the WADC on the basis of which the ADR have been modelled, it can be considered in cases where an athlete establishes that he consumed cocaine in a recreational / social context unrelated to sport performance that the athlete qualifies for NSF.**

4. In light of CAS jurisprudence distinguishing between different categories of negligence, i.e. light, normal and significant negligence, only the first two categories allow for a reduction of the otherwise applicable period of ineligibility according to Art. 22 (2) ADR. In case of NSF, the applicable sanction can be reduced down to one half of the otherwise applicable sanction i.e. from 12 – 24 months. In order to determine which category of negligence is applicable in a particular case, it is helpful to consider both the objective and the subjective levels of fault. While the objective element describes what standard of care could have been expected from a reasonable person in the player’s situation, the subjective element describes what could have been expected from that particular player, with regard to his personal capacities.

I. PARTIES

1. The Fédération Internationale de Football Association (“FIFA” or the “Appellant”) is the world governing body of Football, an association according to Swiss private law with its seat in Zurich.
2. The Confederación Sudamericana de Fútbol (“CONMEBOL” or the “First Respondent”) is the continental football federation of South America, headquartered in Luque, Paraguay.
3. Mr Brian Fernández (the “Player” or “Second Respondent”) is a professional football player currently affiliated with the Argentinian Football Association, member of CONMEBOL.

II. FACTUAL BACKGROUND

4. On 10 May 2015, the Player tested positive to *Benzoyllecgonine* (a metabolite of the Prohibited Substance *Cocaine*) in the match he played for Racing Club against Club Atlético River Plate, and as a result [he was](#) provisionally suspended for three months by the Argentinian Football Association (AFA) as of 5 June 2015.
5. On 28 May 2015, the Player underwent another anti-doping control carried out during the Copa Bridgestone Libertadores at the Estadio Presidente Perón in Buenos Aires. The analysis of the “A-Sample” was carried out by the laboratory of Colombia’s COLDEPORTES national anti-doping control laboratory (“the Laboratory”) on 17 June 2015. The analysis showed the presence of the prohibited substance *Cocaine* and its metabolites, *Methyllecgonine* and *Benzoyllecgonine*, classified under S6 a (Non-Specified Stimulants) on the WADA 2015 Prohibited List. The substance is prohibited in-competition only. On 26 June 2015 the Laboratory informed CONMEBOL of the adverse analytical finding (“AAF”).
6. The Player was notified of the AAF on 30 June 2015 and granted a 12-hour deadline to request

the analysis of the “B-Sample” or the re-testing of the “A-Sample”. On 1 July 2015 the Player requested the analysis of the “B-Sample” and was informed that the analysis would be conducted on 28 July 2015.

7. On 9 July 2015, the Chairman of CONMEBOL’s Disciplinary Unit (“CDU”) issued a provisional suspension of the Player.
8. On 28 July 2015, the “B-Sample” analysis of the sample collected on 28 May 2015 was conducted. The Player and CONMEBOL were informed on 30 July 2015 that the “B-Sample” confirmed the result of the “A-Sample”.
9. On 4 August 2015, the CDU opened disciplinary proceedings against the Player. On 24 August 2015, the Player submitted a written statement, according to which (in summary):
 - (i) he recognized the ingestion of Cocaine outside the Competition, and admitted his addiction which is currently being treated;
 - (ii) the Argentinian Football Association (AFA) has already suspended him for three months following a positive doping control conducted on 10 May 2015 – the current proceedings are based on the same Cocaine ingestion which would violate the principle of *ne bis in idem*;
 - (iii) the FIFA Anti-Doping Regulations do not apply to this case because Art. 4 of the Disciplinary Regulations is not fulfilled;
 - (iv) there are regulatory grounds for a reduction of the sanction (form of ingestion and not intended to improve sporting performance).
10. On 16 October 2015, a hearing was held before the CDU, which was attended by the Player, his legal representative and three witnesses called by the Player.
11. On 21 October 2015, the CDU rendered its decision (the “Decision”). The latter reads, *inter alia*, as follows:

“Notwithstanding the above, this Tribunal considers itself to be authorised to sanction the Player for the offence committed in the 2015 edition of the Copa Libertadores without there being a question of a violation of the general principle of ne bis in idem. This is because the present case stems from a different competition from the one in which the control assessed by the AFA and is governed by a separate set of regulations. (...) Furthermore, in the analysis of the Player’s sample taken in the local tournament, it appears that only the presence of a single metabolite of cocaine was detected (benzoyllecgonine), while the analysis of the samples taken from Mr Fernández on 28 May showed the presence of two metabolites of the substance (methylecgonine and benzoyllecgonine). Based on all of the above, as well as the confirmation by the Player himself with respect to his addiction to and regular consumption of cocaine, this Tribunal concludes that the new positive control does not constitute the same offence for which the Player was sanctioned by the AFA.

(...)

[the Disciplinary Unit/Disciplinary Tribunal] *Has decided that*

1. *That Mr BRIAN FERNÁNDEZ is guilty of a breach of articles 6 and 7 of the FIFA Anti-Doping Regulations.*
2. *As a result, the tribunal imposes on Mr BRIAN FERNÁNDEZ the sanction of a two-year (2) suspension*
3. *After the first year of suspension has been served, the second year of the sanction shall be suspended and Mr BRIAN FERNÁNDEZ shall be eligible to play, under the following conditions:*
 - i. *Mr BRIAN FERNÁNDEZ shall undertake monthly doping tests under the responsibility of his club for a year, the results of which tests must be punctually notified to CONMEBOL.*
 - ii. *In the event that the previous condition is not fulfilled, or in the event of a new adverse finding, Mr BRIAN FERNÁNDEZ shall have to serve the full extent of the second year of the imposed suspension, notwithstanding any possible sanctions that may be imposed for a new offence.*
 - iii. *After the second year of suspension has been served without Mr BRIAN FERNÁNDEZ breaching any of the previous conditions and in the absence of any new adverse analytical findings, the second year of suspension shall be considered to have been cancelled.*
4. *The calculation of the imposed sanction shall be made from 9 July 2015, the date on which Mr BRIAN FERNÁNDEZ was provisionally suspended”.*

12. On 27 October 2015, the Decision was communicated to the Player.

13. On 17 November 2015, the Player filed an appeal against the Decision with the Appeal Chamber of the CDU (the “Appeal Chamber”), requesting the amendment of Point 4 of the Decision, alleging that this should be the date the sample was taken (28 May 2015) or alternatively 5 June 2015, when the Player was provisionally suspended by the AFA.

14. On 14 December 2015, the Appeal Chamber issued its decision (the “Appealed Decision”), dismissing the Appeal filed by the Player. The relevant parts of the Appealed Decision read as follows:

“...the Player lodged an appeal against the Decision, in which he stated, in summary, that:

(...)

The Player has admitted that the violation that was detected and judged by the AFA does not prevent the DT from ruling on the violation that occurred in the 2015 Copa Libertadores; however, he considers that, as the DT itself admits that to all regulatory purposes the case must be treated as a first violation of the anti-doping regulations, the provisional suspension applied by the AFA as of 5 June 2015 and accepted by the Player must be considered as a period to be deducted from the ultimate period of ineligibility, in accordance with what is established in art. 28.3 a) and b) of the FIFA Anti-Doping Regulations. Therefore, the period of 35 days during which the Player was suspended by the AFA, from 5 June 2015 until the date on which the provisional suspension was ruled by CONMEBOL, 9 July 2015, must also be considered as a period completed as part of the sanction.

(...) *Conclusions:*

6.1. *The Chamber observes that the Appellant's objective with this appeal is to reduce the sanction imposed on him by the Disciplinary Tribunal by a month. However, this Chamber does not believe there to be any reasons in the present case that justify the amendment of the starting date of the period of ineligibility imposed on the Appellant in the Decision, which is why the appeal is dismissed.*

(...)

Based on the above, the Appeal Chamber,

(...) *Has decided*

1. *To dismiss the appeal lodged by Mr BRIAN FERNÁNDEZ against decision D/02/2014.*
2. *Consequently, to confirm the appealed decision in its entirety.*
3. *No costs will be charged, although the appeal fee will not be reimbursed".*

15. On 5 January 2016, CONMEBOL provided FIFA with the reasoned decision and full case file.

III. THE PROCEEDINGS BEFORE THE CAS

16. On 25 January 2016, FIFA filed its Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport ("CAS"). FIFA nominated Mr Luigi Fumagalli as Arbitrator and requested an extension of the time limit of five additional days to submit its Appeal Brief. The Appellant also requested the proceedings to be held in English.
17. On 27 January 2016, the CAS Court Office granted the requested extension and confirmed the payment of the Court Office fee.
18. On 2 February 2016, the Second Respondent sent a communication to the CAS Court Office requesting Spanish to be the language of the arbitration. In case the proceedings were conducted in English, the Second Respondent submitted that the Appellant should bear the costs associated with translations and interpreters.
19. On the same day, the CAS Court Office asked the Parties whether they agreed to Spanish being the language of the proceedings and invited the Parties to answer by 4 February 2016.
20. On 3 February 2016, the Appellant again requested the proceedings to be held in English. On the same day, the CAS Court Office advised the Parties that according to Art. R29 CAS Code, English would be the language of the arbitral proceedings.
21. On 8 February 2016, the Appellant filed its Appeal Brief. On the same day the Second Respondent nominated Mr José Juan Pintó as Arbitrator.

22. The CAS Court Office invited the First Respondent on 9 February 2016 to inform the Court whether it agrees with the nomination of Mr José Juan Pintó by 15 February 2016, failing which it would be considered that it agreed.
23. On 25 February 2016, the CAS Court Office informed the Parties that Mr Ulrich Haas had accepted the appointment as President of the Panel.
24. On 29 February 2016, the Second Respondent requested an extension of five days to file its answer to the Appellant's Brief.
25. On 1 March 2016, the CAS Court Office granted the five-day extension for the Second Respondent to file an answer.
26. On 3 March 2016, the First Respondent requested the CAS to grant an extension of five days to present its answer.
27. On 4 March 2016, the CAS Court Office informed the Parties that the extension could not be granted, since the initial deadline to file an answer had already expired on 2 March 2016. The CAS Court Office therefore rejected the First Respondent's request (Art. R32 CAS Code). However, the CAS Court Office invited the Parties to advise by 7 March 2016 whether they agreed to the late filing of the First Respondent's answer.
28. In a letter dated 4 March 2016, the Appellant did not raise any objections to the late filing of the First Respondent's answer. On the same day, the Second Respondent also agreed to the late filing. The CAS Court Office thus invited the First Respondent to file its statement by 8 March 2016.
29. On 9 March 2016, the CAS Court Office confirmed the appointment of the Panel in the procedure as follows: Mr Ulrich Haas (President), Mr Luigi Fumagalli (Arbitrator), Mr José Juan Pintó (Arbitrator).
30. In a letter dated 18 March 2016, the Appellant communicated to the CAS Court Office its preference for a hearing to be held.
31. A hearing took place in Lausanne on 20 June 2016. The Appellant was represented by Mr Volker Hesse and Mr Martin Vaso. The representative of the First Respondent, Ms Monserrat Jimenez Granda, did not attend the hearing. The Second Respondent's counsel, Mr Ariel Reck, and an interpreter, Gabriel Córdoba, were present. The following witnesses were heard on behalf of the Second Respondent: the Player's brother, Mr Leandro Fernández, the Player's Agent, Mr Christian Braga, (both via telephone) and on behalf of the Appellant, Prof Martial Saugy, as expert witness.
32. The Parties throughout the hearing did not raise any procedural objections and expressly confirmed at the end of the hearing that their right to be heard and to be treated equally had

been respected, as they had been given ample opportunity to present their cases and submit their arguments and answers.

33. At the hearing the Player was (via telephone) examined by his counsel, cross-examined by the Appellant, and questioned by the Panel. The Panel also heard evidence by Prof Saugy with regard to the effects of Cocaine and its metabolites, its excretion in general, and in connection with alcohol consumption and when frequently consumed.

IV. PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

34. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award or in the discussion of the claims below.

A. The Appellant

35. In its Statement of Appeal (25 January 2016) and Appeal Brief (8 February 2016), FIFA filed the following prayers for relief:

- “1. *The appeal of FIFA is admissible;*
2. *Mr Brian Fernández is sanctioned with a two-year period of ineligibility starting date on which the CAS award enters into force. Any period of ineligibility already served by the Player based on the doping control initiated by CONMEBOL shall be credited against the total period of ineligibility imposed.*
3. *The costs of the proceedings shall be borne by the Confederación Sudamericana de Fútbol”.*

36. The Appellant's submissions in support of its requests may be summarized as follows:

- With regard to the applicable law Art. 66 (2) FIFA Statutes provides that “the provisions of the CAS Code of Sports Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law”. Moreover, Art. 80 (3) FIFA Anti-Doping Rules (ADR) provides that FIFA Regulations are also applicable in proceedings in which FIFA appeals to CAS. The application of the FIFA ADR is also established in the jurisprudence of CAS (CAS 2008/A/1625).
- Art. R57 CAS Code grants the Panel full power to review the facts and the law. Consequently, the Panel has the authority to review all relevant aspects of the case and is not limited to the subject-matter before the Disciplinary Unit (Appeals Chamber) (in casu the starting date of the ineligibility period).

- Due to the presence of Cocaine, “Methylecgonine” and “Bezoylecgonine” in the Player’s “A- and B-Samples”, an anti-doping rule violation according to Art. 6 ADR is established. The Player even admitted having consumed Cocaine in the proceedings before the CDU. Furthermore, two expert statements confirm that the concentration of Cocaine in the Player’s “A-Sample” indicate a consumption of the Prohibited Substance within 24 hours prior to sample collection.
- Art. 19 ADR lays down the applicable sanctions in case of an anti-doping rule violation (ADRV) within the meaning of Art. 6 ADR. Based on the Player’s explanation regarding the ingestion of Cocaine in a context unrelated to sports, the starting point for determining the period of ineligibility shall not be four years (par. 1), but two years (par. 2) instead. Since the first sample on 10 May 2015 was analysed by a laboratory not accredited by WADA, the ADRV committed on 28 May 2015 cannot be qualified as a second violation in the sense of Art. 24 ADR.
- With regard to the commencement of the ineligibility period the Appellant submits that according to Art. 28 ADR the period of ineligibility shall, in principle, start with the communication of the award in the present arbitral proceedings. Since there were no substantial delays in the proceedings at the level of CONMEBOL, an earlier starting date cannot be justified.
- The ban imposed by the AFA (three months as of 5 June 2015) cannot be deducted from the period of ineligibility in this case, since the two sanctions originate from two different organizations and have a different scope as well.
- The Player only admitted the ingestion of Cocaine as such. However, the Player did not admit the ADRV in its entirety. This is evidenced by the fact that the Player requested the analysis of the B-Sample after the hearing, before the AAF on 30 June 2015. Consequently, the Player did not admit the ADRV promptly. He did admit so only in the course of the disciplinary proceedings. Art. 28 (2) ADR however requires full and prompt admission. The Player did not fulfil these two criteria.
- Partial suspensions of sanctions lead to an unfair treatment of players. The rules must be applied equally to all participants.

B. The First Respondent

37. In its Answer, dated 7 March 2016, the First Respondent requested the CAS:
“CONMEBOL respectfully requests CAS to dismiss the appeal lodged by FIFA against Decision D/2/2014;
(...) Consequently, CAS is respectfully requested to confirm the appealed decision in its entirety”.
38. CONMEBOL’s submissions may be summarized as follows:
- The Player acknowledged having used *Cocaine* out of competition in a context not related to sports. Personal struggles and his problematic background resulted in an addiction

to this Prohibited Substance. The Player is now undergoing therapy to overcome his addiction. Based on these circumstances the CDU reduced the period of ineligibility which is in line with Art. 22 (2) ADR (no significant fault or negligence).

- Sanctions being subject to suspensive conditions are a common practice and accepted and applied worldwide – e.g. FIFA itself extended a decision containing a suspensive condition that was issued by the Superior Court of Sports Justice in Football (STJD) to have worldwide effect.

C. The Second Respondent

39. In his Answer, dated 8 March 2016, the Second Respondent – *inter alia* – requested:

- “1. To reject the appeal against the CONMEBOL decision in the present case.
2. To order FIFA to pay all costs and expenses relating to the CAS arbitration proceedings.
3. To order FIFA to pay a contribution towards the legal fees and other expenses incurred by this party, estimated in CHF 5.000.-”.

40. The Second Respondent – in essence – submits in support of his request as follows:

- Since the AAF occurred in a CONMEBOL competition, rules and regulations of CONMEBOL shall be deemed to be applicable, with the rules of FIFA being only complimentary and applicable only, if they are not contrary to CONMEBOL’s regulations. This approach is in line with the CAS jurisprudence (e.g. CAS 2008/A/1588). Changing the applicable rules just because FIFA decided to appeal the matter would result in an unexpected and unforeseeable change of applicable provisions for the Second Respondent.
- The Player never accepted a two year period of ineligibility per se. He just accepted the decision of CONMEBOL to impose a conditional second year of suspension, subject to permanent doping controls.
- The imposed sanction is in fact in line with FIFA’s ADR and the World Anti Doping Code (WADC).
- CONMEBOL considered that there were mitigating factors to reduce the otherwise applicable sanction to one year, but still decided to impose additional measures in order to supervise and assess the Player’s rehabilitation plan. Therefore, instead of sanctioning the Player for just one year, the CDU imposed additional consequences in relation to the second year. If a panel has the power to reduce a sanction down to one year with no additional condition, it also has the power to impose additional conditions with respect of the “reduced” year. This practice is in line with Art. 31 CONMEBOL Regulations as well as Art. 22 (2) ADR. Furthermore, Art. 23 ADR also stipulates the possibility to suspend, reduce or eliminate the period of ineligibility for reasons other than fault.

- CONMEBOL had valid reasons to reduce the sanction based on the Player's testimony and the witness statements, confirming that the Player consumed *Cocaine* in a complicated home environment and in a difficult personal situation, which eventually turned into an addiction. Thereby CONMEBOL respected the principles of fairness and proportionality.
- CAS jurisprudence (CAS 2013/A/3274) states that first instance panels are in no better position to review an ADRV than the CAS. However, it also follows from CAS jurisprudence that CAS panels shall exercise deference where the first instance tribunal had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses. Moreover, there is no constant jurisprudence of the CAS with regard to the deference given to the tribunals of federations. The better arguments speak in favour of reviewing periods of ineligibility only when the assessment of the first instance panel is evidently and grossly disproportionate to the offence. CONMEBOL's sanction in casu was proportionate, since it carefully considered the Player's personal circumstances. As a result, the CAS may not review the appealed sanction.
- WADA has not appealed the Appealed Decision, and has therefore reached the same conclusion as the Second Respondent.
- The Player did promptly admit the ingestion of the Prohibited Substance. The fact that the Player merely exercised his defense rights (by requesting the analysis of the "B-Sample") before admitting the ADRV does not prevent his admission from being qualified as promptly (see CAS 2012/A/2959 by analogy).

V. JURISDICTION OF THE CAS

41. Art. R47 CAS Code reads as follows:

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

42. The provision provides for three prerequisites, namely:

- i. that the parties must have submitted to the competence of the CAS,
- ii. that there must be a "decision" of a federation, association or another sports-related body, and
- iii. that the "internal remedies available prior to the appeal" to CAS must have been exhausted, in accordance with the statutes or regulations of the mentioned bodies;

43. The first prerequisite is met. The jurisdiction of the CAS to rule on the present dispute follows inter alia from the Order of Procedure, duly signed by all Parties, as well as from Art. 75 ADR and from the FIFA Statutes (Art. 67). Finally, the Panel notes that its jurisdiction has not been

contested by any party to these proceedings, but instead has been explicitly recognised by the Parties in their briefs submitted to the CAS. It follows from all of the above that the CAS has jurisdiction over the present dispute.

44. The Appealed Decision is a “decision of an association” within the meaning of Art. R47 CAS Code. Consequently, this prerequisite is fulfilled, since CONMEBOL is an association or sports-related body within the meaning of Art. R47 CAS Code.

45. The last prerequisite set forth in the provision at issue is also met, since there are no internal remedies available to the Parties for appealing the Appealed Decision. This follows from Art. 70bis CONMEBOL Statutes, which reads as follows:

1. Binding decision related exclusively to breaches of the anti-doping regulations may be appealed by the offender before the Court of Arbitration for Sport (CAS) headquartered in Lausanne (Switzerland) in accordance with what is established in the following paragraphs. Furthermore, FIFA’s right to appeal such decisions is recognised.

2. The deadline for lodging an appeal with CAS shall be 21 days from the date on which the appellant receives the decision.

VI. ADMISSIBILITY

46. Art. R49 CAS Code reads as follows:

In the absence of a time limit set in the statutes or regulation 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.

47. According to the above-reported provision of the CAS Code, a federation may derogate from the 21 day time-limit for the filing of the appeal in its statutes or regulations. In principle the time-limits of Art. 70bis CONMEBOL Statutes correspond to Art. R49 CAS Code. According to Art. 70bis (2) (a) and (b) FIFA’s time-limit to appeal is 21 days from the date on which FIFA receives a copy of the complete case file.

48. The findings of the Appealed Decision were communicated to FIFA on 23 December 2015. The grounds of the Appealed Decision were communicated to FIFA on 5 January 2016. On the same day FIFA received the copy of the full case file.

49. On 25 January 2016, FIFA filed its Statement of Appeal against the Appealed Decision with the CAS Court Office.

50. Consequently, the Appellant complied with the time limits prescribed by Art. 70bis CONMEBOL Statutes and by the CAS Code. The Appeal was therefore filed in time.

VI. APPLICABLE LAW

51. According to Art. R58 CAS Code, the Arbitral Tribunal shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Court deems appropriate. In the latter case the Court shall give reasons for its decision.

52. The determination of the law applicable is based on three findings. Firstly, CONMEBOL's regulations contain multiple references to FIFA's ADR (for instance, Art. 7 (4), Art. 31 (3) CONMEBOL ADR). Secondly, the CDU itself based the Appealed Decision on FIFA's ADR. FIFA's ADR are thus part of CONMEBOL's regulations by reference and have also been applied by the CDU. Thirdly, Art. 80 (3) ADR states as follows:

Where FIFA appeals against a decision of in particular an Association, Anti-Doping Organisation or Confederation to CAS under this chapter, the applicable law for the proceeding shall be the FIFA regulations, in particular the FIFA Statutes, the FIFA Anti-Doping Regulations and the FIFA Disciplinary Code.

Therefore, both CONMEBOL's regulations and FIFA's ADR shall apply.

53. In addition, Art. 66 (2) FIFA Statutes provides as follows:

... the provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss Law.

54. It follows from the above that the FIFA regulations must be interpreted and applied in light of Swiss law. Insofar Swiss law applies subsidiarily.

55. Since the Parties have not agreed on the (rules of) law applicable to the dispute and considering that the sports organisation that issued the Appealed Decision, within the meaning of Art. R58 CAS Code, has its seat in Paraguay, the Panel will also apply the law of Paraguay insofar as matters are concerned that fall outside the scope of CONMEBOL's ADR and FIFA's ADR.

VII. MISSION OF THE PANEL

56. According to Art. R57 CAS Code, the Panel has full power to review the facts and the law. The Panel may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.

57. In application of the aforementioned rule, the Panel is entitled to hear the present case *de novo* (CAS 2012/A/2107, § 9.1). In principle, the Panel will only give deference of the first instance hearing body where it is persuaded by the latter's conclusions.

VIII. MERITS OF THE APPEAL

A. The ADRV

58. It is undisputed that the Second Respondent committed an ADRV on 28 May 2015 according to Art. 6 and Art. 7 ADR (“*Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s biological sample*”). The provision corresponds to Art. 2 (1) WADC. As set out in the outline of the facts of the case, the sample was provided by the Player in the course of an anti-doping control carried out during the Copa Bridgestone Libertadores at the Estadio Presidente Perón in Buenos Aires. The Player tested positive to the prohibited substance *Cocaine* and its metabolites “*Benzoyllecgonine*” and “*Methylecgonine*”. Likewise, it is undisputed that *Cocaine* (and its metabolites) is a “non-specified substance” (see S 6.a Prohibited List) and that the substance is prohibited in-competition only. Furthermore, the Parties are in agreement that the ADRV committed on 28 May 2015 constitutes the Player’s first violation.

B. The appropriate period of ineligibility

59. With respect to the appropriate period of ineligibility the Parties agree that the Player did not commit an intentional ADRV on 28 May 2015 and that, thus, Art. 19 (1) ADR, which provides for a period of ineligibility of four years, is not applicable. In that respect it is to be noted that:

... anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered intentional if the substance is not a Specified Substance and the Player can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

60. As a result, the starting point for the determination of the applicable period of ineligibility is Art. 19 (2) ADR (Art. 10 (2) (2) WADC). The article provides for a (standard) period of ineligibility of two years in case an athlete has acted negligently.

61. Even though the Parties are in agreement that the use of the prohibited substance in the case at hand was unrelated to sport performance, the Parties are in dispute whether or not – based on the facts submitted – further reductions apply to the period of ineligibility provided for in Art. 19 (2) ADR.

a) *No Fault or Negligence*

62. According to Art. 21 ADR (“No Fault or Negligence”) the otherwise applicable sanction shall be eliminated, if the athlete bears “No Fault or Negligence”. The provision corresponds to Art. 10 (4) WADC. The threshold for “No Fault or Negligence” is high. The term “No Fault or Negligence” is defined in the Appendix A to ADR as follows :

“The Player or other Person’s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule”.

63. This notion of “utmost caution” is incompatible with an athlete that deliberately ingests a substance that he knows is prohibited in-competition. This remains true when looking at the facts and circumstances of the present case. The Player did not suggest an accidental or involuntary ingestion of the drug. Instead, the Player admitted having taken *Cocaine* voluntarily. According to his submission he did so on two occasions (on 25 May 2015 and one week later). According to the Player, he had a difficult childhood and, in particular, went through a very difficult phase in his life at the time of sample collection. His father, who had a drug problem himself, exercised a bad influence on him, when he reappeared with his entourage in the Player’s life. His reappearance disrupted the Player’s private life considerably and drove away the Player’s wife, who left taking their common child with her. These difficulties and hardships encountered by the Player were corroborated by the evidence testimony given by the brother of the Player Mr Leandro Fernández and by the Player’s Agent Mr Christian Braga. However, the Panel finds that all these facts do neither justify the presence of the prohibited substance in competition nor do they eliminate the Player’s personal duty to ensure that he did not compete with a prohibited substance present in his body. Consequently, the Panel finds that the otherwise applicable period of ineligibility of two years cannot be eliminated on the ground that the Player bore No Fault or Negligence.

b) No Significant Fault or Negligence

64. The ADR provide for a reduction of the otherwise applicable sanction in case of No Significant Fault or Negligence (“NSF”) where a non-specified substance is involved. Art. 22 (2) ADR provides in this respect as follows:

If a Player or other Person establishes in an individual case where art. 22 par. 1 is not applicable that he bears No Significant Fault or Negligence, then, subject to further reduction or elimination as provided in art. 23, the otherwise applicable period of Ineligibility may be reduced based on the Player or other Person 's degree of Fault, but the reduced period of Ineligibility may not be less than one half of the period of Ineligibility otherwise applicable.

65. The definition of NSF according to the Appendix A of the ADR reads as follows:

... the Player, when establishing that his Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No fault or negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of art. 6 (Presence of a Prohibited Substance or its Metabolites or Markers in a Player’s Sample), the Player must also establish how the Prohibited Substance entered his system.

66. In order to establish whether or not an athlete acted with NSF, the above definition requires that the athlete’s behaviour be compared to the standard of care that can be expected from a “reasonable person” in the athlete’s situation. As a rule of thumb, CAS jurisprudence has

found that the threshold of NSF is met if the athlete observes the “*clear and obvious precautions which any human being would take*” in the specific set of circumstances (CAS 2005/A/847, § 7.3.6). Obviously, a “reasonable person” would never have consumed drugs to begin with, in particular drugs like *Cocaine* the addictive character of which is well known. However, this is not the (decisive) issue when assessing whether or not an athlete acted with NSF, since the definition of said term specifically states that the athlete’s level of fault must be assessed “in relationship to the anti-doping rule violation”.

67. The Panel notes that the consumption of *Cocaine* (or *Cannabis*) by itself is not an ADRV. *Cocaine* is banned – according to the Prohibited List – in-competition only. In doing so the Prohibited List neither seeks to tolerate or encourage the consumption of drugs. However, from the standpoint of the fight against doping there is, in principle, no issue if these drugs are ingested in a “recreational” context unrelated to competition as long as the athlete does not return to competition with the drug still present in his or her system.

i. Sideways glance at Cannabinoids

68. Where an athlete tests positive for a (social) drug that is prohibited in-competition only, NSF is not excluded from the outset. This follows when looking at the legal situation in the context of the use of *Cannabinoids*. The definition of NSF in the WADC includes a comment with regard to *Cannabinoids* which provides as follows:

For Cannabinoids, an Athlete may establish No Significant Fault or Negligence by clearly demonstrating that the context of the Use was unrelated to sport performance.

69. The Panel observes that the respective definition section in the ADR does not include such comment. However, the Panel finds that there is no evidence on file which precludes this Panel to interpret the term NSF in the ADR in light of the WADC on the basis of which the ADR have been modelled. Consequently, in cases where an athlete establishes that he or she consumed *Cannabinoids* in a recreational / social context unrelated to sport performance, the athlete qualifies for NSF.

ii. The situation with respect to Cocaine

70. It appears questionable whether the legal situation with respect to *Cannabinoids* applies also – by analogy – to the consumption of *Cocaine*. The Panel deems that the better arguments speak in favour of answering this question in the affirmative.

71. First, the legislative history of the current version of the WADC does not prevent this Panel from applying the above comment also to the use of *Cocaine* (see in this context RIGOZZI/VIRET/WISNOSKY, *Does the World Anti-Doping Code Revision Live up to its Promises?*, Jusletter 11 November 2013, no. 140 et seq.). In an initial version of the WADC (version 2.0) both drugs (*Cannabinoids* and *Cocaine*) were being treated together as “Substances of Abuse” making it clear that recreational drug use merits “special treatment”. The (draft) provision

dealing with “Substances of Abuse” (that provided a sanction in the range of a reprimand up to one year) was criticized by stakeholders in the revision process, in particular because it suggested rehabilitation at the expense of the athlete. Stakeholders feared that requiring an athlete to foot the bill for a rehabilitation program would result in discriminatory treatment among athletes with different financial means. Thus, the original concept of “Substances of Abuse” was dropped in the final version of the WADC with the consequence that the general provisions on fault-related reductions would apply to recreational drug use. It is to be noted that the final draft of the WADC, which was circulated prior to the World Anti-Doping Conference in Johannesburg, did not contain any special provision relating to recreational drug use. In particular, the final draft of the WADC did not contain today’s comment (in the definition section) relating to *Cannabinoids*.

72. The problem related to recreational drug use was only tabled once again a couple of days prior to the World Anti-Doping Conference by some stakeholders. The latter felt that, under the general rules relating to fault-related reductions, recreational drug users would end up under the new WADC with much harsher sanctions than under the WADC 2009, which was not in line with the overall concept and purpose of the revision process to provide for more flexibility for “non-cheaters”. It appeared, thus, that a solution had to be found quickly. Initially, a broad and cohesive concept dealing with recreational drug use was contemplated in the context of fault-related reductions of the periods of ineligibility (see HAAS, in BERNASCONI (ed.) *Arbitrating Disputes in a Modern Sports World*, 2016, p. 54 seq.). However, in view of the fact that there was no further consultation window available to get any feedback from stakeholders at this late stage, it was decided to keep changes to the final version of the text to a minimum. Thus, a comment was inserted in the definition of NSF dealing with the most relevant recreational drug use in practice, i.e. the use of *Cannabinoids*. Consequently, it appears from the legislative history that the comment in the definition section related to NSF does preclude this Panel to apply the carve out for *Cannabinoids* by analogy also to the recreational use of *Cocaine* (see also in this respect RIGOZZI/HAAS/WISNOSKY/VIRET, *Breaking Down the Process for Determining a Basic Sanction under the 2015 World Anti-Doping Code*, Int. Sports Law J (2015) 15:3, 27: “... the panel might consider applying by analogy the special assessment for cannabinoids included in the Comment to the definition of No Significant Fault or Negligence in Appendix 1 of the 2015 Code, in situations that appear consistent with its underlying rationale”).
73. Second, also a systematic interpretation of the rules speaks in favour of treating both “substances of abuse” similarly when it comes to assessing the athlete’s level of fault in relation to their consumption. Finally, the application of the comment to NSF by analogy to *Cocaine* also helps to avoid inconsistencies with Art. 19 (3) ADR (Art. 10 (2) (3) WADC). The article provides that the recreational use of a drug (that is only prohibited in-competition) does not constitute “intentional doping” when being used in a context unrelated to sport performance. If this, however, is the case it would be contradictory to prevent the same athlete from recourse to the concept of NSF (enshrined in the ADR / WADC) by pointing to his alleged intentional consumption of the drug.

iii. *Applying the above principles to the case at hand*

74. In view of all of the above, the Player may establish NSF in relation to his *Cocaine* use by clearly demonstrating that the context of such consumption was unrelated to sport performance. *In casu*, the Panel finds that the evidence on file speaks in favour of a *Cocaine* use unrelated to sport performance.

75. Prof Saugy testified in the hearing that the excretion time for a single use of *Cocaine* would usually be up to 30hrs. However, Prof Saugy also stated that the detection window can be influenced by a number of factors, in particular such as the regular use of *Cocaine* as well as the consumption of (considerable amounts of) alcohol. The Player submitted that he was not a regular *Cocaine* user and that he consumed the prohibited substance only on two occasions (on 25 May 2015 and one week later). This account of facts, however, is obviously wrong, because the Player had tested already positive to *Cocaine* for a sample taken from him on May 2015. Thus, the Player must have consumed *Cocaine* in May 2015 more than 2 times. In addition, the Player's submissions are clearly contradicted by the findings of the CDU. The latter had stated in the Decision as follows:

Based on all of the above, as well as the confirmation by the Player himself with respect to his addiction to and regular consumption of cocaine...

76. Furthermore, it appears to the Panel that the Player's life in May-June 2015 was rather chaotic. His father, who apparently had a bad influence on him, had moved in his house with his entourage. Thereupon the Player's wife moved out and left the Player taking their daughter with her. The Player stated that at that time a lot of people were hanging out at his place and that a lot of alcohol was consumed. It appears to the Panel that the Player had lost control over his private life. Finally, the Panel notes that according to the expert testimony of Prof Saugy the results of the analysis of the Player's sample taken on 28 May 2015 are compatible with an intake of Cocaine a couple of days prior of the match based on the assumption that the Player is regular drug use and had consumed alcohol. In view of all of the above, the Panel concludes that the positive finding on 28 May 2015 stems from a drug use unrelated to sport performance in the prior to the match. Consequently, based on the facts before it, the Panel concludes that the Player qualifies for NSF.

iv. *The appropriate period of ineligibility*

77. In light of the jurisprudence in CAS 2013/A/3327 & 3335 CAS Panels distinguish between different categories of negligence, i.e. light, normal and significant negligence. Only the first two categories allow for a reduction of the otherwise applicable period of ineligibility according to Art. 22 (2) ADR. In case of NSF, the applicable sanction can be reduced down to one half of the otherwise applicable sanction. Accordingly the applicable scale of sanction in the case at hand extends from 12 – 24 months. Applying the above categories of negligence to this scale of sanction, the Panel concludes that in case of:

- a. light degree of negligence, the applicable period of ineligibility ranges from 12-18 months, and
 - b. in the case of normal degree of negligence, the applicable range is from 18-24 months.
78. In order to determine which category of negligence is applicable in a particular case, it is helpful to consider both the objective and the subjective levels of fault. While the objective element describes what standard of care could have been expected from a reasonable person in the Player's situation, the subjective element describes what could have been expected from that particular Player, with regard to his personal capacities.
79. In the given case the Panel finds that the objective level of negligence is not negligible, since the prohibited substance has been ingested rather close to the sporting event. The Player, thus, did not take any particular precautions with respect to observing a "cooling-off" period. Considering the Player's reduced ability to exert control over and steer his private life, the Panel finds that the Player's subjective level of negligence is lower. Balancing both aspects the Panel finds that this is a case on the borderline between normal and light degree of negligence and, thus, deems a period of ineligibility amounting to 18 months to be appropriate.

C. Commencement of the period of ineligibility

80. Art. 28 ADR provides as a general rule that the period of ineligibility shall start on the date of the Panel's decision. The operative part of the award has been issued on 8 July 2016. Consequently, the period of ineligibility shall commence on such date. Art. 28 (3) ADR also provides that the Player receives credit for any provisional suspension previously imposed on him. The Player in the present case was provisionally suspended as of 9 July 2015. Thus, the period served by the Player under the provisional suspension as of 9 July 2015 shall be credited to him.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Appeal filed by the Fédération Internationale de Football Association on 25 January 2016 against the decision issued by the Appeal Chamber of CONMEBOL's Disciplinary Unit (CDU) dated 14 December 2015 is partially upheld.
2. The decision issued by the Appeal Chamber of CONMEBOL's Disciplinary Unit (CDU) dated 14 December 2015 is set aside.
3. Mr Brian Fernández is sanctioned with a period of ineligibility of 18 months, starting from the date of the present award, with credit given for any period of ineligibility already served.
4. (...).
5. (...).
6. All other or further claims are dismissed.