Arbitration CAS 2022/A/9334 Jakub Świerczok v. Asian Football Confederation (AFC), consent award of 27 March 2023

Panel: Prof. Ulrich Haas (Germany), President; Mr Jeffrey Benz (USA); Mr James Reid KC (United Kingdom)

Football
Doping (trimetazidine)
Consent award
Consent award and necessity of WADA's approval

1. **Under Swiss law an arbitration tribunal sitting in Switzerland has authority to issue an award embodying the terms of the parties' settlement, if the consenting parties do agree to such a termination of their dispute. The CAS panel's ratification of the Parties' agreement and its incorporation into a consent award serves the purpose of vesting the agreement with a *res judicata* effect and of enabling the enforcement of their said agreement. Article R56 para. 2 of the CAS Code provides that *"[…] Any settlement may be embodied in an arbitral award rendered by consent of the parties"*.**

2. **Following article 10.3 lit. c of the WADA International Standard for Results Management, no settlement embodied in an arbitral award rendered by consent of the parties as per Article R56 of the CAS Code shall be entered into by an Anti-Doping Organization without WADA's written approval.**

I. PARTIES

1. Jakub Świerczok (the "Appellant" or the "Player") is a professional Polish football player who was under contract with the Club Nagoya Grampus from Japan.

2. The Asian Football Confederation (the "Respondent" or "AFC") is the confederation governing the sport of football in Asia, and is based in Kuala Lumpur, Malaysia.

II. FACTUAL BACKGROUND

3. On 17 October 2021, the Appellant provided a doping control sample at the end of the AFC Champions League 2021 match between FC Pohang Steelers (KOR) and Nagoya Grampus (JPN).

4. The Player's samples were sent to the WADA-accredited laboratory of the Korea Institute of Science and Technology in the Korea Republic (the "Laboratory").

5. On 29 November 2021, the Laboratory notified the Fédération Internationale de Football Association ("FIFA") of an adverse analytical finding ("AAF") in the Player's A-sample. The A-sample was reported to contain *"S4, Hormone and Metabolic Modulators/trimetazidine"* ("TMZ"). The substance is prohibited at all times according to the International Standard Prohibited List 2021.

6. On 2 December 2021, the FIFA notified the AFC of the Player's AAF.

7. On 6 December 2021, the Appellant was informed by the AFC of the AAF in respect of his A-sample.

8. On 8 December 2021, the Player requested the analysis of the B-sample.

9. On the same day, the Player was provisionally suspended by the Chairperson of the AFC Disciplinary and Ethics Committee.

10. On 3 March 2022, the B-sample was analysed which confirmed the AAF. The Player was informed of such finding the next day.

11. On 14 March 2022, the Appellant admitted that an anti-doping rule violation ("ADRV") had been committed.

12. On 25 August 2022, a letter of charge was notified to the Player according to which Mr Jakub Świerczok was found to have committed an offence under Article 6 of the AFC Anti-Doping Regulations 2021 ("ADR").

13. Following a hearing before the AFC Disciplinary and Ethics Committee issued its decision in the matter on 26 October 2022 ("Appealed Decision"). The operative part of the Appealed Decision reads as follows:

    "Mr Jakub Świerczok (AFC/146427/POL) has committed an offence under Article 6 of the AFC Anti-Doping Regulations 2021.

    Mr Jakub Świerczok (AFC/146427/POL) is banned from taking part in any football-related activity (which includes, inter alia, all domestic, international, friendly and official fixtures) for four (4) years. Such period shall be considered to have commenced on 9 December 2021, being the date on which the provisional suspension (imposed via Decision VTC 20211208DC01) took effect".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

14. On 8 December 2022, the Player filed his Statement of Appeal against the Appealed Decision with the Court of Arbitration for Sport ("CAS"). The appeal was directed against the AFC in accordance with Articles R47 and R48 of the CAS Code of Sports-related Arbitration (the "CAS

Code"). In his Statement of Appeal the Player appointed Mr Jeffrey G. Benz, Attorney-at-Law in London as an arbitrator. Furthermore, the Statement of Appeal contained the following requests for relief:

"(a) set aside the Decision;

(b) eliminate or otherwise reduce the sanction imposed on the Appellant; and

(c) order the Respondent to reimburse his legal costs and expenses related to this appeal".

15. On 14 December 2022, the CAS Court Office acknowledged receipt of the Appeal filed by the Player, set a deadline for the Player to file his Appeal Brief and a deadline for the Respondent to nominate an arbitrator.

16. On 26 December 2022, the Respondent nominated His Honour James Robert Reid, KC as arbitrator in the present procedure.

17. On 28 December 2022, the Appellant filed his Appeal Brief. Furthermore, the Appellant applied for urgent provisional measures.

18. On 29 December 2022, the CAS Court Office acknowledged receipt of the Appeal Brief, set a deadline for the Respondent to file its Answer and invited the Respondent to file its position with respect to the Appellant's request for provisional measures by 5 January 2023.

19. On 4 January 2023, the Respondent requested a 5-days extension of the deadline to address the Appellant's application for provisional measures.

20. On the same day, the CAS Director General granted the Respondent's request.

21. On 10 January 2023, the Respondent requested a further extension of the deadline to address the Appellant's application for provisional measures.

22. Considering the Appellant's agreement, the CAS Court Office on 11 January 2023 granted the Respondent's request for an extension of the deadline.

23. On 17 January 2023, the Respondent requested a one-day extension of the deadline to comment on the Appellant's request for provisional measures.

24. On 18 January 2023, the CAS Court Office granted the Respondent's request for this short extension of the deadline.

25. On the same day, the CAS Court Office informed the Parties that the Panel appointed to decide the dispute is constituted as follows:

President: Prof. Dr. Ulrich Haas, Professor in Zurich, Switzerland and Attorney-at-Law in Hamburg, Germany

Arbitrators Mr Jeffrey G. Benz, Attorney-at-Law in London, United Kingdom

His Hon James Robert Reid KC, Retired Judge in West Liss, United Kingdom

26. Still on the same day, the Respondent requested another extension of the deadline to respond to the Appellant's request for provisional measures in view of the ongoing exchanges between the Parties.

27. On 19 January 2023, the CAS Court Office granted the Respondent's request for a further extension until 19 January 2023, 16:00 (CET).

28. On the same day, the Respondent sent an email to the CAS Court Office requesting *"the CAS to, as soon as possible, confirm via an Order for Provisional Measures the Appellant's immediate eligibility to participate in football"*.

29. Still on the same day, the CAS Court Office acknowledged receipt of the Respondent's email and forwarded it to the Panel for its consideration.

30. By an email dated 19 January 2023, the Respondent requested the CAS Court Office *"to confirm that all deadlines are currently suspended (at least pending receipt of the Panel's instructions)"*.

31. On 20 January 2023, the CAS Court Office confirmed that all deadlines were suspended from 19 January 2023 until further notice from the CAS Court Office.

32. On 24 January 2023, the CAS Court Office issued the operative part of the Order for Provisional Measures and informed the Parties that the reasoning for the Order would follow in due course.

33. On 1 February 2023, the CAS Court Office issued the Reasoned Order for Provisional Measures.

34. On 22 February 2023, the Parties submitted to the CAS Court Office a signed settlement agreement ("Settlement Agreement") and requested the CAS to incorporate it in a consent award pursuant to Article R56 of the CAS Code and to issue the latter as soon as possible.

35. On 23 February 2023, the CAS Court Office acknowledged receipt of the Parties' Settlement Agreement.

36. On 2 March 2023, the CAS Court Office advised the Parties as follows:

"Dear Sirs,

… On behalf of the Panel, I kindly refer the Parties to Article 10.3 lit. c of the WADA International Standard for Results Management, which provides:

'No settlement embodied in an arbitral award rendered by consent of the parties as per R56 of the Code of Sports-related Arbitration shall be entered into by an Anti-Doping Organization without WADA's written

approval. Where the parties to the CAS proceedings are envisaging settling the matter by way of a settlement embodied in an arbitral award rendered by consent of the parties, the Anti-Doping Organization that is a party to the proceedings shall immediately notify WADA and provide it with all necessary information in this respect'.

In view of the above, the Parties are invited to inform the CAS Court Office by 7 March 2023 whether an approval by W ADA has been given in the matter at stake - and in case such approval exists - to provide the CAS Court Office with a copy thereof within the same deadline".

37. On the same day, the Respondent confirmed that the World Anti-Doping Agency ("WADA") had approved the Settlement Agreement and provided correspondence to this effect.

IV. THE SETTLEMENT AGREEMENT

38. The Settlement Agreement contains *inter alia* the following terms:

"…

1.10 On 28 December 2022, the Appellant filed his Appeal Brief. In light of additional analytical evidence filed by the Appellant with his Appeal Brief, which he obtained following the Decision, the Respondent is now satisfied that the Product X used by the Appellant during the relevant period was, on the balance of probabilities, the cause of the AAF (i.e., the Respondent is satisfied that the Appellant has now managed to discharge his burden to establish the source of the Prohibited Substance).

1.11 Subsequently, following discussions between the Appellant and the Respondent, and in recognition of this additional evidence and of all the specific circumstances of the case, the parties agreed to resolve the case on the following basis.

2. NOW, THEREFORE, THE PARTIES ARE WILLING TO INCORPORATE THE PRESENT SETTLEMENT AGREEMENT IN AN ARBITRAL AWARD RENDERED BY CONSENT OF THE PARTIES (THE "CONSENT AWARD") AS PER ARTICLE RSG OF THE CAS CODE, ACCORDING TO THE FOLLOWING TERMS:

2.1 The Appeal is admissible.

2.2 The Decision of the AFC Disciplinary and Ethics Committee dated 24 November 2022, imposing a period of Ineligibility of four years on Mr Swierczok, commencing on 9 December 2021, is set aside.

2.3 The Appellant committed an anti-doping rule violation under Article 6 of the AFC Anti-Doping Regulations as a result of the presence of Trimetazidine in his Sample. However, after having been provided with additional evidence in the context of the appeal proceedings before the Court of Arbitration for Sport ("CAS"), the Respondent is satisfied that:

(a) The source of the Trimetazidine found in the Sample has now been established to be a Contaminated Product, Trimetazidine not having been listed as an ingredient of the product in question;

(b) The Appellant did not knowingly or intentionally ingest Trimetazidine;

(c) The Contaminated Product was produced by a large and reputable food manufacturer that claims to conduct more than 16,000 tests on its products each month;

(d) The Appellant could only have established that the supplement was contaminated by having it tested by a specialist laboratory; and

(e) The Appellant thus bears no significant fault for the anti-doping rule violation.

2.4 This was the Appellant's first anti-doping rule violation. To date, the Appellant has been suspended from participating in football activities since 9 December 2021. The Appellant has respected that suspension.

2.5 The Appellant maintains that, on the basis of relevant case law, he should not be required to serve any period of Ineligibility for the anti-doping rule violation and that he could not have known or suspected that the product was contaminated.

2.6 On the other hand, the Respondent considers that the imposition of a period of Ineligibility was warranted.

2.7 The parties agree that, if the Appeal were to be considered by the CAS panel, there is a likelihood that any sanction that would be imposed on the Appellant would - in light of the new evidence presented by the Appellant du ring the CAS appeal proceedings and applying the Contaminated Products provisions within the ADR - be shorter than the period of suspension which the Appellant has already served.

2.8 Therefore, considering all of the above factors and in light of their desire to bring these proceedings to a swift conclusion, the parties agree (on the Respondent's part, subject to the approval of WADA) that the following outcomes shall conclude the CAS appeal proceedings:

(a) A 6-month period of Ineligibility is to be imposed on the Appellant backdated as from the date of his provisional suspension (i.e. as from 8 December 2021);

(b) The Appellant is immediately eligible to participate in football activities (the above period of Ineligibility having already been served);

(c) The parties will notify the CAS and FIFA that the Appellant is immediately eligible to participate in football activities; and

(d) The parties agree that the period of Ineligibility that had been imposed on the Appellant at first-instance is to be immediately and irrevocably lifted, and that the anti-doping proceedings will be concluded once the CAS panel has issued the Consent Award ratifying the terms agreed between the parties in this Settlement Agreement.

2.9 Subject strictly to the issuance of the Consent Award by the CAS panel ratifying the terms agreed by the parties in this Settlement Agreement, the Appellant agrees to waive any potential claim (including any claim for damages of any sort or on any other basis) against the Respondent and/or any of its officials, bodies or employees relating to or arising from the antidoping proceedings. For the sake of completeness, this Settlement Agreement shall not in any way be construed as an admission and/or an acknowledgement by the AFC of liability to any

extent or any other acts of wrongdoing.

2.10 The parties will refrain from making any negative public statements against each other.

2.11 Each party will bear its own legal and other costs incurred in connection with this arbitration.

2.12 The parties hereby request that the CAS panel issue a Consent Arbitral Award incorporating the terms of this agreement".

V. JURISDICTION

39. Article R47 of the CAS Code states that:

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

40. The jurisdiction of the CAS follows from Article 77 of the ADR and has not been contested by either of the Parties in these Proceedings.

VI. ADMISSIBILITY

41. 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 in 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. […]".*

42. Article 82.1 of the ADR stipulates that

> *"the time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the motivated decision by the appealing party (…)".*

43. The Player received the grounds of the Appealed Decision on 24 November 2022 and filed the Statement of Appeal on 8 December 2022. Consequently, the appeal was filed in time. The admissibility of the appeal is further backed by the explicit agreement of the Parties in clause 2.1 of the Settlement Agreement.

VII. THE MANDATE OF THE PANEL

44. Article R56 para. 2 of the CAS Code provides, in relevant part as follows: *"[…] Any settlement may be embodied in an arbitral award rendered by consent of the parties".*

45. According to CAS 2019/A/6083 and CAS 2019/A/6261:

> *"Under Swiss law an arbitration tribunal sitting in Switzerland has authority to issue an award embodying the terms of the parties' settlement, if the consenting parties do agree to such a termination of their dispute. The Panel's ratification of the Parties' agreement and its incorporation into this Consent Award serves the purpose of vesting the agreement with a res judicata effect and of enabling the enforcement of their said agreement.*
>
> *It is the task of the [Panel/ Sole Arbitrator] to verify the bona fide nature of the agreement to ensure that the will of the Parties has not been manipulated to commit fraud and to confirm that the terms of the agreement are not contrary to public policy principles or to mandatory rules of the law applicable to the dispute".*

46. The Panel, having reviewed the text of the Settlement Agreement and the evidence on the CAS file in this appeal, is satisfied that the Settlement Agreement was validly entered into, is binding on the Parties and that it meets the above requirements. The Panel also notes that the Settlement Agreement was approved by WADA according to Article 10.3 lit. c of the WADA International Standard for Results Management ("ISRM"). The latter provision reads as follows:

> *"No settlement embodied in an arbitral award rendered by consent of the parties as per R56 of the Code of Sports-related Arbitration shall be entered into by an Anti-Doping Organization without WADA 's written approval. Where the parties to the CAS proceedings are envisaging settling the matter by way of a settlement embodied in an arbitral award rendered by consent of the parties, the Anti-Doping Organization that is a party to the proceedings shall immediately notify WADA and provide it with all necessary information in this respect".*

47. Finally, the Panel is of the view that there is no reason to think that the Settlement Agreement does not constitute a *bona fide* settlement of the dispute or that the will of the Parties to this appeal have been manipulated in any way or that the Settlement Agreement offends any public policy principles or any mandatory rules of the law applicable to the dispute.

48. In all the circumstances, the Panel therefore takes the view that it is right to ratify the Settlement Agreement and its terms are incorporated into this Consent Award.

49. It follows that it is unnecessary for the Panel to consider any other requests made by the Parties. Accordingly, all other and further requests, motions, and prayers for relief are hereby dismissed.

ON THESE GROUNDS

By consent, the Court of Arbitration for Sport rules that:

1. The Parties' Settlement Agreement dated 22 February 2023 is hereby ratified with the consent of the parties, and its terms are incorporated into this arbitral Consent Award.

2. The arbitral procedure *CAS 2022/A/9334 Jakub Świerczok v. Asian Football Confederation* is terminated and deleted from the CAS roll.

3. (…).

4. (…).

5. Each Party is hereby ordered to perform the obligations and duties as per their Settlement Agreement.

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