Arbitration CAS 2018/A/5615 Jared Higgs v. Bahamas Football Association (BFA), award of 25 March 2019

Panel: Prof. Cameron Myler (USA), President; Mr Mark Hovell (United Kingdom); Prof. Ulrich Haas (Germany)

Football (beach soccer)
Doping (failure to submit to sample collection/doping control)
Sample collection for anti-doping purposes
Ex post substitution of grounds for the conduct of tests
Duty to substantiate
Onus to substantiate
Threshold of sufficient substantiation

1. **A sample collection needs to have anti-doping purposes for an appellant's non-compliance therewith to potentially constitute an Anti-Doping Rule Violation. In case of doubt, it must be assessed and interpreted from a reasonable person's perspective whether the sample collection was conducted for anti-doping or for other (permissible) medical purposes. When doing so, a panel takes into account that, absent any indication to the contrary, a sports organisation would opt for the alternative most in line with the applicable regulations. Regulations such as the FIFA Anti-Doping Regulations, the World Anti-Doping Code and the International Standard on Testing and Investigations were all drafted with a view to safeguarding *"the principles of respect for human rights, proportionality, and other applicable legal principles",* so any tests conducted under its guise must abide by all the mandatory requirements in those regulations.**

2. **The original purpose of a testing cannot be substituted with another purpose at a later point in time. It must be clear from the outset for the subject of the test, for what purpose the testing is being conducted and therefore what rules shall apply to it.**

3. **The duty to substantiate and, in particular the prerequisites that a party must fulfil in order to dispose of its duty to sufficiently substantiate its submissions is intrinsically linked to the principle of party presentation and thus is a procedural question. There are links also to the law applicable to the merits since, in particular, what must be submitted by a party will be dictated by the law applicable to the merits.**

4. **The onus of substantiation is linked to the law applicable to the merits as the onus of presentation follows from the burden of proof.**

5. **Submissions are in principle sufficiently substantiated if they are detailed enough (i) for a panel to determine and assess the legal position claimed and (ii) for a counterparty to be able to defend itself.**

I. PARTIES

1. Mr Jared Higgs (the "Appellant" or "Player") is a former member of the Bahamas Beach Soccer National Training Team.

2. The Bahamas Football Association (the "Respondent" or "BFA") is the national football federation of the Bahamas, with its registered office in Nassau, Bahamas. The BFA is affiliated to the Confederation of North, Central American and Caribbean Association Football ("CONCACAF"), which is in turn affiliated to the Fédération Internationale de Football Association ("FIFA"). The BFA governs all aspects of beach soccer in the Bahamas, including its anti-doping program.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

A. Background facts

4. From March 2016 to early January 2017, the Player worked out and trained with the Bahamas Beach Soccer National Training Squad prior to the 2017 CONCACAF Beach Soccer Championships in February 2017 and 2017 FIFA Beach Soccer World Cup in May 2017 ("2017 Beach Soccer Events").

5. In the summer of 2016, the Player was selected to participate as a member of the Bahamas team in a beach soccer training camp and tournament in Europe. Following the tournament in Europe and after his return to the Bahamas, the Player continued to practice with the training squad.

6. In late 2016, the BFA was preparing to select a team that would travel to Argentina for training and a competition.

7. In December 2016, the Deputy General Secretary of CONCACAF, Ted Howard, forwarded Circular No. 372 (2017 CONCACAF Beach Soccer Championship – Medical and Doping Control) to the 'General Secretaries of Participating Member Associations' including the General Secretary of the BFA, Frederick Lunn. Attached to Circular No. 372 were three documents:

i. Pre-Competition Medical Assessment ("PCMA") Form;

ii. Participating Member Association ("PMA") Declaration of Agreement to the PCMA; and

iii. Therapeutic Use Exemption ("TUE") Application.

8. CONCACAF Circular No. 372 stated, *inter alia*, that:

> *"A. In order to protect players' health as well as to prevent sudden cardiac death during matches at the Competition, each Participating Member Association shall endure and confirm to the Organizing Committee that its players underwent a pre-competition medical assessment (PCMA) prior to the start of the Competition.* ***The PCMA will include a full medical assessment as well as an echocardiogram and EKG to identify any cardiac abnormality.*** *The medical assessment must be carried out between 270 days and 35 days prior to the start of the Competition. The Organizing Committee will provide the PCMA form to all Participating Member Associations* (emphasis added).
>
> *B. The duly licensed medical representative of each Participating Member Association (i.e., national team doctor) will be required to sign the PCMA form certifying the accuracy of the results and confirming that the players and officials have passed the pre-competition medical assessment.* ***The medical assessment form shall also include the signatures of the President and General Secretary of the Participating Member Association and shall be received by the Organizing Committee General Secretariat at the latest seven (7) business days prior to the start of the competition*** (bold in original).
>
> *(…)*
>
> *J. Doping is the use of certain substances or methods capable of artificially enhancing the physical and/or mental performance of a player, with a view to improving athletic and/or mental performance. If there is medical need as defined by the player's doctor, then a Therapeutic Use Exemption (TUE) application must be filed 21 days prior to competition for chronic conditions and as soon as possible for acute situations. The TUE approval system includes a designated administrative and functional committee that will review applications and certify the exemption as the committee defines".*

9. On 8 January 2017, the Player attended a national team training session.

B. The test of 17 January 2017

10. On 16 January 2017, all members of the national Beach Soccer team were allegedly informed that on the following day (*i.e.*, on 17 January 2017), doping testing would take place pursuant to the PCMA.

11. On 17 January 2017, at 7 am, doping testing took place at the Bonaventure Medical Centre near to the offices of the BFA.

12. The Player was not in attendance for these tests. As such, he received a WhatsApp message from Jason McDowall, a Vice President of the BFA, and engaged in the following exchange:

> *"*[1/16/2017, 07:35] *Jason McDowall: Why u not at bfa office for medical form*
> [1/16/2017, 07:35] [The Player]*: Didnt know about it*
> [1/16/2017, 07:36] *Jason McDowall: Your team mate should have told you*
> [1/16/2017, 07:36] *Jason McDowall: Everyone in squad has to do this today*
> [1/16/2017, 07:37] [The Player]*: Ok… at the bfa office?".*

The Player did not receive a response from Mr McDowall to the question he posed (*"Ok… at the bfa office?"*) and did not go to the BFA's office or to the Bonaventure Medical Centre to complete the test.

13. On 18 January 2017, the BFA provisionally suspended the Player. A letter from Mr Lunn on this date addressed to the Player stated as follows ("BFA Suspension Letter"):

> *"This letter is to inform you that you are suspended from all Senior Men's Football Competition and National Teams Competition effective immediately. This disciplinary action is being taken because of your failure to report for the required BFA/Pre-Competition Testing; this suspension will stay in effect until you have completed the requirements of the BFA Pre- Competition Testing. Testing will be done at the request of the BFA. No advance notice is required prior to testing.*
>
> *You have the right to appeal this decision. If you chose to appeal in writing, please attach a check in the amount of $50 (non-refundable) to you* [sic] *letter and deliver it to the BFA office on Rosetta St. You are advised that all decisions of the Appeals Committee are final".*

It was agreed between the parties that the Player was not notified of the BFA Suspension Letter until sometime in June 2017 (see below).

14. In between January and June 2017, the BFA claimed that it repeatedly attempted to contact the Player through calls and messages, but the Player ignored them. The Player did not reach out to the BFA either. It was agreed between the parties that during this period, the Player and the BFA had no communication whatsoever.

C. The Player's re-appearance in June 2017

15. On 10 June 2017, the Player went to the BFA's Beach Sand Soccer facilities near Malcolm Park on the Island of New Providence to play a game in the Bahamas Beach Soccer Super League, a BFA-sanctioned competition. When he arrived at the football pitch, the Player was informed by Mr McDowall of the BFA about his provisional suspension, and stated that he was not permitted to play in the league. The Player asked to see evidence of his suspension in writing. He became upset, yelled at Mr McDowall, and ultimately was asked to leave the soccer pitch.

16. The official referee's report regarding the incident stated as follows:

"The first match of the Beach Soccer League was prepared to start between Elite 1 VS Barracudas. Before the start of the game Mr Jason MacDowall (BFA VP) approached me as the referee coordinator and informed me that one of the starting members of barracudas was not eligible to play because of recent sanction.

I called the [Player] *to the technical area and directed him to Mr. McDowall. Mr. MacDowall informed him that he was ineligible to play at a sanctioned BFA League and that he* ([the Player]) *would have to speak with the BFA General Secretary to be made aware of why he was ineligible. As this conversation was taking place in the technical area, I asked both parties to kindly continue their conversation in the tunnel so that we could begin the match. They moved to the tunnel where Mr. Higgs' mother was present. At this point Mr. Higgs began saying to Mr. McDowall "see what happens. This is fucking shit. I did not receive any fucking letter". "This is shit". "You will see what the fuck will happen to you". Mr. McDowall said, "I have not done anything, all I am asking you to do is talk with the General Secretary". At this point, the security guard approached them and asked* [the Player] *and his mother to leave the facility. At this point I returned to my duties as the referee Coordinator for the match".*

17. In or around 20 June 2017, the Player went to see Mr Lunn who tried to give him a copy of the BFA Suspension Letter, but Mr Lunn ended up reading the contents to the Player instead. Mr Lunn invited him to return to the office to discuss the suspension and other matters at 6:00 pm on 23 June 2017.

D. Proceedings before the BFA Disciplinary Committee

18. On 23 June 2017, the Player arrived at the BFA office to discuss the contents of the BFA Suspension Letter. Mr Lunn and Mr McDowall were present, but so were Carl Lynch, James Thompson, Andre Moss, and Ivan James. The Player was informed that Messrs. Lynch, Thompson, Moss and James were a disciplinary committee appointed by the BFA ("BFA Disciplinary Committee") to conduct a hearing with respect to the Player's alleged anti-doping violation, as well as his conduct on 10 June 2017.

19. On that same day, a hearing was held before the BFA Disciplinary Committee.

20. On 19 July 2017, the BFA Disciplinary Committee rendered a decision as follows ("BFA Disciplinary Committee Decision"):

"We refer to the Bahamas Football Association's Disciplinary Committee hearing on Friday, the 23rd. June, 2017 concerning your automatic suspension from all Senior Men' s Football Competition and National Teams Competition as reflected in a letter from the Association's General Secretary, Mr. Frederick Lunn, dated the 18th. January, 2017, due to your failure to present yourself for the anti -doping test back in the month of January, 2017. We also considered the facts surrounding your use of abusive foul language directed at Mr. Jason McDowall, Vice President BFA on Saturday, 11th. July, 2017, at the Bahamas Football Association's Beach Sand Soccer facilities near Malcolm Park situate on the Island of New Providence.

Firstly, the members of the Disciplinary Committee provided you with the facts surrounding your failure to take the randomly selected anti-doping test in the month of January, 2017, which is a mandatory test required

by the Federation Internationale de Football Association commonly referred to as "FIFA" of which the Bahamas Football Association is a registered member. You were a member of the pool of registered players selected to try out for the Bahamas's Beach Soccer Men's National Team for the upcoming FIFA Beach Soccer World Cup which was held recently in the Bahamas. Consequently, you were subject to an anti-doping test as required for any player who may be selected to represent the Bahamas in international competition. During the hearing before the Disciplinary Committee, you admitted that you had notice of the anti-doping testing even though you said that it was "short notice". You said that you were unable to attend the anti-doping testing on that particular day in the month of January, 2017 due to family obligations but you never provided the Bahamas Football Association with this excuse until the said hearing. You also stated at the hearing that you became disinterested in the selection process but you never informed the Bahamas Football Association of this fact - therefore, you continued to be a member of the pool of players who were subject to the anti-doping test. In any event, since the month of January, 2017 until now, you have failed to present yourself for the anti-doping testing, which is required before the Bahamas Football Association can lift your suspension. Your suspension is not a ban from future participation in local soccer competition in the Bahamas but it can only be lifted once you have taken the anti-doping testing. Such a request is not unreasonable considering the fact that such a requirement is a worldwide one laid down by FIFA, which all players in the selected pool are made aware of and are required to take. We considered the hearing to be a fair one since you were given an opportunity to refute your failure to take the anti-doping test, which is an international requirement laid down for all soccer players who may be selected to represent their respective countries like the Bahamas. As a result, the members of the Disciplinary Committee will advise the Bahamas Football Association that your suspension will not be lifted until you have presented yourself for an anti-doping test, which is a requirement laid down by FIFA for any international or national soccer competition.

Secondly, you were also given an opportunity to refute the allegation about your use of abusive language directed at Mr. Jason McDowall, Vice President BFA on Saturday, 11th. July, 2017. You were made aware of the language used by you which was reported to the Bahamas Football Association and you denied using such language as reported by Mr. Wilson Da Costa, a FIFA Referee. According to the Referee's report, he alleged that you said, '[t]*his is fucking shit, I did not receive any fucking letter'. 'This is shit'. 'You will see what the fuck will happen to you'. You denied that you used such language that day but we reject your denial and accept the report of the Referee. As a result, the members of the Disciplinary Committee will impose a ban of 4 matches and you are to pay a fine of $40.00. However, any future competition is subject to you completing the anti-doping test as required".*

21. On 24 July 2017, the Player was notified of the BFA Disciplinary Committee Decision.

22. On 7 July 2017, the Player's attorney wrote to FIFA enclosing copies of correspondence with the BFA regarding the validity of the BFA's suspension of the Player without a hearing and requesting FIFA's intervention.

23. On 13 July 2017, FIFA replied:

"[W]e regret having to inform you that the FIFA Disciplinary Committee is not in a position to intervene on the substance of the matter at stake, which would fall under the remit of the Bahamas Football Association and be governed by the applicable regulations of said association".

E. Proceedings before the BFA Appeals Committee

24. On 14 August 2017, the Player filed a Notice of Appeal with the BFA Appeals Committee against the BFA Disciplinary Committee Decision. In this Notice, the Player cited Article 24.3 of the BFA Statutes, various Codes of Conduct of the BFA and Articles 74 and 75 of the FIFA Anti-Doping Regulations (the "FIFA ADR").

25. On 20 October 2017, the BFA notified the Player that the BFA Appeals Committee would hear his appeal on 26 October 2017.

26. On 26 October 2017, the Player and his attorney attended a hearing in front of the BFA Appeals Committee.

27. The BFA Appeals Committee did not permit the Player's attorney, Mr Whitfield, to advocate on the Player's behalf, despite repeated requests by Mr Whitfield to direct him to applicable FIFA and/or BFA statutes or rules that prohibited the Player from being represented by counsel at the hearing. One of the BFA Appeals Committee members, Mr Bowe, made the following statement to the Player's attorney:

> *"Mr. Whitfield, if this is the path that we are going to go under then I'm to the point where I say that you're going to have to take it to another level because we're not going to hear from you. We're not going to hear from you. So if your client wants to appeal he may but we're not going to hear from you. You need to take whatever actions you feel that you need to take, that's fine but this committee, we have gone, we have reviewed all of this documentation, we've spent a lot of time going through your documentation, the BFA's documentation, we've contacted FIFA for guidance in this matter and all we want, all this committee wants is to hear from Mr. Jared Higgs. Alright? If you've taken the position, either we hear from you or it's nothing then so be it".*

28. The Player's attorney asked if the BFA Appeals Committee could refer him *"to any specific provisions of either the FIFA constitution, the FIFA disciplinary code, or the FIFA anti-doping code that authorizes* [the BFA Appeals Committee] *to take the particular course that you're endeavouring to take"*. Dr Collins responded as follows: *"FIFA says that we can go by and comply with our local anti-doping laws, which we do have and it's right here"*.

29. On 22 January 2018, the BFA Appeals Committee rendered a decision as follows (the "Appealed Decision"):

> *"The Appeals Committee has concluded its investigation and the decision have been made to impose a ban of four (4) years in compliance with WADA Anti-doping Code 2015 Vl.10.2.1 and 10.2.1.2 and FIFA's Anti-Doping Regulations 5-3 and 8.*
>
> *The issue is a simple one.* [The Player's] *refusal to take a drug test is in direct non-compliance with FIFA and WADA rules and policies in Anti-doping of which the Bahamas Football Association is a signatory.*

Referring to the meeting of Thursday, October 26, 2017 at 6:30 p.m. held in the office of Callenders and Co, located at One Miller Court, Nassau, Bahamas (attached minutes, self-explanatory), The Appeals Committee has determined that all communications and avenues to deal with this matter has been exhausted".

30. On 26 January 2018, the BFA sent a letter to the Player stating as follows ("Appealed Decision Notification Letter"):

> *"**Re: Final Decision of BFA Appeals Committee-Jared Higgs***
>
> *Dear Mr. Higgs,*
>
> *We inform you that, based on the decision taken by the BFA's Appeals Committee on 22 January 2018, you have been banned for a period of 4 years in accordance with mandatory BFA Pre-Competition Testing, FIFA Anti-Doping Regulations 5-3 and 8 and WADA Anti-Doping Code 2015, VI.10.2.1 and 10.2.1.2.*
>
> *The ban period starts on 22 January 2018, the date on which the decision was made by the Appeals Committee. Consequently, you have lost all membership rights as defined in Article 5 of the BFA Statues* [sic] *and Article 29 of the FIFA Anti-Doping Regulations. You are no longer entitled to take part in competitions and other activities organized by the BFA. Additionally, you are banned from entering any BFA facilities.*
>
> *The decision of the BFA Appeals Committee is final".*

31. On 7 February 2018, the Player's attorney was provided with a copy of the Appealed Decision Notification Letter.

32. On 19 February 2018, the Player was notified of the findings of the Appealed Decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

33. On 12 March 2018, in accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "CAS Code"), the Player filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the BFA Disciplinary Committee Decision and the Appealed Decision. The Statement of Appeal contained the following prayers for relief:

> *"(1) a ruling overturning and setting aside the suspension and fine imposed by the* [BFA Disciplinary Commission Decision], *on the basis that such decision is null, void and of no effect and that the* [Player] *is permitted to participate in all BFA-sanctioned events without the necessity to undergo any anti-doping test as a prerequisite to the lifting of the suspension and/or fine;*
>
> *(2) a ruling overturning and setting aside the* [Appealed Decision] *imposing a ban of four (4) years upon the* [Player] *in alleged compliance with WADA Anti-Doping Code 2015 VI.10.2.1 and 10.2.1.2 and FIFA's Anti-Doping Regulations 5-3 and 8 because the* [Player] *allegedly refused to take a drug*

test, on the basis that the alleged decision failed to comply with the statutes, rules, regulations and procedures of FIFA and/or of the [BFA]*;*

(3) alternatively to (2) above, a ruling that if the [Player] *is guilty of a missed anti-doping test (which is not conceded) the ban of four (4) years upon the* [Player] *is excessive and contrary to the schedule of offenses, penalties and fines to the* [BFA's] *Code of Conduct for National Teams 9/5/2016 wherein the penalty for possession or use of alcohol, performance enhancing drugs or illegal drugs is four (4) weeks suspension and/or $150 fine and in the case of illegal drugs, the team member must pass a drug test before the suspension is lifted, while the penalty in the case of failure to attend training sessions and functions is a two (2) week suspension and/or $25 fine;*

(4) a ruling that the [Player] *should be compensated in damages for being unjustly and unlawfully suspended from participation in BFA-sanctioned events and as a penalty for the dilatory and haphazard manner in which the* [BFA] *has conducted itself in this matter".*

34. In his Statement of Appeal, the Player nominated Mr Mark Hovell, Solicitor, Manchester, United Kingdom, as an arbitrator.

35. On 16 March 2018, the BFA wrote to the CAS Court Office confirming its nomination of Prof. Ulrich Haas, Law Professor, Zurich, Switzerland, as an arbitrator.

36. On 19 March 2018, the Player wrote to the CAS Court Office noting his willingness for the matter be submitted to a Sole Arbitrator in order to minimise costs. The CAS Court Office invited the BFA to submit its position on this issue.

37. On 20 March 2018, the BFA wrote to the CAS Court Office rejecting the Player's request for a Sole Arbitrator to be appointed, stating that it preferred for the matter to be heard before a three-person Panel.

38. On 22 March 2018, in accordance with Article R51 of the CAS Code, the Player filed his Appeal Brief with the CAS Court Office. The Appeal Brief contained the following prayers for relief:

"(1) a ruling overturning and setting aside the suspension and fine imposed by the [BFA Disciplinary Commission Decision], *on the basis that such decision is null, void and of no effect for the reasons stated above in this Appeal Brief and that the* [Player] *is permitted to participate in all BFA-sanctioned events without the necessity to undergo any anti-doping test as a prerequisite to the lifting of the suspension and/or fine;*

(2) a ruling overturning and setting aside the [Appealed Decision] *imposing a ban of four (4) years upon the* [Player] *in alleged compliance with WADA Anti-Doping Code 2015 VI.10.2.1 and 10.2.1.2 and FIFA's Anti-Doping Regulations 5-3 and 8 (and Article 20, para.1) because the* [Player] *allegedly refused to take a drug test, on the basis that the said decision is null, void and of no effect because the Appeals Committee failed to comply with the statutes, rules, regulations and procedures of FIFA and/or of the* [BFA] *and the hearing before the* [BFA's] *Appeals Committee was defective and failed to adhere to the principles of natural justice/procedural fairness for the reasons stated above in this Appeal Brief and that the* [Player] *is permitted to participate in all BFA-sanctioned events. The*

penalty in this matter appears to commence from 22 January 2018 but does not take into consideration or give the [Player] *ant* [sic] *any credit for his provisional suspension from participation in BFA-sanctioned events since 18 January 2017;*

(3) alternatively to (2) above, a ruling that if the [Player] *is guilty of a missed anti-doping test (which is acknowledged for the purposes of these proceedings but not conceded) the ban (under Article 20, para.1 of the FIFA Anti-Doping Regulations) of four (4) years upon the* [Player] *is excessive and contrary to the schedule of offenses, penalties and fines to the* [BFA's] *Code of Conduct for National Teams 9/5/2016 wherein the penalty for possession or use of alcohol, performance enhancing drugs or illegal drugs is four (4) weeks suspension and/or $150 fine and in the case of illegal drugs, the team member must pass a drug test before the suspension is lifted, while the penalty for disobedience of rules, regulations, etc., is 4 weeks suspension and/or $100 fine and the penalty for failure to attend training sessions and functions is a two (2) week suspension and/or $25 fine. The penalty in this instance does not take into consideration or give him any credit for the provisional suspension of the* [Player] *from participating in BFA-sanctioned events commencing 18 January 2017;*

(4) alternatively to (2) and/or (3) above, a ruling that if the [Player] *is guilty of a missed anti-doping test (which is acknowledged for the purposes of these proceedings but not conceded) the ban of four (4) years upon the* [Player] *is excessive and fails to consider that the violation by the* [Player] *was not intentional (as defined in Article 19, para. 3 of the FIFA Anti-Doping Regulations) for the reasons stated above in this Appeal Brief and under Article 20, para. 1 of the FIFA Anti-Doping Regulations could have been subject to a period of ineligibility of two (2) years, subject to taking into consideration or giving the* [Player] *credit for his provisional suspension from participating in BFA-sanctioned events commencing on 18 January 2017;*

(5) a ruling that the [Player] *should be compensated in damages for being unjustly and unlawfully suspended from participation in BFA-sanctioned events and as a penalty for the dilatory and haphazard manner in which the* [BFA] *has conducted itself in this matter".*

39. On 27 March 2018, the Player wrote to the CAS Court Office submitting a copy of his own witness statement.

40. On 26 April 2018, following extensions granted by the Division President and in accordance with Article R55 of the CAS Code, the BFA filed its Answer with the CAS Court Office. The Answer contained the following prayers for relief:

"Prayer 1: The Appeal shall be declared inadmissible.

Subsidiary to Prayer 1:

Prayer 1A: The Appeal shall be rejected and the decision under Appeal shall be confirmed.

Prayer 2: In any event, [the Player] *shall be ordered to bear the costs of the arbitration and he shall be ordered to contribute to the legal fees incurred by the* [BFA] *at an amount of CHF 10,000".*

41. In its Answer, the BFA also requested that the Panel/Sole Arbitrator render a preliminary award on admissibility.

42. On 30 April 2018, the CAS Court Office wrote to the parties acknowledging receipt of the Answer filed by the BFA but also invited the Player to file his comments, solely on the issue of admissibility, within 10 days in light of the BFA's objection to the admissibility of the Appeal. The parties were also invited to submit their preferences regarding a hearing.

43. On 7 May 2018, the Player filed his response to the BFA's objections to the admissibility of the Appeal. The contents of this submission have been summarised in section VIII of this Award, and it contained the following prayers for relief:

> *"3.1 The* [Player] *humbly prays that the CAS will dismiss the* [BFA's] *objection to the admissibility of the Statement of Appeal and subsequent pleadings on the grounds that the* [BFA] *has failed to substantiate the legality of the objections made.*
>
> *3.2 Based on the relevant CAS case law, the letters and email from the BFA's General Secretary did not constitute the decision itself of the BFA's Appeal Committee but merely a summary or synopsis of a part of the decision that the General Secretary considered most important to be notified to the* [Player].
>
> *3.3 Based on the relevant CAS case law, the* [Player's] *duty and responsibility is to provide all parties affected by the appeal with notification by receipt of the decision of the decision-making body whether the decision itself is in letter form or otherwise and howsoever delivered.*
>
> *3.4 The* [Player] *humbly prays that the CAS will find that, having regard to the* [Player's] *actions in this matter and the date upon which the* [Appealed Decision] *was notified to and received by the* [Player] *on 19 February 2018, the* [Player's] *Statement of Appeal was properly lodged within the time limits established by FIFA and by the CAS".*

44. On 22 May 2018, the CAS Court Office informed the parties that, pursuant to Article R54 of the CAS Code, the Panel appointed to decide the matter was constituted as follows:

> President: Prof. Cameron Myler, Law Professor, New York, United States of America;
>
> Arbitrators: Mr Mark Hovell, Solicitor, Manchester, United Kingdom;
> Prof. Ulrich Haas, Law Professor, Zurich, Switzerland.

45. On 12 June 2018, the CAS Court Office wrote to the parties informing them that the Panel had determined to hold a hearing in this matter. Further, the Panel's decision on the BFA's objection to the admissibility of the Appeal would be rendered after the hearing and in the final Award.

46. On 12 and 16 July 2018, the Player and BFA, respectively, signed and returned the order of procedure to the CAS Court Office.

47. On 20 July 2018 a hearing was held at the CAS Court Office in accordance with Article R56 of the CAS Code. The panel was assisted by Mr Brent Nowicki, CAS Managing Counsel and joined by the following persons:

    i. For the Player: Mr C. Vincent Wallace Whitfield (counsel);

    ii. For the BFA: Dr Jan Kleiner and Mr Marc Cavaliero (external counsel).

48. In addition to the Player and Mr Jason McDowall and Mr Frederick Lunn, who were present as party representatives, the following witnesses gave evidence before the Panel at the hearing. All witnesses were physically present with the exception of Mr Gavin Christie and Mr Lesly StFleur, who were heard by telephone.

    i. The Player (himself), the Appellant;

    ii. Mr Jason McDowall (BFA Vice President & National Team Manager);

    iii. Mr Frederick Lunn (BFA General Secretary);

    iv. Dr Patty Symonette (Bahamas Anti-Doping Committee Board Member);

    v. Mr Gavin Christie (BFA Beach Soccer national team member);

    vi. Mr Lesly StFleur (BFA Beach Soccer national team member);

49. At the opening of the hearing, the parties confirmed that they had no objections to the constitution of the Panel. The Panel informed the parties of its conclusion that the Player's appeal was admissible and that the Panel's reasoning would be set forth in the final decision.

50. The party representatives and all the witnesses were invited by the President of the Panel to tell the truth subject to the sanctions of perjury. The parties and the Panel had the opportunity to examine and cross-examine the witnesses. The parties then were given the opportunity to present their cases, to make their submissions and arguments and to answer questions posed by the Panel. The parties then made their final, closing submissions. The hearing was then closed and the Panel reserved its detailed decision to this written Award.

51. Upon closing the hearing, the parties expressly stated that they had no objections in relation to their respective rights to be heard and that they had been treated equally in these arbitration proceedings. The Panel has carefully taken into account in its subsequent deliberation all the evidence and the arguments presented by the parties, both in their written submissions and at the hearing, even if they have not been summarised in the present Award.

IV. SUBMISSIONS OF THE PARTIES

52. The following summary of the parties' submissions is illustrative only and does not necessarily

comprise each and every contention set forth by the parties. The Panel however, has carefully considered all submissions made by the parties, even if no explicit reference is made in what immediately follows.

A. The Player's submissions

53. The Player's submissions, in essence, may be summarized as follows:

1. The BFA Disciplinary Committee hearing – 23 June 2017

54. The Player submitted that the hearing which led to the BFA Disciplinary Committee Decision was *"defective and procedurally incorrect and should be declared null and void"* for the following reasons.

55. Contrary to Article 63 of the FIFA ADR, Article 7 of the BFA's Good Governance Code of Conduct 2016, and the legal principles of natural justice/procedural fairness, the Player was not given any written or other particulars of the rules violations that he was alleged to have committed, was not notified that he was entitled to be assisted by counsel, and was not given the opportunity to be heard in relation to the issues of infringement and sanction. Moreover, contrary to Article 81 of the FIFA Disciplinary Code (the "FDC"), the chairperson of the BFA Disciplinary Committee had no legal qualifications.

56. Contrary to Articles 3 and 67 of the FIFA ADR, the BFA did not produce any evidence demonstrating that the Player had been designated to undergo a doping test by anyone appointed as a responsible officer of the BFA, or that he was obliged to provide a urine or blood sample, or that he was required to undergo any medical examination that the responsible office deemed necessary, or that he failed to cooperate with such officer in that respect.

57. Contrary to Articles 3 and 43 of the FIFA ADR, the BFA failed to produce any evidence that a duly appointed and accredited Doping Control Officer ("DCO") was present and available on any date in January 2017 for the purposes of sample collection, or that a DCO had informed the Player of the consequences for failing to comply.

58. Contrary to Articles 3, 45 and Annex C of the FIFA ADR, the BFA failed to produce any evidence of the inclusion of the Player in a national or international registered testing pool, and it never sought or requested whereabouts information from the Player as required in the regulations. In fact, the General Secretary of the BFA stated that:

> *"I just want to make the point, that I think if* [the Player] *had stayed in touch with the organisation had communicated back to Mr. McDowall we tried to reach out to him but lost communication with him and as G.S. there is no obligation for me to chase people around the island to find them for a letter".*

59. Contrary to Article 66 of the FIFA ADR, the BFA failed to discharge its burden of establishing to the BFA Disciplinary Committee that an anti-doping rule violation ("ADRV") had occurred. Moreover, the BFA has never set out which provisions of the FIFA ADR, if any, the Player was alleged to have violated.

60. The conduct of the disciplinary hearing on 23 June 2017 was contrary to Article 22 of the BFA Statutes/Constitution, Articles 85 and 94 of the FDC and Article 63 of the FIFA ADR. At the hearing, as evidenced by the hearing transcript, the Disciplinary Committee required the Player to prove his innocence rather than requiring the BFA to prove that the Player had committed an ADRV or violated other rules. There were also numerous violations of due process at the hearing, as Mr McDowall (BFA Vice President) and Mr Lunn (BFA General Secretary) were freely allowed to interject and make comments on behalf of the BFA at any time in a completely unstructured manner.

2. The BFA Disciplinary Committee Decision

61. The Player submitted that the BFA Disciplinary Committee Decision itself was also *"defective and procedurally incorrect and should be declared null and void"* for the following reasons.

62. The BFA Disciplinary Committee Decision incorrectly stated that the anti-doping test the Player allegedly failed to take, was *"randomly selected"* and *"a mandatory test required by (…) FIFA"*. Moreover, the decision erroneously stated that the Player admitted during the hearing that he had notice of the anti-doping test, but said he was unable to attend due to family obligations. However, the decision did not mention that the Player corrected his misstatement later in the hearing and told the BFA Disciplinary Committee that the message he actually received from Mr McDowall on WhatsApp was to come to the BFA's office *"for a medical"* and that there was no mention of a drug test. The decision also failed to mention that the Mr Lunn admitted during the hearing that the Pre-Competition Testing could, but does not have to, include an anti-doping test.

63. With respect to the Player's alleged *"abusive language"* directed at Mr McDowall on the soccer pitch, the BFA Disciplinary Committee failed to specify the grounds of the decision and *"the provisions on which the decision was based"*, which is contrary to Article 115, para. 1 of the FDC. Specifically, the penalty imposed by the BFA Disciplinary Committee included a suspension of four matches plus payment of a fine of USD 40. No reasons were given as to how the committee arrived at its decision that the Player was guilty of directing abusive language at Mr McDowall, what factors induced them to accept the report of the referee without explanation or reference to the reports of Dwayne Forbes and/or Daria Adderley.

64. The Player never agreed to or became a member of the pre-competition training squad and never signed the agreement to participate in the national team or national training, which is appended to the BFA's Code of Conduct for National Teams 9/5/2016 ("Code of Conduct"). Consequently, the Player considers that he was not under any obligation to undergo pre-competition anti-doping testing, if that is what occurred. The Player also never became or agreed to become a member of any pool of registered players selected to try out for the Bahamas Beach Soccer Men's National Team as concluded by the BFA Disciplinary Committee and was not subject to any anti-doping test.

65. There was no evidence before the BFA Disciplinary Committee that the BFA actually conducted any Out-of-Competition testing on anyone in January 2017. Further, there was no evidence before the BFA Disciplinary Committee that whatever testing, if any, that was initiated

and directed by the BFA was conducted in accordance with the terms of the FIFA ADR or the Bahamas Anti-Doping Rules 2015 ("Bahamas ADR") by qualified DCOs under the jurisdiction of the Bahamas Anti-Doping Commission or that the analysis of any samples was conducted by a World Anti-Doping Agency ("WADA") accredited laboratory.

66. Further, there is no evidence that the Player was ever formally notified by the BFA that he had to undergo the PCMA, given the option to accept or decline the BFA Code of Conduct, or ever given formal notice from 18 January until 23 June 2017 that he was alleged to have committed an anti-doping infraction.

67. Neither the BFA nor the BFA Disciplinary Committee gave any weight to and totally failed to acknowledge that players have rights too, in this case the right to decline selection or participation in a national team training squad which the Player did beginning on 8 January 2017. Similarly, neither the BFA nor the BFA Disciplinary Committee acknowledge that the Player failed to attend training sessions or any other function involving the squad/team or involve himself in the sport from 8 January to 10 June 2017.

3. The BFA Appeals Committee hearing – 26 October 2017

68. The Player submitted that the hearing on 26 October 2017 which led to the Appealed Decision was *"defective and procedurally incorrect and should be declared null and void"* for the following reasons:

69. Contrary to Article 63 of the FIFA ADR and the principles of natural justice/procedural fairness, the Appeals Committee hearing was not fair and impartial because the Player was denied 1) his right to be assisted by counsel at his own expense, 2) the right to respond to the asserted ADRV and resulting consequences, and 3) the right to present evidence relevant to his appeal.

70. The Player was not provided with all of the documentation used by the BFA Appeals Committee in its deliberations. For example, the Player noted that the BFA Appeals Committee stated that it had received *"guidance"* from FIFA regarding this matter and the Player was never provided any information about what was discussed, and how or whether that information prejudiced the BFA Appeals Committee against the Player. In that regard, the Player noted that his attorney wrote to FIFA on 5 July 2017 regarding the legality of BFA's suspension of the Player without a hearing and requested FIFA's intervention. FIFA replied on 13 July 2017 stating: *"*[W]*e regret having to inform you that the FIFA Disciplinary Committee is not in a position to intervene on the substance of the matter at stake, which would fall under the remit of the Bahamas Football Association and be governed by the applicable regulations of said association".*

71. A review of the Bahamas' Anti-Doping in Sport Act 2009 (Act No. 29 of 2009) ("ADS Act") and the Bahamas ADR (Statutory Instrument No. 25 of 2015) exposes the deficiencies in the BFA's disciplinary process versus the one established by law and governing the National Anti-Doping Organisation of the Bahamas. Under section 20 of the ADS Act, the Bahamas Anti-Doping Commission is required to refer an ADRV to the Bahamas Anti-Doping Disciplinary Committee and that Committee is required by the law to conduct the hearing process consistent with a specified timeframe. Under section 23 of the ADS Act, appeals are subject to strict time

constraints under which the entire appeal should not exceed three months in its entirety except in extenuating circumstances. The Player submitted that the BFA Appeals Committee did not abide by these time constraints.

4. The Appealed Decision

72. The Player submitted that the Appealed Decision itself was *"defective and procedurally incorrect and should be declared null and void"* for the following reasons.

73. The Appealed Decision was not timely or reasoned and its conclusions were not supported by evidence, since the BFA produced no evidence of any kind at the hearing in support of its assertion that the Player had committed an ADRV. The Player argued that the BFA failed to discharge its burden of proof under Article 66 of the FIFA ADR, and the BFA Appeals Committee failed to identify which provisions of the FIFA ADR the Player was alleged to have violated and also failed to state what issues of fact and law it considered. Further, the BFA Appeal Committee took almost three months to come to its two pages of conclusions which the Player considered was not timely.

74. Contrary to Article 81 of the FDC, the chairperson of the BFA Appeals Committee had no legal qualifications. Further, the Appealed Decision purported that there were four persons on the panel, but only three were present at the hearing. Moreover, the Appealed Decision failed to consider or render a decision on the second ground of the appeal regarding the suspension and fine for allegedly abusive language used by the Player against Mr McDowall.

75. While the Player did not concede that he was a member of the BFA's National Team or subject to BFA Code of Conduct, even if he were, the Player submitted that to impose a ban of four years in compliance with the World Anti-Doping Code ("WADC") 2015 Vl.10.2.1 and 10.2.1.2 and Articles 5-3 and 8 of the FIFA ADR is *"erroneous and excessive when considered against the schedule of offences, penalties and fines attached to the BFA Code of Conduct"*.

76. The Player noted that Article 3 of the BFA Code of Conduct states: *"A breach of any of the offences outlined in 28 above will lead to your removal from the team and delegation"*. In the schedule of offences, penalties and fines attached to the BFA Code of Conduct, the following offences, fines and penalties are stipulated:

- *"Having in your possession or use of Alcohol or any performance enhancing drug of any kind or any Illegal drugs is strictly prohibited by ALL members of the team and delegation" the penalty is "4 weeks suspension and/or $150 fine. In the case of Illegal drugs, team members must pass a drug test before suspension is lifted"*.

- *"Disobedience to rules, regulations, etc." the penalty is "4 weeks suspension and/or $100 fine"*.

- *"Failure to attend training sessions and functions" the penalty is "2 weeks suspension and/or $50 fine"*.

77. The Player argued that under the BFA Code of Conduct, the penalty that should have been imposed by the Appeals Committee for what the BFA stated was the Player's alleged failure to

attend a testing session (*i.e.*, *"a function"*) would be a two-week suspension and/or a USD 50 fine, not the open-ended suspension until an anti-doping test was taken (imposed by the BFA Disciplinary Committee) or the four-year ban imposed by the Appeals Committee.

78. As an example of the inequitable application by BFA of its own and FIFA's rules and regulations, the Player noted that on the same date that BFA posted a notice on its website informing the public of the Player's four-year ban (27 February 2018), it also posted a notice about the penalties imposed on four other players who had tested positive and were deemed guilty of committing ADRVs. Each of those players, in accordance with Article 2 and the schedule of the BFA Code of Conduct, was suspended for 4 weeks, fined USD 150 and, *inter alia*, required to undertake another anti-doping test before their suspensions were lifted. By the time of these Appeal proceedings, the BFA stated that two of those players had been re-tested with negative results and reinstated to active status.

79. In the event that the Panel determined that the Player was a member of the National Team in January 2017 and that his conduct in January 2017 amounted to a failure to submit to sample collection pursuant to the FIFA ADR, then as an alternative argument the Player submitted that the ban of four years imposed by the Appealed Decision was excessive because (i) it failed to consider that the violation by the Player was not intentional (as defined in Article 19, para. 3 of the FIFA ADR), (ii) this matter did not properly qualify as a failure to submit to sample collection based on the errors by the BFA, and (iii) the fact that the Player no longer considered himself a member of the training squad. Under Article 20, para. 1 of the FIFA ADR, the Player could have been sanctioned to a period of ineligibility of two years, subject to taking into consideration or giving the Player credit for his provisional suspension from participating in BFA sanctioned events commencing on 18 January 2017.

80. The Player submitted that if it is determined that the BFA Disciplinary Committee Decision and the Appealed Decision were based on an assumption of guilt without the BFA having discharged its original burden of proof that the Player had committed an ADRV in accordance with the FIFA ADR, the Player requested compensation in damages for being unjustly and unlawfully suspended from participation in BFA sanctioned events and as a penalty of the dilatory and haphazard manner in which the BFA conducted itself in this matter.

B. The BFA's submissions

81. The BFA's submissions, in essence, may be summarized as follows:

1. The doping education provided by the BFA

82. The BFA submitted that it takes the education of its players in doping-related matters very seriously. The BFA regularly hold seminars and workshops for its players and staff so that they are aware of the regulatory framework, the obligations for players, applicable sanctions and the fundamental importance of the fight against doping.

83. The BFA submitted that in 2016 and 2017, every player training with the national team, including the Player, were told and informed regularly about the importance of medical tests

and doping tests, in particular in preparation for the upcoming 2017 Beach Soccer Events. PowerPoint presentations and handouts were given to players, including the Player, about the Doping Control Process, TUEs and information on what constitutes doping.

84. The players were all informed that doping control testing could occur at any time, any place and anywhere according to international standards. Every player, including the Player, knew that in order to be a possible member of the national team for the 2017 Beach Soccer Events, it was mandatory to pass medical tests and doping tests. This was of greater importance as the BFA was to be the host of the FIFA Beach Soccer World Cup for the first time in its history.

85. Further, every player was informed that the doping tests were mandatory and a missed test would constitute an ADRV which was subject to a sanction. The BFA employed highly qualified experts to provide this kind of education, such as Dr Patti Symonette, who serves as a Board Member of the Bahamas Anti-Doping Committee. Accordingly, the BFA argued that the Player knew all the rules and knew that failure to submit a sample constituted an ADRV, and that *"any other suggestion is simply unsustainable"*.

2. Legal framework

86. The BFA argued that the Player participated in activities and trainings of the BFA as member of the national Beach Soccer team (provisional selection). As such, he was bound by the FIFA ADR, pursuant to Article 1 para. 1 FIFA ADR. Additionally, because the Player is a license-holder of the BFA, he is bound by the Bahamas ADR, which are essentially identical with the WADC (*i.e.*, they constitute the implementation of the WADC requirements on a national level in the Bahamas).

3. The Player's failure to take a doping test

87. The BFA submitted that the Player deliberately and intentionally failed to take a doping test, although he was obliged to do so as an active member of the provisional roster for the national Beach Soccer team of the BFA. Pursuant to Article 3 para. 1 of the FIFA ADR, players are responsible for knowing what constitutes an ADRV. Additionally, pursuant to Article 3 para. 2 of the FIFA ADR and Article 2 of the Bahamas ADR, players are obliged to undergo testing. The Player failed to meet these basic requirements.

88. Furthermore, pursuant to Article 8 of the FIFA ADR and Article 2.3 of the Bahamas ADR, refusing or failing to submit to Sample collection after notification, without compelling justification, constitutes an ADRV. It has been demonstrated that the Player failed to submit to Sample collection on 17 January 2017 (and in the following days and weeks), although he admitted to having known at that time that a mandatory doping test was taking place. Therefore, the BFA demonstrated, in compliance with its burden of proof (Article 66 para. 1 FIFA ADR; Article 3.1 Bahamas ADR), that an ADRV occurred.

89. The BFA argued that it was then up to the Player to demonstrate that he had a compelling justification for this behaviour (CAS 2008/A/1557, at para. 46). However, the Player had not done so. Likewise, the Player did not even bring forward any argumentation why his behaviour

should not be considered as intentional. In any event, the notion of "compelling justification" is constantly construed very narrowly by the CAS, which confirms that *"whenever physically, hygienically and morally possible, the sample* [must] *be provided despite objections by the Player"* (CAS 2013/A/3077, at para. 42, with reference to CAS 2005/A/925, para. 75).

90. The BFA submitted that the Player failed by all means to bring forward any explanation for his failure to take the doping test. Further, the BFA noted that the Player had always received all the necessary support from BFA whenever this was needed to adjust his work schedule to meet his obligations as a Beach Soccer player. In fact, the BFA even contacted the Ministry of Youth Sports & Culture on 22 January 2016, as well as the employer of the Player in February 2016 to inform them of the Player's call up for training with the Beach Soccer national team and to request work schedule adjustments for the Player, allowing him to represent the Bahamas in the upcoming international events.

91. Based on the applicable regulatory framework, in line with the requirements set out in the WADC and the FIFA ADR, a four-year suspension was correctly imposed on the Player by the BFA Appeals Committee.

4. Additional sanction for disciplinary infringements

92. The BFA argued that while it is true that the Appealed Decision did not mention the additional sanction imposed on the Player for his hostile behaviour towards BFA representatives, the power for a *de novo* review granted to CAS under Article R57 para. 1 CAS Code enables the Panel to review this sanction.

93. Given the clearly unacceptable choice of words and use of language towards BFA representatives, the moderate sanction of a four (4) match ban and the fine of USD 40 was not only justified, but also entirely in line with the "Beach Soccer League Infringements Fines 2017" Regulations. Pursuant to CAS jurisprudence, such disciplinary sanctions are reviewed only if they are grossly and evidently disproportionate (see *inter alia*, CAS 2016/A/4595, at para. 59, with reference to numerous CAS precedents). Plainly, this is not the case here.

5. Alleged procedural flaws

94. The BFA noted that the Player alleged that there were a variety of procedural flaws in the disciplinary proceedings undertaken by the BFA Disciplinary Committee and the BFA Appeals Committee.

95. However, the BFA submitted that the entire disciplinary process was thorough, fair and balanced. Pursuant to CAS jurisprudence, even if there had been any procedural defects, the power of the Panel to hear the entire case *de novo* in any event cures such alleged flaws (see *inter alia*, CAS 2016/A 4387, at para. 146 *et seq.*, with reference to numerous CAS precedents). Accordingly, these arguments of the Player are meritless.

6. Irrelevance of further arguments

96. The BFA noted that the Player argued that the four-year suspension imposed in the Appealed Decision was *"excessive when considered against the schedule of offences, penalties and fines attached to the* [BFA Code of Conduct]*"*. However, the BFA submitted that these rules were irrelevant, since the suspension is based on the applicable legal framework under the FIFA ADR and the Bahamas ADR. Whatever the aforementioned BFA Code of Conduct may stipulate as sanctions for other disciplinary offences is of no relevance to the sanction imposed on the Player for the committed ADRV.

7. Claim for damages

97. In response to the Player's request to be compensated in damages for being *"unjustly and unlawfully suspended"*, the BFA submitted that the Player failed to substantiate, let alone prove, what exactly would constitute such a damage, so this request cannot be awarded for that reason alone.

98. Further, the BFA argued that in any event, under Swiss law, for a liability of a decision-making instance (such as the judicial bodies of the BFA), it does not suffice that an act or decision subsequently turns out to be wrong and/or is subsequently overturned. A liability exists only where *"the competent person commits inexcusable mistakes"* (Swiss Federal Tribunal, decision 132 II 449) or *"where grave violations of the respective duties occur"* (Swiss Federal Tribunal, decision 132 II 405). Moreover, it is also expressly mentioned in some state laws that Courts of lower instances are liable only if the previous instance has acted maliciously or fraudulently. The BFA cited section 6 of the Cantonal Law of Zurich regarding state liability, which expressly determines that *"if a decision is changed by legal remedy, the state is only liable if an official of the lower instance has acted fraudulently"*. The BFA submitted that none of the above applied in this case, so any claim for damages must be entirely rejected.

V. JURISDICTION OF THE CAS

99. Article R47 of the CAS Code provides 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".*

100. The Player relied on the following laws and regulations conferring jurisdiction to the CAS:

- Articles 5-2(f) and 27-1 of the Statutes (Constitution) of the BFA;
- Part 3 of the BFA Code of Conduct;
- Clause 7.4 of the BFA Good Governance Code of Conduct; and

- Articles 74 and 75 of the FIFA ADR.

101. The jurisdiction of CAS was not disputed by either of the parties. The jurisdiction of the CAS was further confirmed by the Order of Procedure duly signed by both parties.

102. It follows that the CAS has jurisdiction to hear this dispute.

VI. ADMISSIBILITY

103. The Panel notes that the BFA argued that the Statement of Appeal was filed late, and the Appeal should therefore be dismissed as being inadmissible. The parties were notified at the hearing that the Panel had concluded that the Appeal was, in fact, admissible. The grounds of the Panel's decision was reserved for this Award. Accordingly, the Panel has summarised the arguments of the parties, and the reasons for its conclusion, regarding the issue of admissibility below.

A. The Player's position on the admissibility of the Appeal

104. In summary, the Player rejected the BFA's challenge of the admissibility of his Appeal.

105. The Player noted that the BFA submitted as evidence a receipt signed by the Player's attorney on 7 February 2018 at 12:49 pm confirming the delivery by hand of the Appealed Decision Notification Letter. The contents of this letter have been quoted in section II of this Award, but have been repeated here for convenience:

> *"**Re: Final Decision of BFA Appeals Committee-Jared Higgs***
>
> *Dear Mr. Higgs,*
>
> *We inform you that, based on the decision taken by the BFA's Appeals Committee on 22 January 2018, you have been banned for a period of 4 years in accordance with mandatory BFA Pre-Competition Testing, FIFA Anti-Doping Regulations 5-3 and 8 and WADA Anti-Doping Code 2015, VI.10.2.1 and 10.2.1.2.*
>
> *The ban period starts on 22 January 2018, the date on which the decision was made by the Appeals Committee. Consequently, you have lost all membership rights as defined in Article 5 of the BFA Statues* [sic] *and Article 29 of the FIFA Anti-Doping Regulations. You are no longer entitled to take part in competitions and other activities organized by the BFA. Additionally, you are banned from entering any BFA facilities.*
>
> *The decision of the BFA Appeals Committee is final".*

106. The Player argued that the Appealed Decision Notification Letter did not constitute the official decision by the BFA Appeals Committee, but was *"merely a summary or synopsis of the actual decision that was not actually delivered until 19 February 2018".*

107. The Player noted that Article 61, para. 3 of the FIFA ADR, dealing with "form of decisions" states:

> *"In exceptional circumstances, the parties may be informed solely of the terms of the decision. The motivated decision will be communicated in full, written form. The time limit to lodge an appeal, where applicable, begins upon receipt of this motivated decision".*

108. Article 78 of the FIFA ADR, dealing with "notification of appeal decisions" states:

> *"Any Anti-Doping Organisation that is a party to an appeal shall promptly provide the appeal decision to the Player or other Person and to the other Anti-Doping Organisations that would have been entitled to appeal under art. 75 par. 3 (Persons entitled to appeal) as provided by these Regulations".*

109. Further, Article 80, para. 1.1 of the FIFA ADR states:

> *"The time to file an appeal to CAS shall be 21 days from the date of receipt of the motivated decision in an official language by the appealing party".*

110. The Player also cited CAS 2006/A/1168, in which the Panel stated:

> *"We therefore conclude that the CAS Rules require that in the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, a Statement of Appeal shall be lodged by an appellant within 21 days of the receipt of the decision appealed against".*

111. The Player submitted that insofar as the BFA had no written anti-doping rules of its own, pursuant to Article 2 para. 1 of the FIFA ADR the FIFA ADR is incorporated by reference into the rules of the BFA. As such, the BFA Appeals Committee had to provide full, written reasons for its decisions. Similarly, anyone wishing to appeal those decisions had 21 days from the receipt of the full, grounded decisions to do so. As the Appealed Decision was not received by the Player's attorney on 19 February 2018, the time limit to appeal was therefore 12 March 2018, which was when the Player's Statement of Appeal was filed.

112. The Player claimed that the legal principles adversely applied to the appellant in CAS 2006/A/1168 (where no reasoned decision was ever provided by the respondent and in the absence of such a decision, the athlete finally filed an appeal 7 months later at the CAS) did not apply in the present case, as a reasoned decision was ultimately provided to the Player, and an Appeal was filed within 21 days thereafter.

113. Finally, the Player cited CAS 2016/A/4814 in arguing that the notification by Mr Lunn of the Appealed Decision by sending letters dated 26 and 27 January 2017 and 3 February 2018 *"did not comply with the requirements of the CAS Code or the FIFA Rules and did not constitute receipt of the* [Appealed Decision]*"*. The formal notification of the Appealed Decision only occurred on 19 February 2018, so the time limit to appeal only begun at that time.

B. The BFA's position on the admissibility of the Appeal

114. The BFA argued in its Answer that the Statement of Appeal, which was filed on 12 March 2018, was manifestly late. According to the BFA, the Player was notified of the Appealed Decision at the latest on 7 February 2018 and, as such, the 21-day deadline to file an appeal before the CAS expired on 28 February 2018. Therefore, the BFA argued that the Appeal was lodged outside the applicable time limit pursuant to Article 80 para. 1 of the FIFA ADR and is inadmissible.

115. As noted above, the BFA submitted that the Player's attorney was provided with a copy of the Appealed Decision Notification Letter on 7 February 2018. The BFA argued that CAS jurisprudence is clear that the time limit to file a statement of appeal runs from the receipt of notification of such form as contained in the Appealed Decision Notification Letter, *"even if a more detailed and/or reasoned version of a decision is also notified at a later stage"*. Moreover, the BFA noted that the Player's attorney stated to FIFA on 6 February 2018, in relation to the Appealed Decision Notification Letter, that *"*[o]*f course, this "decision" will be appealed to a higher body, the* [CAS] *and/or the Bahamas Supreme Court"*. Despite this clear understanding and analysis of the legal nature of the Appealed Decision Notification Letter, the Player's attorney remained passive and did not file an appeal at the CAS.

116. The BFA argued that the Player's behaviour *"clearly contradicts fundamental requirements of good faith"* (Swiss Federal Tribunal, decision 138 I 49, decision 117 IA 297), which should be applied strictly given the Player was represented by counsel throughout.

117. The BFA submitted that CAS jurisprudence was clear in what constitutes a decision, as the panel in CAS 2015/A/4266 determined as follows:

> *"The form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal".*
>
> *"In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties".*
>
> *"A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects".*
>
> *"an appealable decision of a sports association or federation "is normally a communication of the association directed to a party and based on an "animus decidendi", i.e. an intention of a body of the association to decide on a matter* […]. *A simple information, which does not contain any "ruling", cannot be considered a decision"".*

118. Based on the above criteria, the BFA submitted that the Appealed Decision Notification Letter qualified as a decision.

119. Despite the above, the Panel notes that the BFA admitted that *"it is true that this notification of 26 January 2018 only contained the essential part of the Appealed Decision"* and that the Player was *"notified in full on 19 February 2018"*.

C. The Panel's decision on the admissibility of the Appeal

120. At the outset, the Panel notes that Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".*

121. However, the Panel considers that time limits are, in fact, set out in the applicable regulations in the present case. The FIFA ADR (which are referenced in the Appealed Decision and to which both parties refer in their submissions) include provisions both with respect to the form of decisions (Article 61) and the time for filing of appeals (Article 80):

> *"Article 61 Form of decisions*
>
> *1. Decisions communicated by fax shall be legally binding. Alternatively, decisions may be communicated by registered letter, which shall also be legally binding.*
>
> *2. The communication of decisions by e-mail is not permitted.*
>
> *3. In exceptional circumstances, the parties may be informed solely of the terms of the decision.* ***The motivated decision will be communicated in full, written form. The time limit to lodge an appeal, where applicable, begins upon receipt of this motivated decision****"* (emphasis added).
>
> *"Article 80 Time for filing appeals*
>
> *1.1 Appeals to CAS*
>
> ***The time to file an appeal to CAS shall be 21 days from the date of receipt of the motivated decision*** *in an official FIFA language by the appealing party"* (emphasis added).

122. The Panel also notes that the WADC states that decision should be set out with reasons:

> *"8.4 Notice of Decisions*
>
> *The reasoned hearing decision, or in cases where the hearing has been waived, a reasoned decision explaining the action taken, shall be provided by the anti-doping organization with results management responsibility to*

the athlete and to other anti-doping organizations with a right to appeal under Article 13.2.3 as provided in Article 14.2.1.

(…)

14.2 Notice of Anti-Doping Rule Violation Decisions and Request for Files

14.2.1 Anti-doping rule violation decisions rendered pursuant to Article 7.10, 8.4, 10.4, 10.5, 10.6, 10.12.3 or 13.5 shall include the full reasons for the decision, including, if applicable, a justification for why the maximum potential sanction was not imposed. Where the decision is not in English or French, the anti-doping organization shall provide a short English or French summary of the decision and the supporting reasons".

123. Overall, the Panel agreed with the Player's arguments. The Panel considered that Article 80 of the FIFA ADR should be construed and interpreted – absent any indications to the contrary – in light of the WADC. What is intended by the respective provision in the WADC clearly is a full decision (including the grounds) to set the deadline for appeal in motion. The FIFA ADR should be read in conjunction with, and provide the Player with no fewer rights than, the WADC. Any deadline under the WADC begins upon receipt of the reasoned decision.

124. The Panel notes that the BFA states that it sent the Appealed Decision Notification Letter to the Player on 26 January 2018. The Player states he was only notified on 19 February 2018. It appears his attorney received the letter on 7 February 2018. At the hearing Mr Lunn spent some time explaining why he never trusted the post with the BFA Suspension Letter and rather waited 6 months to hand this to the Player. He had no address for the Player, many streets on the Island had no name and the post was unreliable. Further, it can be seen above, the Appeal Committee did not recognise the Player's attorney as having any part in these proceedings. With no evidence as to when or how the Appealed Decision Notification Letter was sent to the Player, the Panel cannot determine whether his submission that he received it on 19 February 2018 is false. Given the severity of the sanction he received from the Appeal Committee, the Panel determines to accept his version of the facts.

125. In the case at hand, the full reasoned decision (albeit a brief reasoned decision) was not served on the Player until 19 February 2019, so the Panel considered that the 21-day deadline for filing an appeal was 12 March 2018. The Player filed his Appeal on 12 March 2018, so it should be considered admissible.

126. Further, for completeness, the Panel notes that the Statement of Appeal filed on 12 March 2018 also complied with the requirements of Articles R47, R48 and R64.1 of the CAS Code, including the payment of the CAS Court Office fee.

127. It follows that the Appeal is admissible.

VII. APPLICABLE LAW

128. Pursuant to Article R58 of the CAS Code, in an appeal arbitration procedure before the CAS:

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

129. The Player did not make any specific arguments regarding applicable law, however he repeatedly made reference to the Bahamas ADR, the FIFA ADR and the WADC in his arguments. The BFA submitted that *"the dispute shall be decided based on the FIFA ADR and the Bahamas ADR".*

130. Having considered the submissions of both parties, the Panel notes that the differences between the Bahamas ADR (which is a copy of the WADC 2015) and the FIFA ADR (which is based upon the WADC 2015) are limited. Article 2 of the FIFA ADR ensures that all Associations, including the BFA, must comply with the FIFA ADR and it is to be incorporated into the Bahamas ADR as necessary to implement the FIFA ADR. The Panel there determines that it shall apply both the Bahamas ADR and FIFA ADR, but noting that the Bahamas ADR is intended to implement the provisions of the FIFA ADR, so that if there are any inconsistencies between the two, the FIFA ADR shall prevail.

131. The introduction to the WADC 2015 also identifies the "main elements" of the World Anti-Doping Program, which include *"Level 2: International Standards"*. The WADC requires mandatory compliance with International Standards:

> *"International Standards for different technical and operational areas within the anti-doping program will be developed in consultation with the Signatories and governments and approved by WADA. The purpose of the International Standards is harmonization among Anti-Doping Organizations responsible for specific technical and operational parts of the anti-doping programs. Adherence to the International Standards is mandatory for compliance with the Code. The International Standards may be revised from time to time by the WADA Executive Committee after reasonable consultation with the Signatories and governments. Unless provided otherwise in the Code, International Standards and all revisions shall become effective on the date specified in the International Standard or revision"* (Emphasis added).

132. Accordingly, the Panel considered that various International Standards in force at any given time, such as International Standard on Testing and Investigations ("ISTI") and International Standard for Laboratories ("ISL") were also applicable to the present dispute.

VIII. MERITS

A. The main issues

133. Considering the parties' submissions and the testimonies of the witnesses and experts at the hearing, the Panel observes that the main issues to be resolved are:

Appellant's conduct on 16 January 2017

1. Did the Player's failure to report to the BFA offices on 16 January 2017 constitute an ADRV?

2. If not, did Higgs' conduct violate any other rules of the BFA?

3. Were the sanctions imposed in the Appealed Decision appropriate?

Appellant's conduct on 10 June 2017

4. Did the Player's conduct on 10 June 2017 at the Beach Soccer Stadium violate BFA rules?

5. If so, were the sanctions imposed in the BFA Disciplinary Committee Decision and/or the Appealed Decision appropriate?

In general

6. Is the Player entitled to damages?

The Panel will consider these issues in turn.

1. Did the Player's failure to report to the BFA offices on 16 January 2017 constitute an ADRV?

134. The parties were in agreement that the Player failed to report to the BFA offices on 17 January 2017. The Panel notes that the crux of this dispute is whether his failure to attend constituted an ADRV under the FIFA ADR and/or the Bahamas ADR. The Player insisted that he was not aware of the testing that would occur that day, while the BFA insisted that he was fully aware. The important issue here is whether the Player had been *"notified"*, as required for a *"refusal"* or a *"failure"* to submit to sample collection, but notification would not be an issue for "evading" Sample Collection.

135. However, before considering such matters as notification, the Panel needs first to determine if there was a *"Sample collection"* process that he was required to attend, as envisaged by the FIFA ADR and/or Bahamas ADR. A *"Sample"* is defined as *"any biological material collected for the purposes of Doping Control"*. *"Doping Control"* is the entire official process undertaken by a sport on its athletes.

136. What is questionable in the case at hand is whether or not the BFA tried to collect a sample from the Appellant for *"anti-doping purposes"*. Only if this is the case the non-compliance of the Appellant to undergo sample collection would constitute an ADRV. The Panel is not convinced that the sample collection foreseen on the 17 January 2017 was for anti-doping purposes. If, however, the sample collection was not for anti-doping purposes, then the Appellant could not

commit an ADRV by not submitting to doping control. The Panel basis its findings on the following findings:

a) Lack of anti-doping formalities

137. The WADC, the FIFA ADR and the Bahamas ADR all refer to the aim of setting and enforcing *"in a global and harmonised manner"* anti-doping principles. These include standard, *i.e.* highly formalised processes for selecting athletes to be tested, notifying them, collecting any samples, transporting the same to WADA-accredited laboratories, analysing the samples, results management and hearings.

138. The Panel notes that any anti-doping testing by the BFA must comply with the FIFA ADR, WADC and ISTI. In that regard, Article 1 of the ISTI states:

> *"The first purpose of the International Standard for Testing and Investigations is to plan for intelligent and effective Testing, both In-Competition and Out-of-Competition, and to maintain the integrity and identity of the Samples collected from the point the Player is notified of the test to the point the Samples are delivered to the laboratory for analysis. To that end, the International Standard for Testing and Investigations (including its Annexes) establishes mandatory standards for test distribution planning (including collection and use of Player whereabouts information), notification of Players, preparing for and conducting Sample collection, security/post-test administration of Samples and documentation, and transport of Samples to laboratories for analysis.*
>
> *The second purpose of the International Standard for Testing and Investigations is to establish mandatory standards for the efficient and effective gathering, assessment and use of anti-doping intelligence and for the efficient and effective conduct of investigations into possible anti-doping rule violations. Like the Code, the International Standard for Testing and Investigations has been drafted giving due consideration to the principles of respect for human rights, proportionality, and other applicable legal principles. It shall be interpreted and applied in that light".*

139. These provisions of the FIFA ADR and ISTI were – to a very large extent – not respected in the case at hand. In particular, the Panel notes as set out below.

- First, as emphasised repeatedly by the BFA, all the players (including allegedly the Player who disputed the fact) were given notice about the test by the BFA representatives the day before the testing occurred. However, pursuant to Article 40(5) of the FIFA ADR, the Out-of-Competition testing of individual players must be performed with no advance notice. This is consistent with Article 5.3 of the ISTI.

- Second, based on the evidence available to the Panel, no DCO or chaperone were present on the day of sample collection. Rather, the players were sent to the Bonaventure Medical Centre where (as Mr Christie put it) they *"peed in a cup"*. While a lady from the Centre was present, she looked away. It also appears that she was not a Doping Control Personnel, rather someone who worked at the Centre. Where the Samples went from there was not clear. There was no splitting of the Samples into "A" and "B" bottles, no Doping Control

Form, or the like, including to notify the players (including the Player) of the consequences for failing to comply with the FIFA ADR.

- Third, in relation to the sample processing, Article 46(1) of the FIFA ADR states that analysis of samples must be carried out by WADA-accredited laboratories or as otherwise approved by WADA. However, as confirmed by Dr Symonette, the testing of the samples collected on 17 January 2017 was conducted at the Bonaventure Medical Centre (presumably in its own Laboratory) in the Bahamas, which the Panel notes is not included on WADA's list of laboratories that are accredited to conduct human doping control sample analyses.

140. The above-mentioned lack of formalities clearly point into the direction that the sample collection on 17 January 2017 was not for anti-doping purposes, but for other reasons.

b) The PCMA

141. The Panel is backed in its finding by the fact that each member of the team needed to complete a PCMA in order to be eligible for the 2017 Beach Soccer Events. However, the Panel considered that the PCMA, on the face of it, did not require a mandatory anti-doping test. Circular 372 from CONCACAF does refer to anti-doping, but appears to tackle only health issues. This is not contradicted by the reference to TUEs. In particular, the PCMA does not state that an anti-doping test must be passed by the individual participant. It only states that *"a full medical assessment"* must be completed by each player. Indeed, this reinforces the Panel's impression that the sample collection conducted by the BFA on 17 January 2018 was more akin to a drug test completed for health and safety reasons, similar to how, for example, engineers might need to complete a drug test before being able to work with heavy machinery.

c) Mr McDowall's WhatsApp texts

142. The conclusion reached by the Panel is also consistent with Mr McDowall's WhatsApp texts to the Player on the morning of 17 January 2018. Therein, Mr McDowall asked the Player why he was not at the BFA office for a *"medical"*. Moreover, in the transcript of the hearing held by the BFA Disciplinary Committee, Mr Lunn admitted that Pre-Competition Testing *"could but doesn't have to"* include a drug test. The Panel notes the difference between an optional drug test which appears to have taken place here, and the mandatory nature of anti-doping tests conducted under the FIFA ADR, WADC and ISTI.

d) The BFA Suspension Letter

143. Further evidence of the view held here can be found in the BFA Suspension Letter. On 18 January 2017, Mr Lunn on behalf of the BFA provisionally suspended the Player. This BFA Suspension Letter reads as follows:

> *"This letter is to inform you that you are suspended from all Senior Men's Football Competition and National Teams Competition effective immediately. This disciplinary action is being taken because of your*

failure to report for the required BFA/Pre-Competition Testing; this suspension will stay in effect until you have completed the requirements of the BFA Pre- Competition Testing. Testing will be done at the request of the BFA. No advance notice is required prior to testing".

144. The letter clearly describes the (failed) test by the Appellant as part of the *"Pre-Competition Testing"* and, consequently, not as a test for anti-doping purposes.

e) BFA's posting on the website

145. The Panel further notes that the Player also identified that on the same date that BFA posted a notice on its website informing the public of the Player's 4-year ban (27 February 2018), it also posted a notice about the penalties imposed on 4 other players who had tested positive for THC (as a result of the consumption of marijuana). No consequence typical for an ADRV was imposed on those players. Instead, in accordance with Article 2 and the schedule of the BFA Code of Conduct, they were suspended for 4 weeks, fined USD 150 and, *inter alia*, required to undertake another drug test before their suspensions were lifted. By the time of these Appeal proceedings, the BFA stated that two of those players had been re-tested with negative results and reinstated to active status. The Panel considers that the BFA's conduct relating to these other players is inconsistent with the FIFA ADR and/or WADC. Furthermore, Mr Lunn admitted at the hearing that he made the initial decision to suspend the Player pursuant to the BFA Code of Conduct (and not according to the FIFA ADR and/or WADC).

f) Competence to conduct sample collection

146. The Panel notes that a sample collection does not automatically fall under the FIFA ADR or WADC simply because it was conducted by a national association on national team players, nor does it fall under those regulations simply because the players had been warned beforehand that they could be subject to anti-doping tests at any time. The Panel appreciates that the BFA took steps to educate its players on anti-doping and the consequences of failing a doping test, but that too does not, in and of itself, result in any sample collection carried out by the BFA automatically falling under the FIFA ADR, the Bahamas ADR or WADC.

147. In case of doubt, as in the case at hand, it must be assessed and interpreted from a reasonable person's perspective whether the sample collection was conducted for anti-doping or for other (permissible) medical purposes. When doing so, the Panel takes into account that, absent any indication to the contrary, a sports organisation would opt for the alternative most in line with the applicable regulations. Regulations such as the FIFA ADR, WADC and ISTI were all drafted with a view to safeguarding *"the principles of respect for human rights, proportionality, and other applicable legal principles",* so any tests conducted under its guise must abide by all the mandatory requirements in those regulations. As noted by the sole arbitrator in CAS 2014/A/3639 (concurring with the panel in CAS 2009/A/1752 & 1753):

"Doping is an offence which requires the application of strict rules. If a Player is to be sanctioned solely on the basis of the provable presence of a prohibited substance in his body, it is his or her fundamental right to know that the Respondent, as the Testing Authority, including the WADA-accredited laboratory working with it, has strictly observed the mandatory safeguards.

Strict application of the rules is the quid pro quo for the imposition of a regime of strict liability for doping offenses (…). The fight against doping is arduous, and it may require strict rules. But the rule-makers and the rule appliers must begin by being strict with themselves".

g) Conclusion

148. Overall, for all the reasons set out above, the Panel considered that sample collection conducted by the BFA on 17 January 2017 was not intended to fall under the FIFA ADR, the WADC, the Bahamas ADR and the ISTI. Instead, the intention of the BFA was to test its entire squad for educational and/or medical reasons in order to ensure that if any players failed the drug test, they could be sanctioned under the Code of Conduct, effectively reprimanded and given an opportunity to stop taking whatever drug (detectable by the local laboratory) they had been taking, then take the same test again at the Centre and if they passed, be allowed back on the team for the upcoming World Cup, which the BFA was hosting. All of those efforts were fine and understandable, but it is equally clear that to such processes and procedures, not the FIFA ADR, Bahamas ADR or the WADC, but – instead – the Code of Conduct applied.

149. Accordingly, it follows that the Player's failure to participate in the testing cannot be qualified as an ADRV, since the sample collection was – clearly – not for anti-doping purposes. In addition, the Panel finds that the original purpose of the testing cannot be substituted with another purpose at a later point in time. Instead, it must be clear from the outset for the subject of the test, for what purpose the testing is being conducted and consequently, what rules shall apply to it.

3. Were the sanctions imposed in the Appealed Decision appropriate?

150. The Panel notes that the Appealed Decision found as follows:

"The Appeals Committee has concluded its investigation and the decision have been made to impose a ban of four (4) years in compliance with WADA Anti-doping Code 2015 Vl.10.2.1 and 10.2.1.2 and FIFA's Anti-Doping Regulations 5-3 and 8.

The issue is a simple one. [The Player's] *refusal to take a drug test is in direct non-compliance with FIFA and WADA rules and policies in Anti-doping of which the Bahamas Football Association is a signatory.*

Referring to the meeting of Thursday, October 26, 2017 at 6:30 p.m. held in the office of Callenders and Co, located at One Miller Court, Nassau, Bahamas (attached minutes, self-explanatory), The Appeals Committee has determined that all communications and avenues to deal with this matter has been exhausted".

151. However, pursuant to the Panel's conclusion above, it follows that the Player should not have been sanctioned under the FIFA ADR or the WADC. As such, the Appealed Decision, as far as it relates to the Player's suspension under the FIFA ADC and/or the WADC, is set aside.

152. Instead, the Panel finds that the Player – in principle – should have been disciplined under the Code of Conduct for not complying with the Pre-Competition Testing. The Panel finds that the Player was part of the wider national team training squad, had trained and travelled with it

and consequently, was submitted to the rules applicable to the team members. The Player did not show up for the test at the hospital despite receiving a text message by Mr McDowall. Whether this justifies the imposition of a disciplinary sanction akin to those players that failed to pass the drug test, may be questionable. There are – at least at first sight – good reasons to do so in the view of the Panel. However, this may be left unanswered in the case at hand, since according to the Panel even a proportionate sanction for not showing up to the Pre-Competition Testing under the Code of Conduct cannot be upheld in view of the specific circumstances of this case, in particular considering the *ex post* substitution of the very purpose of the sample collection by the BFA. In addition, the BFA has failed – unlike with respect to other players – to offer the Player the opportunity to retake the test. This shall not go to the detriment of the Player. For completeness, the Panel acknowledges that the Player made numerous submissions regarding various alleged procedural violations during the proceedings before the BFA Disciplinary Committee and the BFA Appeals Committee. As the Appealed Decision has been set aside – save for the sanctions relating to the events of 10 June 2017 (addressed below) – the Panel does not need to consider any of those claims any further.

4. Did the Player's conduct on 10 June 2017 at the Beach Soccer Stadium violate BFA rules?

153. The Player admitted that he lost his temper on 10 June 2017, however it was disputed between the parties whether profanity was used by the Player towards BFA representatives. The Panel took note of the various witness reports submitted as evidence and the submissions of the parties and on balance, was satisfied that the Player did use *"offensive, insulting or abusive language or gestures"*.

5. If so, were the sanctions imposed in the BFA Disciplinary Committee Decision and/or the Appealed Decision appropriate?

154. The sanctions imposed in the BFA Disciplinary Committee Decision in relation the 10 June 2017 incident were as follows:

> *"As a result, the members of the Disciplinary Committee will impose a ban of 4 matches and you are to pay a fine of $40. However, any future competition if subject to you completing the anti-doping test as required".*

155. The Panel notes that the Appealed Decision failed to address this sanction. However, as noted by the BFA, the Panel has the power to conduct a *de novo* review under Article R57 of the CAS Code, so is able to consider the appropriateness or proportionality of this sanction. However, there is a consistent line of CAS jurisprudence which states that disciplinary sanctions can only be amended by CAS panels if they are *"evidently and grossly disproportionate"* (see, *inter alia,* CAS 2016/A/4595).

156. In the case at hand, the Player was fined USD 40 and banned for 4 matches. The BFA's "Beach Soccer Infringements Fines 2017" sets out the relevant range of fines and suspensions for general infringements. The relevant fine for *"using offensive, insulting or abusive language or gestures"* is USD 40, while the range of suspensions is two to six matches. In light of that range of potential sanctions, the Panel does not consider a fine of USD 40 and a four-match suspension

to be *"evidently and grossly disproportionate"*. Accordingly, the sanctions imposed on the Player in this regard in the BFA Disciplinary Committee Decision are upheld.

6. Is the Player entitled to damages?

157. The Player submitted a request for relief for damages, as follows:

> *"(4) a ruling that the* [Player] *should be compensated in damages for being unjustly and unlawfully suspended from participation in BFA-sanctioned events and as a penalty for the dilatory and haphazard manner in which the* [BFA] *has conducted itself in this matter"*.

158. The duty to substantiate and, in particular the prerequisites that a party must fulfil in order to dispose of its duty to sufficiently substantiate its submissions is intrinsically linked to the principle of party presentation and, thus, clearly is a procedural question (KuKo-ZPO/OBERHAMMER, 2nd ed. 2014, Art. 55 N. 12; BSK-IPRG/SCHNEIDER/SCHERRER, 3rd ed. 2013, Art. 184 N 8). Consequently, Article 182 of the PILA applies in respect of the applicable law.

159. In qualifying the above question as a matter of procedure the Panel does not ignore that there are links also to the law applicable to the merits. This is particularly true in respect of what must be submitted by a party, since the latter will be dictated by the law applicable to the merits. Furthermore, the onus of substantiation, *i.e.*, which party has the onus of presenting and submitting the facts is linked to the law applicable to the merits, because the onus of presentation follows from the burden of proof. The latter is, however, a question governed by the law applicable to the merits (cf. para. 100 *et seq.*). The burden of proof does not only allocate the risk among the parties of a given fact not being ascertained, but also allocates who bears the duty to submit the relevant facts before the court/tribunal (see also CAS 2011/A/2384 & 2386, no. 249). It is, in principle, the obligation of the party that bears the burden of proof in relation to certain facts to also submit them to the court/tribunal in a sufficient manner (Swiss Federal Tribunal: SFT 97 II 216, 218 E. 1). The party that has the burden of proof, thus, in principle has also the burden of presenting the relevant facts to the tribunal/panel.

160. With respect to the procedural question when a party's submission is deemed sufficiently substantiated, the Panel refers primarily to the procedural rules agreed upon by the parties (Article 182 para 1 of the PILA). Since the CAS Code does not contain any provisions with respect to the threshold of substantiation, this Panel – in application of Article 182 para 2 of the PILA – takes guidance and inspiration in Swiss procedural law. Consequently, this Panel is inspired by the jurisprudence of the Swiss Federal Tribunal, according to which submissions are – in principle – sufficiently substantiated, if:

a. they are detailed enough for the panel/Tribunal to determine and assess the legal position claimed (SFT 4A_42/2011, 4A_68/2011, E. 8.1); and

b. detailed enough for the counterparty to be able to defend itself (SFT 4A_501/2014, E. 3.1).

161. A party that fails to sufficiently substantiate its submissions according to the above prerequisites is treated as if it had failed to submit the relevant facts altogether.

162. In this specific case the Appellant failed to sufficiently substantiate the facts in a manner for the Panel to assess the legal position claimed by the Appellant. Therefore, the Appellant must be treated as if it had not made any submissions at all on the quantum of the damage.

163. Since the Player did not substantiate its request for damages and failed to provide the Panel with any evidence at all demonstrating a financial loss, the Player's request for damages must be rejected.

B. Final conclusion

164. Based on the foregoing, and after taking into due consideration all the evidence produced and all submissions made, the Panel rules that the Appealed Decision is set aside:

165. The Player shall serve (to the extent he has not already done so) a ban of four (4) matches, and pay a fine of USD 40 to the BFA pursuant to the "Beach Soccer League Infringements Fines 2017" Regulations.

166. Any further claims or requests for relief are dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 12 March 2018 by Jared Higgs against the decision rendered by the Bahamas Football Association Appeals Committee on 22 January 2018 is upheld.

2. The decision rendered by the Bahamas Football Association Appeals Committee on 22 January 2018 is set aside, and replaced as follows:

   Jared Higgs shall serve (to the extent he has not already done so) a ban of four (4) matches and pay a fine or USD 40 to the Bahamas Football Association.

3. (…).

4. (…).

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