



Arbitration Newsletter Switzerland

CAS held in Check

The latest decision of the Swiss Federal Supreme Court rendered on March 17, 2011¹ in conjunction with the annulment of a CAS award is straight forward and raises no special issues which would need to be further addressed. However, following our commitment to comment on CAS awards which were successfully annulled at the Federal Swiss Supreme Court², we shall, nevertheless, briefly touch thereupon.

1 Facts of the Case

At the heart of a case presented to the CAS and brought forward by five national chess federations, all being member federations of the World Chess Federation (FIDE), plus a company called Karpov 2010 Inc. (altogether "**Claimants**") against FIDE was Claimants' claim that Mr Ilyumzhinov's nomination for president of FIDE was invalid. In its Award of September 27, 2010³ the CAS panel ruled, *inter alia*, that it does not have jurisdiction over Karpov 2010 Inc., dismissed the claims of the Claimants and ordered Claimants to pay FIDE CHF 35'000 as a contribution to its legal fees and other expenses.

It was this last order which then was appealed by FIDE at the Swiss Federal Supreme Court arguing that its right to be heard, as stipulated in Art. 190 para. 2 lit. d PILA, was violated. What happened?

In their submissions both Parties requested the CAS panel to allow them to produce their submissions on costs at a later stage of the proceedings. Accordingly, the CAS panel requested on September 24, 2010 both Parties to submit their cost submissions within a given deadline. However, before said deadline elapsed and hence before the Parties produced their cost submissions, the CAS panel rendered its Award,

which included its order that Claimants shall pay FIDE CHF 35'000.

2 The Findings

The Swiss Federal Supreme Court first noted that a CAS panel is most likely not obliged to specifically request the Parties to submit their submissions on costs and arguments as to the cost allocation prior to the close of the proceedings. Rather, the Swiss Federal Supreme Court holds that it is sufficient if the Parties, in the course of the proceedings, are allowed to develop their cost arguments and to produce the pertaining evidence.

However, in the case at hand the CAS panel explicitly requested the Parties to submit their cost submission within a given deadline but nevertheless rendered the Award before elapse of that deadline and hence without that the Parties had filed their submissions on costs. The Swiss Federal Supreme Court therefore held that this constitutes a violation of the Parties' right to be heard and, consequently, annulled the cost order.

3 Conclusion

The ruling of the Swiss Federal Supreme Court is to be welcomed: if a Tribunal invites the Parties to produce their cost submissions it creates a *bona fide* expectation that the Tribunal will not issue an Award allocating the costs of the proceedings before the Parties' cost submissions have been filed. Accordingly, if a Tribunal issues such a "premature" Award its behaviour violates the parties' right to be heard and hence qualifies as a ground for the annulment pursuant to Art. 190 para 2 lit. d PILA.

August 30, 2011

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Attachments:

- CAS 2010/O/2166
- BGE 4A_600/2010

¹ BGE 4A_600/2010.

² So far five; see our previous newsletters of January 5, February 2, July 5 and August 11, 2010 as well as of April 20, 2011 published on our firm's website www.thouvenin.com.

³ CAS 2010/O/2166.

Bundesgericht
Tribunal fédéral
Tribunale federale
Tribunal federal

{T 0/2}
4A_600/2010

Arrêt du 17 mars 2011
Ire Cour de droit civil

Composition
Mmes et MM. les Juges Klett, présidente, Corboz, Rottenberg Liatowitsch, Kolly et Kiss.
Greffier: M. Carruzzo.

Participants à la procédure
Fédération X. _____, représentée par Me Jean-Marc Reymond, et par Me Sébastien Besson,
recourante,

contre

1. Fédération A. _____,
2. Fédération B. _____,
3. Fédération C. _____,
4. Fédération D. _____,
5. Fédération E. _____,
6. F. _____ Inc.,
toutes représentées par Me Antonio Rigozzi, et par Me Ank Santens,
intimées.

Objet
arbitrage international; dépens; droit d'être entendu; ordre public procédural,

recours en matière civile contre la sentence rendue le 27 septembre 2010 par le Tribunal Arbitral du Sport (TAS).

Faits:

A.
La Fédération X. _____ (ci-après: X. _____) est une association de droit suisse qui a son siège à Lausanne. Elle regroupe les fédérations nationales ..., au nombre desquelles figurent les fédérations française, allemande, suisse, ukrainienne et états-unienne, intimées à la présente procédure.

F. _____ Inc., autre intimée, est une entité de droit américain créée afin de soutenir la campagne de R. _____ à l'élection présidentielle de X. _____ qui s'est déroulée lors de l'assemblée générale de cette association tenue le 29 septembre 2010. Le prénommé entendait prendre la place du président sortant, S. _____, qui se représentait pour un nouveau mandat.

B.
Le 9 juillet 2010, les cinq fédérations nationales précitées et F. _____ Inc. (ci-après: les intimées) ont saisi le Tribunal Arbitral du Sport (TAS) d'une requête d'arbitrage dirigée contre X. _____. La requête visait à faire constater que les candidatures de S. _____ et de sa colistière n'avaient pas été présentées conformément aux prescriptions réglementaires applicables, de sorte qu'elles devaient être écartées.

A titre principal, X. _____ a contesté la compétence matérielle du TAS. Subsidiairement, elle a conclu au rejet de la requête sur le fond.

Une Formation de trois membres a été constituée le 3 août 2010. Les parties ont déposé un nombre considérable de documents et de pièces en peu de temps, désireuses qu'elles étaient de voir le TAS trancher le litige avant l'assemblée générale de X. _____.

La Formation a rendu sa sentence le 27 septembre 2010. Elle a admis sa compétence à l'égard des intimées, à l'exception de F. _____ Inc. (ch. 1 et 2 du dispositif), rejeté les conclusions des fédérations intimées (ch. 3 du dispositif) et décidé que les frais de l'arbitrage, à fixer ultérieurement, seraient mis pour 65% à la charge des intimées et pour 35% à celle de X. _____ (ch. 4 du dispositif). Sous chiffre 5 du dispositif de sa sentence, la Formation a condamné les intimées à payer une somme de 35'000 fr. à X. _____ à titre de contribution pour ses frais d'avocat et ses autres frais en relation avec l'arbitrage.
S'agissant des dépens, les arbitres ont considéré qu'ils étaient en mesure de trancher cette question sans devoir inviter les parties, au préalable, à déposer des écritures supplémentaires sur ce point.

C.
Le 27 octobre 2010, X. _____ a formé un recours en matière civile au Tribunal fédéral

en vue d'obtenir l'annulation du chiffre 5 du dispositif de la sentence précitée. Elle reproche au TAS d'avoir violé son droit d'être entendue, au sens de l'art. 190 al. 2 let. d LDIP, en statuant sur les frais d'avocat et autres frais encourus pour les besoins de la procédure sans jamais donner aux parties la possibilité de s'exprimer à ce sujet, au préalable, quand bien même il les avait invitées à déposer leurs observations sur ces frais et avait été requis par elles de leur accorder un délai à cette fin. Invoquant l'art. 190 al. 2 let. e LDIP, la recourante se plaint également d'une violation de l'ordre public procédural à raison des mêmes faits.

Dans leur réponse du 5 janvier 2011, les intimées ont conclu au rejet du recours. Le TAS a pris la même conclusion dans sa réponse du 14 janvier 2011 à laquelle il a joint un mémorandum établi le même jour par le président de la Formation au nom de celle-ci.

Considérant en droit:

1.

D'après l'art. 54 al. 1 LTF, le Tribunal fédéral rédige son arrêt dans une langue officielle, en règle générale dans la langue de la décision attaquée. Lorsque cette décision est rédigée dans une autre langue (ici l'anglais), le Tribunal fédéral utilise la langue officielle choisie par les parties. Devant le TAS, celles-ci ont utilisé l'anglais. Dans les mémoires adressés au Tribunal fédéral, elles ont employé le français. Conformément à sa pratique, le Tribunal fédéral adoptera la langue du recours et rendra, par conséquent, son arrêt en français.

2.

Dans le domaine de l'arbitrage international, le recours en matière civile est recevable contre les décisions de tribunaux arbitraux aux conditions fixées par les art. 190 à 192 LDIP (art. 77 al. 1 LTF). Qu'il s'agisse de l'objet du recours, de la qualité pour recourir, du délai de recours, des conclusions prises par la recourante ou encore des motifs invoqués dans le mémoire de recours, aucune de ces conditions de recevabilité ne fait problème en l'espèce. Rien ne s'oppose donc à l'entrée en matière.

3.

La Formation a fondé le chiffre 5 du dispositif de sa sentence sur l'art. R64.5 du Code de l'arbitrage en matière de sport (ci-après: le Code; texte en vigueur au 31 décembre 2009, remplacé le 1er janvier 2010 par une nouvelle version) ainsi libellé (version française):

"La sentence arbitrale détermine quelle partie supporte les frais de l'arbitrage ou dans quelle proportion les parties en partagent la charge. La sentence condamne en principe la partie qui succombe à une contribution aux frais d'avocat de l'autre partie, ainsi qu'aux frais encourus par cette dernière pour les besoins de la procédure, notamment les frais de témoins et d'interprète. Lors de la condamnation aux frais d'arbitrage et d'avocat, la Formation tient compte du résultat de la procédure, ainsi que du comportement et des ressources des parties."

Les intimées, à l'instar de la Formation qui a rendu la sentence attaquée, cherchent, pour l'essentiel, à démontrer au Tribunal fédéral que les arbitres ont fait une application correcte de la disposition réglementaire précitée en allouant la somme de 35'000 fr. à la recourante. Ce faisant, elles ne placent pas le débat sur le bon terrain.

D'une part, faut-il le rappeler, le Tribunal fédéral, lorsqu'il est saisi d'un recours en matière civile dirigé contre une sentence arbitrale internationale, ne revoit pas la manière dont le tribunal arbitral a appliqué les règles de droit entrant en ligne de compte, sinon dans le cadre fort limité des griefs fondés sur l'art. 190 al. 2 LDIP qui lui sont valablement présentés. D'autre part et surtout, étant donné la nature formelle du droit d'être entendu (**ATF 133 III 235** consid. 5.3 p. 250 in fine), si elle constatait une violation de cette garantie, la Cour de céans ne pourrait qu'annuler la sentence incriminée.

4.

4.1 Le droit d'être entendu, tel qu'il est garanti par les art. 182 al. 3 et 190 al. 2 let. d LDIP, n'a en principe pas un contenu différent de celui consacré en droit constitutionnel (**ATF 127 III 576** consid. 2c; **119 II 386** consid. 1b; **117 II 346** consid. 1a p. 347). Ainsi, il a été admis, dans le domaine de l'arbitrage, que chaque partie avait le droit de s'exprimer sur les faits essentiels pour le jugement, de présenter son argumentation juridique, de proposer ses moyens de preuve sur des faits pertinents et de prendre part aux séances du tribunal arbitral (**ATF 127 III 576** consid. 2c; **116 II 639** consid. 4c p. 643).

S'agissant du droit de faire administrer des preuves, il faut qu'il ait été exercé en temps utile et selon les règles de forme applicables (**ATF 119 II 386** consid. 1b p. 389). Le tribunal arbitral peut refuser d'administrer une preuve, sans violer le droit d'être entendu, si le moyen de preuve est inapte à fonder une conviction, si le fait à prouver est déjà établi, s'il est sans pertinence ou encore si le tribunal, en procédant à une appréciation anticipée des preuves, parvient à la conclusion que sa conviction est déjà faite et que le résultat de la mesure probatoire sollicitée ne peut plus la modifier (arrêt 4A_440/2010 du 7 janvier 2011 consid. 4.1). Le Tribunal fédéral ne peut revoir une appréciation anticipée des preuves, sauf sous l'angle extrêmement restreint de l'ordre public. Le droit d'être entendu ne permet pas d'exiger une mesure probatoire inapte à apporter la preuve (arrêt 4P.114/2003 du 14 juillet 2003 consid. 2.2).

4.2 Dans leur "Statement of claim" du 20 août 2010, les intimées ont requis expressément le TAS de les autoriser à soumettre à la Formation un résumé de leurs frais dans un délai de cinq jours après la clôture de l'audience d'instruction fixée aux 15 et 16 septembre 2010 à Lausanne (§ 276 in fine). De son côté, la recourante a demandé, dans sa réponse du 2

septembre 2010, l'autorisation de présenter un état de frais le moment venu, à un stade ultérieur de la procédure arbitrale (§ 382). Le vendredi 24 septembre 2010, le TAS, n'ayant pas reçu d'observations sur la question des frais, a spontanément relancé les parties afin qu'elles y pourvoient dans les meilleurs délais ("at their earliest convenience"). Réagissant sans tarder à cette injonction, les parties l'ont requis - les intimées le même jour, la recourante le lendemain - de se prononcer dans un premier temps sur le fond, le lundi 27 septembre 2010, et de surseoir à statuer sur les dépens en leur fixant un délai pour produire leurs états de frais respectifs (la semaine après l'élection du 29 septembre 2010 pour les intimées, le 11 octobre 2010 au plus tard pour la recourante); elles l'ont fait en motivant leur demande. Le TAS a du reste expressément pris note de celle des intimées, le 24 septembre 2010, sans autres explications et sans réserver une éventuelle décision de la Formation sur cette requête. Sur quoi, les arbitres ont rendu, le 27 septembre 2010, une sentence finale tranchant également la question des dépens. Dans les motifs de cette sentence, ils ont simplement indiqué qu'il n'était pas nécessaire pour les parties de déposer des écritures supplémentaires à cet égard, ce que le TAS a confirmé, sans commentaires, dans un fax du même jour accompagnant la notification de la sentence.

Il appert de cette relation de la dernière phase de la procédure arbitrale que la recourante se plaint à juste titre de n'avoir pu s'exprimer sur la question des frais d'avocat et autres frais encourus pour la défense de ses intérêts. Les intimées auraient aussi lieu de s'en plaindre, puisque ce sont elles qui, les premières, ont insisté pour que l'occasion leur fût donnée d'indiquer, avec preuves à l'appui, les frais qu'elles avaient exposés dans la procédure d'arbitrage; si elles ne le font pas, c'est sans doute qu'elles s'accrochent au montant de la contribution mise à leur charge au titre des dépens, qualifié par elles de "visiblement modeste" (réponse, n. 46). Toujours est-il qu'il y a là de quoi relativiser leur démarche consistant à venir au secours de la décision des arbitres de ne point entendre les parties sur le problème des dépens.

La question déterminante pour le sort du recours n'est pas de savoir si, d'une manière générale, le TAS est tenu d'inviter spécialement les parties à se déterminer sur la répartition et le montant des dépens avant de pouvoir rendre sa sentence finale. Il est peu probable qu'il le soit. Sous l'angle du droit d'être entendu, il devrait suffire, en effet, que les parties aient eu l'occasion, en cours de procédure, de développer leurs arguments et de produire leurs moyens de preuve à cet égard (factures, notes d'honoraires, états de frais, etc.), qu'elles aient fait usage ou non de cette faculté. Au demeurant, comme la Formation le souligne dans son memorandum, il n'existe aucune disposition particulière dans le Code qui instituerait une procédure spécifique pour le dépôt de mémoires et de pièces relatifs aux dépens.

Le problème, en l'occurrence, est différent parce que la Formation a demandé de sa propre initiative aux parties de l'éclairer à ce sujet et qu'elle a été nantie de requêtes de celles-ci, sinon conjointes du moins analogues, tendant à obtenir un délai pour ce faire, sans qu'elle y donnât suite. Venir soutenir, après coup, comme le fait la Formation, que les parties ont "volontairement choisi de ne déposer aucun mémoire, alors qu'elles auraient eu la possibilité d'agir relativement rapidement..." (mémoire, n. 23), n'est pas conforme aux règles de la bonne foi qui régissent aussi la procédure (ATF 111 II 62 consid. 3 p. 67), y compris en matière d'arbitrage international (arrêt 4P.196/2003 du 7 janvier 2004 consid. 5.2). De fait, les parties ont réagi sans délai, lorsqu'elles ont été relancées par le TAS; elles lui ont expliqué les raisons pour lesquelles il ne leur était pas possible de s'exécuter sur-le-champ et ont réclamé qu'un peu de temps leur fût accordé pour y procéder, de sorte qu'elles pouvaient s'attendre de bonne foi à ce que la Formation se prononçât sur leurs requêtes avant de statuer sur le fond. Il ne faut pas non plus perdre de vue, sur un plan plus général, que l'instance arbitrale n'avait débuté que deux mois et demi avant la date de cette relance, si bien qu'il serait irréaliste de considérer que les parties avaient disposé, dans l'intervalle, de tout le temps nécessaire à la confection d'un état de frais, eu égard aux multiples démarches accomplies par elles durant cette période. Pour le surplus, il convient de noter qu'il ne s'est pas écoulé un seul jour ouvrable entre le moment où les parties ont été enjointes de déposer leurs observations sur les dépens et ont réclamé un délai à cette fin, d'une part, et celui où la Formation a rendu sa sentence finale, d'autre part. De ce point de vue, la situation diffère ici de celle, mentionnée par les intimées, dans laquelle les arbitres renoncent, pendente lite, à une mesure procédurale prise antérieurement.

Au demeurant, les intimées déniaient à tort le caractère pertinent des faits sur lesquels la recourante aurait souhaité pouvoir s'exprimer. Il s'agit, en effet, de deux éléments mentionnés expressis verbis par l'art. R64.5 du Code, à savoir, pour l'un, les "frais d'avocat de l'autre partie, ainsi [que les] frais encourus par cette dernière pour les besoins de la procédure, notamment les frais de témoins et d'interprète"; pour l'autre, les "ressources des parties". Concernant le premier élément, les intimées, à l'instar de la Formation, insistent, il est vrai, sur le fait que l'indemnité allouée en application de cette disposition ne constitue qu'une "contribution" aux dépens de l'autre partie. Cependant, il n'apparaît pas qu'une telle circonstance soit propre à ôter toute pertinence à la question de l'ampleur des frais d'avocat et autres frais de procédure; sinon, il suffirait de mettre en avant la nature simplement contributive de l'indemnité due à titre de dépens pour justifier l'allocation de la même somme à deux parties dont l'une aurait pourtant consacré dix fois plus d'argent que l'autre à la défense de ses intérêts. A cet égard et pour garantir une certaine égalité de traitement, le TAS serait bien inspiré de préciser la notion de "contribution" au sens de l'art. R64.5 du Code de manière à encadrer un tant soit peu le pouvoir discrétionnaire des arbitres en la matière. Quant au second élément, savoir si, comme la recourante le soutient, les montants dépensés par elle pour résister à l'action introduite par les intimées "grèvent son budget de façon inquiétante et lui portent un préjudice financier considérable" (recours, n. 56) n'est sans doute pas dénué de pertinence. Il n'est pas nécessaire, pour vérifier la chose, de procéder à une expertise approfondie de la situation financière de cette partie.

Enfin, les considérations émises par les intimées et par la Formation pour tenter de justifier ex post le point controversé du dispositif de la sentence attaquée ne peuvent pas être retenues pour les motifs susmentionnés (cf. consid. 3).

4.3 Force est ainsi de constater que la Formation a violé le droit d'être entendu de la recourante. Il y a lieu, partant, d'annuler le chiffre 5 du dispositif de la sentence du 27 septembre 2010.

Point n'est, dès lors, besoin d'examiner le grief tiré de la violation de l'ordre public procédural (art. 190 al. 2 let. e LDIP), ce type d'ordre public ne constituant du reste qu'une garantie subsidiaire (arrêt 4P.105/2006 du 4 août 2006 consid. 5.3 et les références).

5.

Les intimées, qui succombent, seront condamnées solidairement à payer les frais de la procédure fédérale (art. 66 al. 1 et 5 LTF) et à indemniser la recourante (art. 68 al. 1, 2 et 4 LTF).

Par ces motifs, le Tribunal fédéral prononce:

1.

Le recours est admis et le chiffre 5 du dispositif de la sentence rendue le 27 septembre 2010 par le Tribunal Arbitral du Sport dans la cause précitée est annulé.

2.

Les frais judiciaires, arrêtés à 4'000 fr., sont mis à la charge des intimées, solidairement entre elles.

3.

Les intimées sont condamnées solidairement à verser à la recourante une indemnité de 5'000 fr. à titre de dépens.

4.

Le présent arrêt est communiqué aux mandataires des parties et au Tribunal Arbitral du Sport.

Lausanne, le 17 mars 2011

Au nom de la Ire Cour de droit civil
du Tribunal fédéral suisse
La Présidente: Le Greffier:

Klett Carruzzo

CAS 2010/O/2166 Fédération Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy, United States Chess Federation and Karpov 2010, Inc. v. Fédération Internationale des Echecs

ARBITRAL AWARD

delivered by

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Dr. Dirk-Reiner Martens, attorney-at-law in Munich, Germany

Arbitrators: Prof. Richard H. McLaren, barrister in London, Canada

Dr. Quentin Byrne-Sutton, attorney-at-law in Geneva, Switzerland

Ad hoc clerk: Mr. Roderick Maguire, barrister-at-law in Dublin, Ireland

in the arbitrations

Fédération Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy, United States Chess Federation and Karpov 2010, Inc. represented by Ms. Ank A. Santens, White and Case LLP in New York, USA and Dr. Antonio Rigozzi, Lévy Kaufmann-Kohler, attorney-at-law in Geneva, Switzerland

-Claimants -

and

Fédération Internationale des Echecs

represented by Me. Jean-Marc Reymond, Reymond & Hohenauer Avocats, attorney-at-law in Lausanne, Switzerland and Dr. Sébastien Besson, Python and Peter, attorney-at-law in Geneva, Switzerland.

- Respondent-

1. THE PARTIES

- 1.1 The first five Claimants are the national chess federations of France, Germany, Switzerland, the Ukraine and the United States, respectively. These are member federations of the Respondent. The sixth Claimant, Karpov 2010, Inc. is described by Claimants as the Presidential ticket of Mr. Anatoly Karpov for the election to the Presidency of the Fédération Internationale des Echecs scheduled for 30 September 2010, organised and operating as a not-for-profit corporation.
- 1.2 The Respondent is the Fédération Internationale des Echecs, or FIDE, the governing international body of the sport of chess.

2. FACTUAL BACKGROUND

- 2.1 Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the pleadings and evidence adduced at the hearing. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
- 2.2 Mr. Karpov seeks to run for President of the Respondent and his rival for that position is the current President Mr. Kirsan Ilyumzhinov, who has been in that position since 1995.
- 2.3 The Electoral Regulations ("EL") prescribe the requirements for the Presidential ticket in Article 1. In summary, each Presidential ticket must contain six nominees to specified positions, at least one of whom must be a woman. A federation must not nominate more than one candidate for each position.
- 2.4 On 29 June 2010, FIDE announced on its website that there were two Presidential tickets in the forthcoming elections, being those of Mr. Karpov and Mr. Ilyumzhinov. The announcement indicated, *inter alia*, that Mr. Ilyumzhinov was nominated by the Russian Chess Federation ("RCF"), the Argentinean federation and the Mexican federation. It also indicated that Ms. Beatriz Marinello was nominated, as part of Mr. Ilyumzhinov's ticket, by the Chilean and Brazilian federations.
- 2.5 The same announcement indicated that Mr. Karpov was nominated by the national federations of France, Germany and Switzerland. In the course of the Claimants' preparation for the arbitration hearing, they discovered that Mr. Karpov was not a member of the Swiss Federation and notified both the Panel and the Respondent of this fact.
- 2.6 The announcement by FIDE was accompanied by a statement concerning the RCF nomination as follows:

“Concerning the FIDE election, the Russian Chess Federation (RCF) informed FIDE on 28 June 2010 that the Supervisory Board of the RCF, during its meeting of 28 June, confirmed the letter of its Chairman Mr Arkady Dvorkovich to FIDE on 21 April, nominating Kirsan Ilyumzhinov as Russia’s candidate for the office of FIDE President 2010-2014. Furthermore, the RCF informed FIDE that the letter sent by Mr. Alexander Bakh on 23 June is not valid on nominating a candidacy from the Russian Chess Federation.”

- 2.7 By letter dated 21 April 2010, Mr. Dvorkovich, writing as Chairman of the Supervisory Board of the RCF, had informed FIDE that the RCF were recommending as candidate and supporting Mr. Ilyumzhinov for FIDE President at the upcoming elections.
- 2.8 On 14 May 2010, there was a Supervisory Board meeting at which the decision was taken to nominate Mr. Karpov to the position of FIDE President on behalf of the RCF.
- 2.9 On 21 May 2010, Mr. Aleksander Bakh, writing as Chairman of the Management Board of the RCF, drafted a letter to FIDE, attaching minutes of the meeting of 14 May 2010. In that letter, Mr. Bakh informed FIDE that the RCF was nominating Mr. Karpov for President of FIDE. This letter was not sent until 23 June 2010, when Mr. Bakh enclosed a covering letter indicating the nomination contained within. An acceptance letter by Mr. Karpov was sent with the 23 June letter. These were sent by fax on 28 June, and hand-delivered to the FIDE office on 28 June by Mr. Nigel Short, a Chess Grandmaster who lives in Athens Greece.
- 2.10 On 28 June 2010, the New Charter of the RCF was registered at the United State Register of Legal Entities in Russia. On the same day, a meeting of the Supervisory Board under the New Charter took place.
- 2.11 That meeting accepted the resignation of Mr. Bakh from his post from 10 July 2010.
- 2.12 The meeting also resolved to *“delegate to Mr. Dvorkovich, the Chairman of the RCF’s Supervisory Board, the authority to represent the RCF’s interests with regard to third parties until the next extraordinary meeting of the RCF’s congress.”*
- 2.13 After that meeting, on 28 June 2010 Mr. Dvorkovich wrote to the Electoral Congress of the International Chess Federation (FIDE) in Russian stating that *“in accordance with the decision of the Supervisory Board of the Russian Chess Federation (RCF), the meeting of which took place on the June 28th, 2010, I hereby confirm the letter sent by me on 21st April 2010 on nominating the candidacy from the RCF for the election to*

the position of FIDE President at the elections at the FIDE congress in the city of Khanty-Mansiysk (2010).”¹

2.14 It was agreed between the parties, that Pursuant to Articles 1.2 and 1.3 of the FIDE Electoral Regulations as set out below at Paragraph 3, nominations were required to be submitted to the FIDE Secretariat by 28 June 2010 at midnight Athens time, being three months before the opening of the General Assembly on 28 September 2010. At the end of the arbitration hearing there was no longer any issue as to the timeliness of the various nominations, which were all received by the Secretariat by the 28 June 2010 deadline.

2.15 By letter dated 28 June 2010, Mr. David Jarrett, FIDE Executive Director, wrote to Mr. Dvorkovich thanking him for his correspondence concerning the nomination of Mr. Ilyumzhinov, and seeking clarification in relation to the document received from Mr. Bakh on 23 June, a copy of which was enclosed, and asking whether it was a valid letter from the RCF.

2.16 By e-mail in Russian dated 29 June 2010 from Mr. Ilya Levitov, writing as First Deputy Chairman of the government of RCF,² informed the FIDE Secretariat that the letter from Mr. Bakh dated 23 June 2010 was not a legally valid document on the nomination for the office of FIDE President from the RCF.

2.17 By an announcement on its website on 29 June 2010, FIDE announced that:

“FIDE is examining the validity of all candidacies submitted within the deadline of 28 June and will ratify the list of candidates during its Presidential Board meeting in Tromso, 24-25 July.”³

2.18 By an announcement on its website dated 2 August 2010, FIDE stated that:

“On July 24-25 the 3rd quarter FIDE Presidential Board meeting was held in Tromso, Norway. At the meeting the candidacies for the Presidential tickets and Continental Presidents were tabled. Since several members of the Presidential Board are personally involved in the election, the Presidential Board will list all candidacies in the General Assembly agenda and all issues concerning the nominations will be submitted to the General Assembly.”⁴

¹ Respondent’s exhibit 78.

² Translation per Claimants’ Exhibit 21.

³ Claimants’ Exhibit 12

⁴ Claimants’ Exhibit 65.

3. REGULATORY FRAMEWORK

The FIDE Statutes and Electoral Regulations provide, *inter alia*, as follows:

Statutes

“1.1. The International Chess Federation or Federation Internationale des Echecs, (referred to in the ensuing text as FIDE for short), is the recognised international federation in the domain of chess, which was founded on July 20, 1924 in Paris. FIDE is recognised by the International Olympic Committee as the supreme body responsible for the game of chess and its Championships. FIDE has the sole rights to organize the World Chess Championships and the Chess Olympiads.

FIDE unites national chess federations throughout the world and oversees all International competitions.

...

1.3. Chess is one of the most ancient, intellectual and cultural games. It is a combination of sport, of scientific thinking and of elements of art.

...

The purpose and aim of FIDE are the diffusion and development of chess among all nations of the world, as well as the raising of the level of chess culture and knowledge on a sporting, scientific, creative and cultural basis. FIDE supports a close international cooperation of the chess devotees in all fields of chess activity, thereby also aiming to improve friendly harmony among all peoples of the world.

[...]

2.1. Members of FIDE are national chess federations which have principal authority over chess activities in their own countries and which have been admitted to FIDE as member-federations, if they acknowledge the FIDE Statutes and develop activities not contrary to those statutes. Only one federation of each country can be affiliated to FIDE. In addition FIDE can grant the status of provisional member to chess federations, in accord with Art. 2.8. However, applicants granted full or provisional membership must have fulfilled any of the following conditions:

a. The country of the federation (with the same boundaries) must be a country or territory that is a member of the International Olympic Committee

b. The country of the federation (with the same boundaries) must be a country or territory with a membership or an observer status in the United Nations

[...]

Chapter 03 - FIDE officials and organizations

(GA '96) The FIDE officials and organizations are:

- a.the General Assembly,*
- b.the Executive Board,*
- c.the Presidential Board,*
- d.the President,*
- e.the Honorary President,*
- f.the Deputy President,*
- g.the Vice Presidents,*
- h.the Honorary Vice Presidents*
- i.the four Continental Presidents,*
- j.the General Secretary,*
- k.the Treasurer,*
- l.the Auditor,*
- m.the Zonal Presidents,*
- n.the Executive Director*
- o.the Marketing and PR Director*
- p.the permanent and temporary Commissions,*
- q.the delegates,*
- r.the Continental Representatives*
- s.CEO Development*
- t.Commercial Director*

The President and all other FIDE officials and organizations are elected or nominated and confirmed, as the case may be, for a period of four years.

The Executive Director shall remain in office until he resigns or his appointment terminated by the President on confirmation by the General Assembly.

Where an interim election is necessitated by resignation or death, the person elected shall serve for the remainder of the normal election period.

[...]

4.1. *The General Assembly, being the highest authority of FIDE, exercises the legislative and - unless otherwise defined below - also the executive power. It supervises the activities of the Executive Board, the Presidential Board, the President and also the other FIDE officials and organizations. It approves the FIDE budget, elects the Presidential Board, Ethics Committee, Verification and Constitutional Committees and determines the schedule of FIDE activities.*

When the General Assembly is not in session its powers are transferred to the Executive Board. However, the Executive Board cannot take decisions on the following:

*election of officials - as previously defined
changes in Statutes,
matters of Rules Commission,
matters of Qualification Commission.*

All decisions taken by the Executive Board shall be reviewed by the following General Assembly. The World Champion and the Women`s World Champion shall be invited to attend the General Assembly with consultative voice, but no vote.

[...]

5.1. The Executive Board concerns itself with matters that are usually dealt with by the General Assembly between its sessions ; it deals in particular with the annual reports of the President and the Treasurer as well as all further subjects listed on the agenda for the General Assembly and recommends actions. During Olympiad years the Executive Board will only hold an abbreviated meeting which will discuss only those issues which are paramount on the agenda and have broad interest or those that may generate controversy at the General Assembly.

*5.2. The Executive Board consists of:
the President, the Honorary President, the Deputy President, the General Secretary, the Treasurer, the Vice Presidents, the Honorary Vice-Presidents, the four Continental Presidents, the Zonal Presidents, four representatives from each of the Continents, the Auditor, and the Men`s World Champion and the Women`s World Champion.*

[...]

7.1. The Presidential Board is the managing organization of FIDE and is in charge with the day-to-day management of FIDE. It resolves on all matters not otherwise and explicitly reserved to another body by those Statutes. The Presidential Board exercises the rights of the General Assembly and the Executive Board between meetings of the General Assembly and the Executive Board respectively. Such powers include taking decisions which require a 3/4 majority vote pursuant to Standing Order to 1.2. Any rights so exercised have no continuing effect beyond the following General Assembly unless so authorized by the requisite majority vote.

However, the Presidential Board cannot take decisions on the following:

election of officials,

*changes in Statutes,
Rules Commission matters,
Qualification Commission matters,
Budget reviews.*

7.2. (GA `96) The Presidential Board consists of the President, the Honorary President, the Deputy President, the General Secretary, the Treasurer, the Vice Presidents, the four Continental Presidents, World Champion, Women`s World Champion and the Honorary Vice-Presidents. Honorary Vice Presidents are ex officio members of the Presidential Board without vote. The Auditor shall be invited to all the Presidential Board meetings. The Auditor should not be a member of the Presidential Board when he is elected by the General Assembly.

In the event of any vacancy occurring on the Presidential Board, it shall be filled from within the Board by the Board, except in the case of a Continental Presidency vacancy which shall be referred for election by the particular continent, provided that the membership of the Presidential Board does not drop below the statutory requirements.

[...]

14.1. Notwithstanding any provisions to the contrary in this Statute, FIDE hereby subscribes to the final settlement of any dispute directly or indirectly related to chess in its whole or partial practice, be it commercial or relating to the practice and development of chess or a dispute following a decision by FIDE, to be sent to the Court of Arbitration for Sport in Lausanne without recourse to any other court or tribunal, as earlier subscribed to by FIDE on 11 October 1995.”

16.3. Decisions made by the General Assembly concerning the statutes, the standing orders or the electoral regulations will come into effect on the last day of the General Assembly, after the General Assembly is closed except amendments to Financial Regulations which come into operation on the first day of the next fiscal year.

Electoral Regulations

“1.1 The Presidential ticket shall be six persons, at least one of whom must be a woman. Nominations on the Presidential ticket shall specify the proposed nominees for the offices of President, Deputy President, two Vice Presidents, General Secretary and Treasurer.

1.2 Nominations for the Presidential ticket and Continental Presidents must reach the FIDE Secretariat at least three months before the opening of the General Assembly. To be elected, each candidate shall be nominated by his federation. He/She should have been a member of their federation at least one year before the General Assembly.

1.3 The federation of the candidate shall send the letter of nomination to FIDE Secretariat by fax and by registered mail. FIDE Secretariat shall confirm receipt of this letter. Nominees shall confirm at the same time to the FIDE Secretariat their acceptance of the nominations.

1.4 The FIDE Secretariat will insure that the listing of all nominees is included in the agenda sent to all member federations prior to the Congress.

1.5 The elections for the Presidential ticket shall be held prior to the other elections.

1.6 On the day of the elections, the candidate for President of each Presidential ticket will have a maximum of fifteen (15) minutes on stage to present his programme. The order of appearance shall be decided by the drawing of lots.

[...]

4. Election conditions

Eligibility for office pertains only to those persons who belong to a member-federation.

No person can be elected to a FIDE-office against the will of his national federation. This stipulation may be waived by the General Assembly only in exceptional cases. Federations that are against the nomination of one of their members for a FIDE office, should raise their objections to such a nomination before the election.”

4. THE PARTIES' SUBMISSIONS

4.1 The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

4.2 The Claimants' Submissions

Claimants argue that in accordance with the arbitration agreement set out in Article 14.1 of the FIDE Statutes, they are requesting CAS to decide on a “*dispute relating to chess*”, i.e. a dispute whether FIDE violated its obligation to verify in a timely manner before the FIDE General Assembly at the end of September 2010 the validity of the nominations for FIDE Presidency.

In particular, the Claimants submit that Mr. Ilyumzhinov’s “nominations” on 21 April and 28 June 2010 were invalid because they were not based on an ordinary resolution of the competent body of RCF and were not communicated by Mr. Bakh who was the only person authorised to make legally binding declarations on behalf of RCF. The same was true, in the opinion of the Claimants, for the “clarification” made by Mr. Dvorkovich on 29 June 2010.

With respect to Mr. Ilyumzhinov’s nominations by Mexico and Argentina, the Claimants argue that they were invalid because Mr. Ilyumzhinov has not been a “member” of the respective federations one year before the FIDE General Assembly as required by Paragraph 1.2 of the FIDE Electoral Regulations.

In general, the Claimants contend that in connection with the nominations for Presidency, FIDE acted with a clear bias in favour of Mr. Ilyumzhinov and improperly used FIDE resources in the latter’s favour.

In its 20 August 2010 statement of claim, the Claimants make the following prayers for relief:

Preliminarily

(a) *holding that the CAS has jurisdiction over the dispute and all parties to this arbitration;*

Principally

(b) *holding that the ostensible nominations of Mr. Ilyumzhinov as a candidate for President of FIDE are invalid;*

(c) *holding that Mr. Karpov was validly nominated by the RCF as its sole nominee to run for the Presidency of FIDE;*

(d) *holding that the ostensible nominations of Ms. Beatriz Marinello as the Vice Presidential nominee on the Presidential ticket of Mr. Ilyumzhinov are invalid;*

(e) *as a result of the above rulings, holding that Mr. Ilyumzhinov’s ticket is disqualified from the election;*

(f) *ordering FIDE to pay damages to Claimant Karpov 2010, Inc. in the amount of all campaign costs expended by the Karpov Presidential ticket after 29 June*

2010, which as of the date of this Statement of Claim amount to \$106,028.17 and which Claimants seek leave to update within five days of the close of the hearing in Lausanne;

- (g) ordering FIDE to pay post-award interest on any damages granted in the award, in the amount of 5% per annum.

Subsidiarily

- (h) holding that FIDE has breached its obligation to verify that the above nominations complied with its Electoral Regulations;
- (i) holding that FIDE has breached its obligation to act with impartiality towards the candidates and to conduct the election in a fair manner;
- (j) holding that the FIDE must remove from its website the incorrect and biased statements concerning the nomination by the Russian Chess Federation of its candidate for President for the 2010 FIDE elections, as well as the documents listed in support of these statements, or, alternatively, correct the statements and supplement them with the documentation supporting Anatoly Karpov's claim to the nomination;
- (k) holding that FIDE and its officials must refrain from using any FIDE resources (including but not limited to money, websites, the FIDE name, and personnel) to advance the candidacies of the members of the Ilyumzhinov President ticket and those of allied Continental Presidents (Ali-Nihat Yazici, Jorge Vega Fernandez Dabilani Bhutali, Mohammed Moammar Al-Ghathafi, and Lakhdar Mazouz.)

[Note by the Panel: at the end of the hearing on 16 September 2010, Claimants requested that the prayers for relief mentioned under (h) to (k) be treated as principal requests to which Respondent did not object]

4.3 Respondent's Submissions

Respondent primarily submits that CAS has no jurisdiction because the arbitration clause in the FIDE Statutes was "an offer to arbitrate" which was not intended to cover disputes unrelated to the practice of chess.

In the event that the Panel were to decide that it has jurisdiction, Respondent further argues that Mr. Ilyumzhinov's nomination by RCF was made in compliance with Russian law and the applicable regulations of the RCF and FIDE.

Respondent also contends that both Mr. Ilyumzhinov's and Ms. Marinello's nominations by Mexico/Argentina and Chile/Brazil, respectively, comply with the FIDE requirements as both have been members of the respective federations for more than one year before the FIDE General Assembly.

In its 2 September 2010 answer, the Respondent makes the following prayers for relief:

- I. *Ruling that CAS has no jurisdiction and/or that Claimants' Prayers for Relief are inadmissible;*
- II. *Alternatively to I., dismissing entirely any and all Prayers for Relief of the Statement of Claim filed by Claimants (Fédération Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakhiv Ukrainy, United States Chess Federation and Karpov 2010, Inv.);*
- III. *Alternatively to I. and in the event that CAS would grant any or all Prayer(s) for Relief contained at para. 278 b) to e) of the Statement of Claim, disqualifying Mr. Karpov's presidential ticket from the Election;*
- IV. *In all events, ordering Claimants (Fédération Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakhiv Ukrainy, United States Chess Federation and Karpov 2010, Inc.), jointly and severally, to pay all the costs of the arbitration, including without limitation the fees and expenses of the Panel and Respondent's legal fees and expenses.*

5. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

- 5.1 By a Request for Arbitration dated 9 July 2010, the Claimants filed their request for arbitration and provisional measures against the Respondent.
- 5.2 On 23 July 2010, the Respondent filed its position on the Claimants' request for provisional measures.
- 5.3 The request for provisional measures was subsequently withdrawn.
- 5.4 On 9 August 2010, the Claimants filed their submission on jurisdiction, standing and admissibility. On the same date, the Respondent filed its answer to the request for arbitration and also filed a request for security for costs.
- 5.5 On 11 August 2010, the Claimants filed their comments on the Respondent's request for security for costs.
- 5.6 The request for security for costs was subsequently withdrawn.
- 5.7 On 16 August 2010, the Respondent filed its comments on the Claimants' request for production of documents.
- 5.8 On 19 August 2010, the Respondent filed the documents that it agreed to produce voluntarily.

- 5.9 On 20 August 2010, the Claimants filed their Statement of Claim, exhibits, legal authorities, witness statements and expert report.
- 5.10 On 24 August 2010, the Claimants filed a corrected list of legal authorities and an amended translation of exhibit CL-34.
- 5.11 On 2 September 2010, the Respondent filed its Response to the Statement of Claim, factual and legal exhibits and witness statements.
- 5.12 On 8 September 2010, the Respondent submitted additional extracts of legal sources and translations.

6. THE CONSTITUTION OF THE PANEL AND THE HEARING

- 6.1 On 3 August 2010, the CAS Court Office informed the Parties that the arbitral panel in the Arbitration had been constituted as follows: Dr. Dirk-Reiner Martens, President of the Panel, Prof. Richard H. McLaren, co-arbitrator appointed by the Claimants, and Dr. Quentin Byrne-Sutton, co-arbitrator appointed by the Respondent (the “**Panel**”). The Panel was constituted without objections by the parties in accordance with Articles R33 and R40 of the CAS Code.
- 6.2 The Panel convened an oral hearing on Wednesday, 15 September 2010 and Thursday, 16 September 2010 at the Hotel De La Paix, Lausanne, Switzerland. The Panel heard arguments in relation to jurisdiction on the first day of the hearing and in relation to the merits of the case on the second day of the hearing.
- 6.3 The following witnesses were heard by the Panel:
- Mr. Aleksander Bakh, former Chairman of the RCF;
 - Mr. Jean-Pierre Chamorro, President of FENANIC, the Nicaraguan Chess Federation;
 - Mr. Garry Kasparov, former world chess champion and campaign manager and adviser of Mr. Karpov;
 - Mr. Bessel Kok, former candidate for President of FIDE;
 - Mr. Nigel Short, professional chess player and supporter of Mr. Karpov;
 - Mr. David Jarrett, Executive Director of FIDE;
 - Dr. Bernhard Berger, attorney-at-law and associate lecturer at the University of Berne, Faculty of Law;

- Prof. Henri Peter, professor at the University of Geneva, Faculty of Law.
- Mr. Michael Khodarkovsky, Chair of the International Affairs Committee of the US Chess Federation and delegate to FIDE;
- Mr. Gregory Chernyshov, Russian attorney-at-law at Egorov Puginsky Afansiev & Partners, Moscow;
- Ms. Olga Baglay, Russian attorney-at-law at Watson, Farley & Williams, London;
- Mr. Ilya Levitov, acting Head of the Board of RCF;
- Mr. Darcy Lima, FIDE Delegate of the Brazilian Chess Federation;
- Mr. George Mastrokoukos, FIDE official;
- Ms. Eli Sperdokli, in-house counsel for FIDE.

6.4 At the conclusion of the hearing, the Parties requested that a reasoned award be delivered in a short period of time, at least in advance of 28 September 2010. In order to accommodate the Parties' request, it was not possible to summarize the testimony or the witness statements where they were provided. Instead, the Panel indicates in these reasons where it is relying on testimony given by witnesses or legal experts.

7. APPLICABLE LAW

Pursuant to R45 of the Code of Sport-related Arbitration ("CAS Code") and the agreement of the parties, Swiss law is applicable both procedurally and substantively.

8. JURISDICTION

The majority of the Panel considers that it has jurisdiction to decide this arbitration, except with respect to the claims made by Karpov 2010, Inc., where the entire Panel finds that it has no jurisdiction. Throughout this section 8 of the award, the term "Panel" refers to the majority of the Panel.

8.1 Firstly, the Respondent argues that no arbitration agreement is in place between the Claimants and FIDE. It submits that chapter 14 of the FIDE Statutes constitutes an "offer to arbitrate" and that according to constant jurisprudence of the Swiss Federal Tribunal, such an offer must be interpreted narrowly. The Swiss Federal Tribunal is quoted as stating that:

"By entering into an arbitration agreement the parties forego the choice of having their possible disputes decided by state courts; this is a far-reaching choice given the resultant limits imposed on the available legal

remedies as well as the typically higher costs of arbitrations in comparison with state proceedings. It cannot therefore be lightly assumed in the instant case that such an agreement was reached. However whenever the existence of an agreement to arbitrate is established, there is no longer any basis for applying a restrictive approach: in such cases it is to be assumed that the parties wanted the arbitral tribunal to have extensive jurisdiction when they went to the lengths of agreeing to arbitrate in the first place.”⁵

- 8.2 The Panel disagrees and rejects the first argument of the Respondent. It considers that in the case of FIDE as a Swiss association, its members, i.e. the federations forming the association, enter into an agreement on the statutes and, more particularly, as far as this case is concerned, an arbitration agreement either upon formation of the association (if the arbitration clause is already part of the statutes) or upon the joining of a particular new federation (with respect to that federation) or upon a resolution of the members to add an arbitration clause. The Federal Tribunal⁶ and CAS jurisdiction are unanimous in considering that once an arbitration agreement is concluded, it has to be interpreted broadly in favour of arbitration.
- 8.3 The Panel thus considers that a (pre-existing) arbitration agreement exists between the FIDE members and FIDE.
- 8.4 However, the Panel does not accept jurisdiction for Karpov 2010, Inc. which asks this Panel to award damages which it allegedly incurred as “*campaign costs expended by the Karpov presidential ticket [...]*”. The Panel considers that with respect to non-members, the “offer to arbitrate” must be interpreted narrowly and is not addressed to just *any* third party but merely to those mentioned in 14.3.
- 8.5 Secondly, the Respondent argues that even if in the Panel’s view an arbitration agreement has been entered into between the parties, such an agreement only encompasses disputes which are related to the practice of chess, i.e. to matters relating to the playing activities.
- 8.6 The Panel disagrees with the second argument of the Respondent: Chapter 14.3 of the FIDE Statutes provides that “*acts performed by FIDE as an organisation*” are within the disputes arbitrable under Chapter 14.1. In addition, the text of Chapter 14.1 makes it clear that disputes “*directly or indirectly related [...] to the [...] development of chess*” can be made the subject of an arbitration. As FIDE’s “*purpose and aim are the diffusion and development of chess [...]*” (Chapter 1.3 of the FIDE Statutes) and as the FIDE Presidential Board, of which the FIDE President is a member, is “*in charge of managing FIDE and resolves on all matters not otherwise and explicitly reserved to*

⁵ The opinion of Dr. Bernhard Berger dated 2 September 2010 filed by the Respondents refers at paragraph 44 to this passage in case BGE 116 Ia 56, 58 E. 3b.

⁶ As an example for a sports-related dispute, compare the Federal Tribunal’s decision dated 2 February 2001, 4P.230/2000.

another body [...]” (Chapter 7.1 of the FIDE Statutes), the Panel considers that the primary issue of this arbitration, i.e. the legality of the nomination for Presidency, is within the scope of the arbitration agreement.

8.7 Thirdly, the Respondent argues that according to Article 75 of the Swiss Civil Code⁷, which is mandatory according to the Respondent, the Panel does not have jurisdiction because decisions of FIDE can only be the subject of an arbitration if they are (i) final and (ii) all internal remedies have been exhausted. Furthermore, according to the Respondent, any remedy may only be in the form of an acceptance of a decision or its rejection and setting aside.

8.8 The Panel disagrees and rejects the third argument of the Respondent. Claimants have stressed from the outset that they are not attacking a FIDE “*decision*” but rather that they request this Panel to arbitrate a “*dispute directly or indirectly related to chess.*” In fact, the arbitration agreement between FIDE members and FIDE itself contemplates two instances in which a matter can be referred to arbitration (Article 14.1 of the FIDE Statutes):

- “*Any dispute directly or indirectly related to chess [...]*”, and
- “*a dispute following a decision by FIDE*”.

8.9 While the requirements of Article 75 of the Swiss Civil Code must in fact be met if a “*decision*” is the subject matter of the arbitration, nothing prevents an association in the exercise of the freedom of contract and the wide autonomy granted to it under Swiss law⁸ to agree that in addition to decisions “*any dispute related to chess*” can be submitted to arbitration. This is exactly what the FIDE members and FIDE itself have done, that is to submit “*any dispute*” relating to chess to arbitration. In addition, it is worth noting that the CAS court office has opened the proceedings within the framework of “*Ordinary Arbitration*”, not under the Appeal provisions.

8.10 The foregoing conclusion of the Panel does not mean that the scope of the arbitration agreement is all-encompassing and that any FIDE member can at any time submit any dispute *in abstracto* to arbitration. However, in the present case the Claimants (except for Karpov 2010, Inc.) are directly affected in their rights to have FIDE respect its own regulations in connection with the forthcoming elections for which the Claimants/federations have submitted a candidate, and to have FIDE timely verify the validity of all candidatures. CAS has jurisdiction for this type of dispute.

⁷ « Each member shall be entitled by force of law to challenge in court, within one month of his having gained knowledge thereof, resolutions that he has not consented to and that violate the law or the articles of the association. » [Translation provided in the witness statement of Dr. Bernhard Berger at p.7 referenced as being provided by the Swiss-American Chamber of Commerce, 2008 and not contested by the Claimants].

⁸ The Federal Tribunal has granted “the greatest possible freedom in terms of their [the Associations’] internal organisation”. Quotation and translation by Dr. Berger of Swiss Federal Tribunal case BGE 132 III 503 E 3.2 = JdT 2009 I 165 at p. 7 of the opinion of Dr. Berger dated 2 September 2010.

9. THE PANEL'S FINDING ON THE MERITS

9.1 Standing

Having found jurisdiction, the Panel considers that the Claimants (other than Karpov 2010, Inc.) have standing as against FIDE. The Panel considers that the member federations have the right as against FIDE to request that the association properly apply its own rules with respect to the EL.

Claimants are asking this Panel to find “*that Mr. Karpov was validly nominated by the RCF as its sole nominee to run for the Presidency of FIDE:*” In order for FIDE (and this Panel) to make this determination it would have to review internal RCF processes such as the relevance of the amendments to the RCF Statutes or the validity of decisions taken by the RCF Supervisory Board.

FIDE has no standing to be sued with respect to this prayer for relief. A party seeking to have these matters reviewed must turn to the competent body in the country concerned, in this case Russia.

The Claimants' prayer for relief under (c) is thus dismissed.

9.2 Claimants have made several requests for relief with which the Panel will deal with in turn, except for prayer for relief (f) since such prayer is made on behalf of Claimant Karpov Inc. over which the Panel considers it lacks jurisdiction.

9.2.1. As its principal prayer, the Claimants request the Panel hold that Mr. Ilyumzhinov and Ms. Marinello's nominations are invalid and that FIDE has breached its obligation to verify the nominations (“**Nominations Claims**”).

9.2.2. The Claimants' further prayers relate to FIDE's alleged breach of its obligation to act with impartiality and fairness. Finally, Claimants request the Panel to hold that certain changes must be made to FIDE's website as it relates to the nominations for Presidency (the “**Subsidiary Claims**”).

9.3 The Respondent requests the Panel dismiss all of the above claims and brings a counterclaim in the event that the Panel finds in favour of Claimants on certain prayers.

(i) The Nomination Claims

9.4 The Claimants' nomination claims can only succeed if FIDE

- has an obligation to decide on the nominations before the general assembly (“GA”) (First Question), and
- if FIDE – had it complied with the foregoing obligation and taken a decision – would have had to refuse Mr. Ilyumzhinov's and Ms. Marinello's nominations because they were invalid (Second Question).

9.5 For the reasons that follow, the majority of the Panel answers the First Question in the affirmative but the Panel considers that the nominations of both Mr. Ilyumzhinov and Ms. Marinello (Second Question) comply with the applicable rules and regulations. The nomination claims have thus to be dismissed.

9.6 The First Question

9.6.1. Throughout this subsection 9.6 of the award, the term “Panel” refers to the majority of the Panel.

9.6.2. In order to determine whether a duty to decide on the nominations before the GA exists, the Panel has to examine

- who within the FIDE organisation is in charge of verifying nominations, and
- whether the body responsible for the verification can shift its responsibility to the GA, for reasons of conflict of interest or otherwise.

9.6.3. The FIDE Statutes and the EL do not determine the body in charge of the verification of nominations for the FIDE Presidency. As a matter of principle, therefore, the GA as “*the highest authority of FIDE [which] exercises [...] – unless otherwise defined below – also the executive power*” (Chapter 4.1 of the FIDE Statutes) is the body responsible for the verification of nominations.

9.6.4. However, Article 4.1 of the FIDE Statutes provides that when the GA is not in session, “*its powers are transferred to the Executive Board*” (“EB”). Yet, certain decisions cannot be taken by the EB, including decisions regarding the “*election of officials*”. The Presidential Board (“PB”), according to Article 7.1 of the FIDE Statutes, is “*in charge of the day-to-day management of FIDE*” and exercises the right of the GA and the EB between the meetings of the GA and the EB. Like the EB, the PB cannot take decisions on “*election of officials*”.

The Panel interprets these provisions as precluding both the EB and the PB from the voting process for officials which is the exclusive authority of the GA. However, the Panel does not consider that the FIDE Statutes prevent the PB from acting to verify the nomination and eligibility of candidates for election. Indeed as the body responsible for “the day-to-day management of FIDE”, the PB has a duty to inquire when necessary and to verify nominations. This conclusion is confirmed by practical considerations: contrary to arguments made by the Respondent, it is highly impractical to expect an assembly of delegates from more than 150 countries speaking several dozen languages to decide on issues which this Panel is expected to rule on, on the basis of thousands of pages of submissions and exhibits and hearings which lasted for a total of 31 hours in two days.

- 9.6.5. It is customary in practically all sports federations to transfer the powers of the general assembly to a body which manages the affairs of the federation between the sessions of the general assembly (which sits every two or four years). In the case at hand, this body is the PB which not only has the right but also the duty to make decisions like the one in question here, i.e. to verify the nominations for Presidency. It has to do so in advance of the session of the GA in order for the latter to decide on what it has the exclusive authority to do, namely to hold elections and the voting procedure related hereto.
- 9.6.6. Respondent has submitted that the PB is prevented from ultimately deciding on the validity of nominations because the PB's decisions are not final and need approval by the GA session. The Panel disagrees: Chapter 4.1 of the FIDE Statutes provides that "*all decisions taken by the Executive Board shall be reviewed by the following General Assembly*". No such provision can be found in Chapter 7 of the FIDE Statutes dealing with the PB. Once again, this assignment of duties and responsibilities fully corresponds to the practical needs: the PB will be unable to run FIDE's management if its actions are subject to final approval by the GA.
- 9.6.7. Respondent has also referred to Chapter 7.1 of the FIDE Statutes which provides that "*[s]uch powers [the power to exercise the rights of the GA between its meetings] include taking decisions which require a ¾ majority vote pursuant to Standing Order to 1.2. Any rights so exercised have no continuing effect beyond the following General Assembly unless so authorised by the requisite majority vote.*" Proper reading of this provision clearly leads to the conclusion that the second sentence ("*any rights so exercised*") relates to decisions pursuant to the previous sentence ("*decisions which require a ¾ majority vote*") and not to the day-to-day management of FIDE.
- 9.6.8. Finally, the Panel's conclusion is confirmed by the following considerations: Article 16.3 of the FIDE Statutes provides that decisions made by the GA "*concerning [...] the electoral regulations will come into effect on the last day of the General Assembly, after the General Assembly is closed [...]*". On this basis alone, the GA cannot be the proper forum to make decisions respecting the eligibility of nominations, the reason being that the decision regarding eligibility would not become effective until after the vote on the election would have to take place.
- 9.6.9. Respondent has submitted that in the special circumstances of this case, the PB can and must return the responsibility to decide on the validity of nominations for FIDE Presidency to the GA because some members of the PB felt they had a conflict in voting on this issue.
- 9.6.10. The Panel disagrees. While it was appropriate for the PB to be concerned with conflicts of interest, given that some of its members were also candidates in Mr. Ilyumzhinov's ticket, the appropriate way to proceed for a Swiss

association is for those who are conflicted to excuse themselves from the meeting while the PB acts and determines the validity of nominations and eligibility for Presidential tickets. For legal and practical reasons the PB has a duty to make the determination on the nominations and must do so in a timely fashion before the GA is held.

- 9.6.11. Claimants have suggested that as a result of the conflicts of interest mentioned above, the PB is the inappropriate forum to decide on the validity of nominations. They further argue that for the practical reasons outlined above the GA is equally unable to decide on these issues. The Claimants conclude therefore, that in the circumstances of this case this Panel must decide instead of the PB and the GA. The Panel disagrees with this proposition. As has been explained above, the PB members who have a conflict must excuse themselves from the decision making, but the rest of the PB is authorised and obligated to make the requisite decisions on nominations for the GA.

9.7 The Second Question

- 9.7.1. Having determined that FIDE failed to exercise its duty to verify the validity of the nominations, the Panel will now examine whether Mr. Ilyumzhinov and Ms. Marinello have been properly nominated in compliance with the FIDE Statutes and regulations. In making its examination, the Panel considers that the validity of nominations by member federations must be determined from the point of view of the FIDE Electoral Regulations and not from the internal laws and rules of the various member federations leading up to the nomination of candidates for the Presidential ticket.
- 9.7.2. FIDE Rules require that
- a nomination (see below 9.7.3.)
 - of an eligible candidate (see below 9.7.4. et seqq.)
 - has been timely filed.
- 9.7.3. A “**nomination**” within the meaning of the EL is a declaration by the nominating federation vis-à-vis a third party (FIDE) and must thus be made by a person who can make legally binding declarations on behalf of the nominating entity.
- 9.7.4. With respect to the **eligibility** of candidates for FIDE Presidency 1.2 of the EL provides that

“to be elected, each candidate shall be nominated by his federation. He/she should have been a member of their federation at least one year before the General Assembly.”

9.7.5. Section 4 of the EL (first paragraph) provides the following:

“Eligibility for office pertains only to those persons who belong to a member/federation.”

9.7.6. It was the testimony of Mr. Mastrokoukos, an official of the FIDE General Secretariat, that it has always been FIDE’s practice that the membership requirements for candidates for Presidential tickets were not applied strictly so long as the candidates were part of the “chess family”. This practice is in line with the text of the applicable regulations:

9.7.7. Section 1.2 of the EL uses three different words to indicate the level of “duty” to be fulfilled:

- *“nominations [...] **must** reach the FIDE Secretariat [...]”*
- *“to be elected, each candidate **shall** be nominated [...]”, and*
- *“he/she **should** have been a member [...]”*

[emphasis added]

9.7.8. Contrary to what has been suggested at the hearing, one cannot ignore that according to the text of Section 1.2 of the EL membership is a “should-requirement” as opposed to “must” or “shall”. The Panel therefore considers that the requirement of a one-year membership is not mandatory but recommendatory.

Furthermore, if membership in the nominating federation were mandatory, a number of FIDE federations would never be able to submit candidates because in their countries individuals cannot be members of the national federation but rather only in clubs which in turn are members in (regional bodies or) the national federation.

9.7.9. This finding is confirmed by the language of Section 4, first paragraph of the EL, which provides that eligibility requires the candidate to “belong” (not: “to be a member”) to “a” federation (not: “the nominating federation”). As a result, the Panel considers that it is sufficient for a candidate for a Presidential ticket to be a member of *any* of the FIDE members.

9.7.10. These requirements as regards “nomination” and “eligibility” must be examined with respect to a) Mr. Ilyumzhinov and b) Ms. Marinello.

a. Validity of Mr. Ilyumzhinov’s Nomination

9.7.11. *Has Mr. Ilyumzhinov been validly nominated by RCF?*

- 9.7.11.1. According to Claimants, at all relevant times to these proceedings, Mr. Bakh was the only person who could legally represent RCF without a power of attorney. While Mr. Karpov's nomination was signed by Mr. Bakh, the nominations of Mr. Ilyumzhinov were signed by members of the Supervisory Board of RCF. The same is true for the "confirmation" of 29 June 2010 and the assertion that Mr. Karpov's nomination was not valid.
- 9.7.11.2. In circumstances where the FIDE Secretariat has no reason to doubt that a person with the authority to bind the member federation has properly signed the nomination of candidates, FIDE can rely on these declarations from member federations and does not have to look behind the ways and means as to how the respective national federation arrived at the decision and subsequent declaration on nominations.
- 9.7.11.3. If, however, it becomes obvious that the validity of nominations is questionable, FIDE's Secretariat has an obligation to make further enquiries which in this case may include, for instance, a request for "clarification" not only to the Supervisory Board of RCF but also to the person who at that time was the only person authorised to represent RCF.
- 9.7.11.4. However, in view of the Panel's finding that Mr. Ilyumzhinov's nomination by the federations of Mexico and Argentina are valid (see below), the Panel does not have to make a final determination whether Mr. Ilyumzhinov's nomination by RCF was valid and whether and to what extent it would have been proper for the FIDE Secretariat to make further enquiries on Mr. Ilyumzhinov's nomination by RCF.

9.7.12. *Has Mr. Ilyumzhinov been validly nominated by Mexico/Argentina?*

- 9.7.12.1. It has been confirmed at the hearing that Mr. Ilyumzhinov is a member "at least" of RCF. In view of the Panel's finding that under FIDE rules it is sufficient for a candidate for a Presidential ticket to be a member of *any* of the FIDE members, the Panel considers that it is irrelevant whether Mr. Ilyumzhinov is a full or only a honorary member of the Mexican/Argentinian federation. It is sufficient for him to be part of the chess family (which he obviously is in view of his long-lasting FIDE Presidency), in the words of the EL that he belongs to "*a member federation*". It is not relevant whether the "recommendation" that he "should" be a member of the Mexican/Argentinian federation has been fulfilled.

9.7.12.2. For the sake of completeness the Panel wishes to add that the withdrawal by the Argentinian federation of its endorsement of the Ilyumzhinov ticket does not affect the nomination filed by it prior to the applicable deadline.

9.7.12.3. For the foregoing reasons, the Panel considers that Mr. Ilyumzhinov has been properly nominated by the federations of Mexico/Argentina.

b. Validity of Ms. Marinello's nomination

9.7.13. In view of the Panel's findings with respect to the nomination of Mr. Ilyumzhinov, it is clear that Ms. Marinello has been validly nominated by the federations of Chile and Brazil.

9.7.14. Ms. Marinello "belongs" to the federation of the United States and it is not relevant whether she fulfils the "should"-requirement of a one-year membership in the federations which have nominated her (Chile and Brazil).

9.7.15. Conclusion

As a result of the above, Claimants' claims requesting that both Mr. Ilyumzhinov's and Ms. Marinello's nominations be deemed invalid and, accordingly, that Mr. Ilyumzhinov's ticket must be disqualified from the election, must fail.

(ii) The Subsidiary Claims

9.8 Breach of FIDE's obligation to verify nominations?

As a result of the Panel's considerations above, the Claimants' request "*that FIDE has breached its obligations to verify that the above nominations complied with its electoral regulations*" must be dismissed. The Panel views this request as being linked to the primary requests to declare Mr. Ilyumzhinov's and Ms. Marinello's nominations invalid which the Panel has declined to do.

9.9 Breach of FIDE's obligation to act impartially and in a fair manner?

9.9.1. Claimants request a holding by the Panel that "*FIDE has breached its obligations to act with impartiality towards the candidates and to conduct the election in a fair manner*".

9.9.2. The testimony heard by the Panel did not produce proof of an impartial and unfair conduct on the part of FIDE. On the contrary, the FIDE Secretariat alerted the Karpov ticket a few hours before the lapse of the term for nominations that a certain signature was missing. The Secretariat would certainly not have acted in this manner had they intended to unfairly help the ticket of Mr. Ilyumzhinov.

9.9.3. Finally, the Panel considers that it would be premature for it to rule that FIDE breached its obligation “*to conduct the election in a fair manner*”. The election will be held at the end of this month and it will only be shown at that point in time whether FIDE acts fairly.

9.10 Removal of Statements from FIDE Website?

9.10.1. Claimants request a holding from the Panel that “FIDE must remove from its website the incorrect and biased statements concerning the nomination by the Russian Chess Federation of its candidate for President [...]” and further information.

9.10.2. The Panel notes that FIDE’s announcement has been qualified in substance by the Presidential Board’s actions following its decisions made in Tromso on 24-25 July 2010 to refer to the General Assembly the verification of the nominations. Indeed, the agenda of the General Assembly posted on the website on 16 August 2010 now makes it clear that the validity of candidacies on both Presidential tickets is disputed and for the moment unresolved by FIDE.

9.10.3. Consequently, the Panel finds there are no reasons to currently consider the content of the FIDE website to be misleading as to the status of the nominations, and Claimants’ above prayer for relief must be dismissed.

10. **RESPONDENTS COUNTERCLAIM**

Respondent’s request that Mr. Karpov’s ticket be disqualified is only made on the condition that the Panel finds in favour of Claimants with respect to their prayers of relief under b) to e). Since the Panel does not find in the Claimant’s favour on these prayers, the Respondents counterclaim is moot.

11. COSTS

11.1 Article R64.4 of the Code provides:

“At the end of the proceedings, the CAS Court Office shall determine the final amount of the costs of arbitration, which shall include the CAS Court Office fee, the administrative costs of the CAS calculated in accordance with the CAS scale, the costs and fees of the arbitrators calculated in accordance with the CAS fee scale, a contribution towards the expenses of the CAS, and the costs of witnesses, experts and interpreters. The final account of the arbitration costs may either be included in the award or communicated separately to the parties”.

Article R64.5 of the Code provides:

“In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule, the award shall grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the outcome of the proceedings, as well as the conduct and financial resources of the parties”.

11.2 In the present case, some of the Claimants have been successful in one aspect of the dispute (CAS jurisdiction to hear the claim filed by the national federations), but have lost the substantial part of the dispute. The claim filed by Karpov 2010, Inc. is declared inadmissible. Therefore, taking in consideration also the behaviour of the parties and their financial capabilities, the Panel finds it appropriate to have the costs of this arbitration borne by the parties as follows: 65% by Karpov 2010, Inc., Federation Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy and United States Chess Federation jointly, and 35% by FIDE. Such costs will be determined and notified by separate communication from the CAS Court Office.

11.3 Additionally, for the same reasons, the Panel finds it appropriate to grant FIDE a contribution towards its legal fees and other expenses in a total amount of CHF 35'000, without need for the parties to file any additional submissions in this regard. This amount shall be paid jointly by Karpov 2010, Inc., Federation Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy and United States Chess Federation to FIDE.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport does not have jurisdiction in this matter over Karpov 2010, Inc.
2. The Court of Arbitration for Sport does have jurisdiction in this matter over Federation Française Des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy and United States Chess Federation.
3. The claims filed by Federation Française Des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy and United States Chess Federation are dismissed.
4. The costs of the arbitration, to be determined and served on the parties by the CAS Court Office, shall be borne 65% by Karpov 2010, Inc., Federation Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy and United States Chess Federation jointly, and 35% by FIDE.
5. Karpov 2010, Inc., Federation Française des Echecs, Deutscher Schachbund, Schweizerischer Schachbund, Federatsiya Shakiv Ukrainy and United States Chess Federation are ordered to pay jointly a sum of CHF 35'000 (thirty five thousand Swiss francs) to FIDE as a contribution towards the legal fees and other expenses incurred by FIDE in connection with this arbitration.
6. All further and other claims for relief are dismissed.

Lausanne, 27 September 2010

THE COURT OF ARBITRATION FOR SPORT

Dirk-Reiner Martens
President of the Panel

Richard H. McLaren
Arbitrator

Quentin Byrne-Sutton
Arbitrator

Roderick Maguire
Ad hoc Clerk