Arbitration CAS 2012/A/2977 Volyn FC v. Maicon Pereira de Oliveira, award of 4 July 2013

Panel: Prof. Petros Mavroidis (Greece), President; Mr Graeme Mew (Canada); Mr Rui Botica Santos (Portugal)

Football
Employment contract between a player and a club
Admissibility of new evidence produced after the submission of the answer
Principle of exhaustion of internal legal remedies
Final decision

1. **If a document produced by a player as new evidence is an administrative form signed each year by all the players of a club before they leave for winter break, there are no exceptional circumstances justifying its admission, as the player is familiar with this document and could have relied on it at a much earlier stage of the proceedings.**

2. **When terminating legal proceedings between two parties following a claim withdrawal in accordance with the applicable regulations, the adjudicating body adopts a position of a merely procedural nature that does not have the effect of exhausting internal remedies pertaining to the substantive issues of the case. As a result, an appeal to the CAS regarding the merits of the dispute is not available.**

3. **A decision of terminating legal proceedings following a claim withdrawal is only final insofar as the consequences of the claim withdrawal are concerned. It is not a final decision as regards the substance of the matter.**

I. PARTIES

1. Volyn Football Club (hereinafter "the Club" or "the Appellant") is a football club with its registered office in Lutsk, Ukraine. It is a member of the Football Federation of Ukraine (hereinafter "FFU"), which has been affiliated to the Fédération Internationale de Football Association (hereinafter "FIFA") since 1992.

2. Mr Maicon Pereira de Oliveira (hereinafter "the Player" or "the Respondent") is a professional football player. He was born on 8 May 1988 and is of Brazilian nationality.

II. FACTUAL BACKGROUND

A. Background Facts

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

4. On 1 September 2009, the Club and the Player signed a fix-term employment contract, effective from 1 September 2009 until 31 August 2012.

5. As from August 2011, the Club entered into negotiations with the Player and his representatives to renew his employment contract. After two meetings and several e-mail exchanges, the formal discussions were put on hold in October 2011.

6. On 12 December 2011, the parties allegedly signed an Ukrainian as well as an English version of the following statement (hereinafter the "Statement"):

> *"AGREEMENT to Contract n°19/18 from 01.09.2009 between [the Club] and [the Player]*
>
> *The Sides confirm, that as of 12.12.2011 all obligations under the Contract (…) between [the Club] and [the Player] for the salary fully implemented.*
>
> *Claims the Sides do not have to each other.*
>
> *According to Art. 6.2. the Sides agreed to extend the validity period of the Contract for two years – till 31.08.2014. All other terms remained unchanging".*

7. During the present proceedings, the parties filed conflicting submissions concerning the authenticity of the Statement:

- The Player contended that a) he had never signed any document extending his contract with the Club, b) the Statement was a forged document, c) he was deceived into signing the Statement by misrepresentation of its substance and effect (he does not read English or Russian) and/or d) he might have signed the document in question, believing it to be an administrative form, necessary for his release before the winter holidays, but that the first as well as the last sentences of the Statement were inserted after he had signed it.

  In addition, and according to the Player, the alleged authenticity of the Statement was inconsistent with the subsequent attitude adopted by the Club in 2012:

  a) the Club made several public announcements in the beginning of 2012 about on-going negotiations with the Player for the renewal of his labour agreement;

b) the Club did not make use of the Statement during the negotiations held between January and February 2012 or, on 16 February 2012, when the Player gave notice to the Club of his decision not to extend his working relationship for the next season;

c) it was only in March 2012 that the Club filed the Statement with the FFU, the existence of which was brought to the Player's attention for the first time in May 2012.

– The Club claimed that the Statement was an authentic document. It carried out two forensic analyses, which confirmed the integrity of the Statement as well as the fact that the Player's signature was original. Based on the applicable Ukrainian Law and the expert opinions submitted, the Statement enjoyed a presumption of validity. The Player had not discharged his burden to displace the presumption. On the contrary and according to the Club, the Player had deliberately misrepresented the facts in an endeavour to undermine the authenticity of the Statement in order to escape his contractual commitments with the Club and to sign a more profitable employment contract with another team.

8. On 2 March 2012, the Player's representatives required the Club to promptly pay his salary for the month of January, failing which they would initiate proceedings with FIFA. The same kind of notification was made on behalf of the Player in June, July and August 2012, respectively for the wages of May, June and July.

9. On 31 August 2012 and on behalf of the Player, the following letter was sent to the Club:

> *"Reference is made to your notification no. 388, dated as 28 August 2012 and received by the Player today, by means of which you reinforce your position concerning the validity of the Employment Contract's Extension until 31.08.2014.*
>
> *In this regard, we revert to the terms of all several previous notifications exchanged between the parties according to which the player sustains that not only the signature contained therein but also the contents of the "Employment Contract's Extension" unilaterally deposited by F.C. Volyn before the UPFCA "Premier League" is forged. And of no value and therefore shall produce no legal effects.*
>
> *Moreover, we make reference to all previous notification sent by the player concerning the late and non-payment of his salaries, which include the months of January, May, June, July and August 2012, in order to inform you that, until the present date, he does not acknowledge receipt the payment of such outstanding and undisputed amounts.*
>
> *In light of all above, due to the crass violation of the employment contract by the F.C. Volyn's side – and without prejudice to any further sanctions to be taken by the competent courts – this letter serves to officially* ***NOTIFY*** *you that* ***the player herewith terminates his employment relationship with F.C. Volyn with immediate effect****".*

B. The Proceedings before the FIFA Dispute Resolution Chamber

10. On 16 July 2012, the Player lodged a claim with the FIFA Dispute Resolution Chamber seeking for the payment of *"the total sum of USD 30,000 (…) as late salaries related to January, May and June*

2012, plus interest rate of 05% p.a. over the amount due as compensation, as from the date when the salaries became due until the date of effective payment".

11. On 8 August and 5 September 2012, the Player amended his claim, which ultimately had the following content:

> *"In light of all of the above, the Player respectfully request this deciding body to enforce its jurisdiction over the present claim and, based on the merits and on the FIFA Regulations for the Status and Transfer of Players, to:*
>
> *a) Consider FC Volyn guilty of breaching the employment contract signed on the 01st September 2009 with Mr. Maicon Pereira de Oliveira without a just cause;*
>
> *b) Order that F.C. Volyn pays to Mr. Maicon Pereira de Oliveira the total sum of USD 50,000 (…) as outstanding salaries related to January, May, June, July and August 2012, plus an interest rate of 05% p.a. over the amount due as compensation, as from the date when the salaries became due until the date of effective payment; and*
>
> *c) Order that F.C. Volyn bears with any and all legal costs incurred by Mr. Maicon Pereira de Oliveira".*

12. To date, the matter is still pending before the FIFA Dispute Resolution Chamber.

C. The Proceedings before the FFU Dispute Resolution Chamber

13. On 22 May 2012, the Player filed the following claim with the FFU Dispute Resolution Chamber (hereinafter the "FFU DRC") (as translated from Russian into English by the Club):

> "***<u>On the grounds of presented above, I ask the Disciplinary Committee of UPL:</u>***
>
> *1. Recognise as invalidated and void any extension of the contract between the Player Maicon Pereira de Oliveira and Volyn FC after 31.08.12.*
>
> *2. In accordance with p. 1.6. of Art 24 of Disciplinary Rules of FFU, for submission of forged documents to UPL:*
>
> *1) to impose disciplinary penalties on Volyn FC officials, who are liable for execution and submission of forged documents, and suspend them from office for the period specified by UPL DC (…).*
>
> *2) to impose disciplinary penalties on Volyn FC appropriate to committed violation in the form of revocation of Club's right to register in FFU new football players during the period specified by UPL DC (…)".*

14. On 24 September 2012, Mr Dmytro Korobko, the Player's attorney, withdrew the claim filed on 22 May 2012 in the following terms (as translated from Russian into English by the Club):

> "*On behalf of [the Player] I hereby dismiss my claim of 22.05.12 (…) against [the Club] regarding recognizing as void the additional agreement to the labour contract No. 19/18 of 01.09.2009.*
>
> *The decision to dismiss the claim was caused by recent events regarding the dispute concerned. As previously reported, [the Club] systematically paid no arrears in salaries to the football player which caused the latter to lodge a respective claim to the FIFA Dispute Resolution Chamber on August 10, 2012. Despite the repeated complaints of the football player the arrears in salaries were never paid. As a result, on 31.08.2012 the football player sent a notice to [the Club] on termination labour relations several hours before the end of the contract's duration.*
>
> *Therefore, as of today the labour contract between [the Player] and [the Club] is terminated. Hence, the dispute about whether the labour contract was extended or not is no longer of the player's concern".*

15. The Club was invited to make any declaration it considered appropriate regarding Mr Korobko's letter of 24 September 2012.

16. On 3 October 2012, the Club filed a "statement of defence", whereby it claimed that all the accusations made by the Player against it (namely regarding the late payment of his wages or the fact that the Statement was forged) were false and unsubstantiated. Under these circumstances, the Club maintained that it must have the right to give its version of the facts regarding all those unjustified charges brought against it by the Player. As a result, it asked the FFU DRC a) to consider the Player's claim withdrawal as groundless and in breach with the Club's right to be heard, b) to dismiss it, c) to enter into the merits of the case, d) to schedule a hearing, e) to refuse *"the satisfaction of the Claim of Korobko D.V. (…) of 22.05.2012 on recognition of the Additional Agreement of 12.12.2011 on extension of the Contract No. 19/18 of 01.09.2009 for two years as invalid"* and f) to *"Transfer to FFU CDC the materials of the case as they pertain to the committed breaches by [the Player] of statutory and regulatory norms of FIFA and FFU in order to impose respective disciplinary sanctions".*

17. In a decision dated 10 October 2012, the FFU DRC held that a party had the right to file and to revoke a claim brought before it *"throughout the whole period of consideration of the case and during the process of execution of a decision that came into force"*. It furthermore found that the termination of the proceedings following a claim withdrawal did not breach any law and did not affect in any manner the Club's rights and interests. As a matter of fact, by *"adopting the resolution of termination of the proceedings in the case FFU DRC does not establish existence or non-existence of facts of legal significance (legal facts); instead, acting within the scope of its competence where the subject matter of the dispute is not considered, adopts a relevant procedural act settling the issue which is directly related to the course of the case consideration - in this case, the issue of termination of the proceedings in the case".*

18. As a result, the FFU DRC decided the following:

> *"1. To* ***terminate*** *legal proceedings in the case regarding the claim of 22.05.2012 of [the Player] on recognizing as void the agreement on labour contract extension concluded on 01.09.2009 between the player and [the Club].*

2. According to Article [34] of the Regulation of the FFU Dispute Resolution Chamber this Resolution may be appealed at the International Court of Arbitration for Sports within 21 (twenty-one) days upon receipt thereof".

19. On 16 October 2012, the Club was notified of the decision issued by the FFU DRC (hereinafter the "Appealed Decision").

III. SUMMARY OF THE PROCEEDINGS BEFORE CAS

20. On 5 November 2012, the Club filed a Statement of Appeal with the CAS Court Office.

21. On 13 November 2012, the CAS Court Office acknowledged receipt of the Club's Statement of Appeal, of its payment of the CAS Court Office fee and took note of the Club's nomination of Mr Graeme Mew as Arbitrator.

22. On 19 November 2012, the CAS Court Office acknowledged receipt of the Club's Appeal Brief, dated 5 November 2012 but received on 16 November 2012.

23. On 22 November 2012, the CAS Court Office informed the parties that the Club failed to attach to its Appeal Brief some of the listed exhibits. Accordingly the Club was granted an additional period of five days to provide the missing documents. As a result, the time limit to file the Answer was suspended.

24. On 23 November 2012, the FFU confirmed to the CAS Court Office that it renounced its right to request its intervention in the present arbitration proceeding.

25. The same day and upon the request of the CAS Court Office, the Player confirmed that he was appointing Mr Rui Botica Santos as Arbitrator.

26. On 26 December 2012, and in a timely manner, the Player filed his Answer.

27. On 22 January 2013, the CAS Court Office acknowledged receipt of payment by the Club of the total first advance of costs and informed the parties that the Panel to hear the appeal had been constituted as follows: Prof. Petros C. Mavroidis, President of the Panel, Mr Graeme Mew, Arbitrator designated by the Club and Mr Rui Botica Santos, Arbitrator appointed by the Player.

28. On 6 February 2013 and considering the fact that the Player was challenging the CAS jurisdiction in the present matter, the Club was invited by the CAS Court Office, acting on behalf of the Panel, *"to file its position strictly limited to the CAS jurisdiction issue within **10 days**".*

29. On Monday 18 February 2013, the Club filed its submissions regarding the CAS jurisdiction issue.

30. On 4 March 2013, the CAS Court Office informed the parties that the Panel had decided to hold a hearing.

31. On 13 March 2013, the CAS Court Office informed the parties that the hearing would be held on 28 May 2013 at the CAS Headquarter. The date was fixed with the agreement of all the parties to the present proceedings and was confirmed in the Order of Procedure.

32. Between March and the 28 May 2013, the parties lodged numerous requests regarding namely the attendance of certain witnesses or experts at the hearing, the issues at stake and the admission into evidence of certain documents. The Panel dealt with all the requests before or at the outset of the hearing.

33. The only request, which remained unresolved, was related to the objection lodged by the Club to the production by the Player, on 24 May 2013, of a document entitled *"Confirmation of absence of financial debts"*. This request will be addressed hereafter (see chapter V. below).

34. On 27 May 2013, the parties signed and returned to the CAS Court Office a copy of the Order of Procedure, duly signed.

35. The hearing was held on 28 May 2013 at the CAS premises in Lausanne, Switzerland. The Panel was assisted by Mr Fabien Cagneux, Counsel to the CAS, and Mr Patrick Grandjean, *ad hoc* Clerk.

36. The parties did not raise any objection as to the composition of the Panel.

37. The following persons attended the hearing:

- The Club was represented by its General Director, Ms Ievgeniia Zhukhovytska, its Sports Director, Mr Oleksandr Iaroshchuk, accompanied by Ms Larysa Lytvynenko (legal adviser) and by Mr Payam Beheshti and Mr Shane Jury (Clifford Chance LLP), solicitors, assisted by Mr Dimytro Shkryoba, interpreter.

- The Player was present. He was accompanied by Mr Marcos Motta, attorney-at-law, and assisted by Mr Luiz Della Casa, interpreter.

38. The Panel heard the testimony of the Player as well as of Ms Ievgeniia Zhukhovytska, who were examined and cross-examined respectively by counsel and questioned by the Panel members. Thereafter, the Panel heard evidence from the following persons, who were also examined and cross-examined respectively by counsel, as well as questioned by the Panel:

- Dr Audrey Giles, expert witness on authentication of documents;
- Mr Fernando Guimarães, one of the Player's attorneys;
- Mr Leonardo Mello, the Player's agent.

39. Each person heard was invited by the President of the Panel to tell the truth subject to the consequences provided by the law.

40. After the parties' final arguments, the President of the Panel closed the hearing and announced that the award would be rendered in due course. Upon closure, the parties expressly stated that they did not have any objection in respect of their right to be heard and to be treated equally in these arbitration proceedings.

IV. SUBMISSIONS OF THE PARTIES

41. For the reasons exposed hereafter, the Panel has concluded that the CAS must decline jurisdiction over the appeal, as submitted. This finding makes it legally impossible as well as unnecessary for the Panel to consider the other requests submitted by the parties. Accordingly, and for the sake of procedural economy, the Panel will limit its discussion to the issue of the CAS jurisdiction.

A. The Appeal

42. The Club submitted the following requests for relief:

> *"Based on the abovementioned, [the Club] hereby asks the Court of Arbitration for Sports to satisfy the following claims:*
>
> *1. Reconsider the case and annul the Resolution of the FFU CDC of October 10, 2012.*
>
> *2. Consider the case and refuse to satisfy the claim of [the Player].*
>
> *3. To bind [the Player] to pay all the legal costs related to consideration of this case".*

B. The Answer

43. The Player submitted the following requests for relief:

> *"(…) [the Player](…) ask for the rendering of an award recognizing the following requests:*
>
> *a) That, according to Articles 186 of the PIL Act and R55 of the CAS Code, the Panel issues a preliminary award regarding the issue of jurisdiction and, consequently, decides that CAS does not have jurisdiction to intervene into the present dispute;*
>
> *b) In case that this Panel understands that CAS has jurisdiction over this dispute, that:*
>
> *b.i) the merits of the present dispute lacks of grounds since Respondent unilaterally terminated any employment relationship with Appellant on 31.08.2012 and the case is still pending before the Federation Internationale de Football Association-FIFA;*

b.ii) an expert examination be held in order to attest that the Contract's extension is forged and consequently, as of no legal value between the parties.

c) That [the Club] shall bear with all arbitration and legal costs incurred by [the Player]".

V. ADMISSION OF NEW EVIDENCE PRESENTED BY THE PLAYER

44. On 24 May 2013, the Player filed a document entitled *"Confirmation of absence of financial debts"*. According to the Player, this document would establish indisputably that the Statement was a forged document.

45. At the hearing, the Club confirmed that it objected to the production by the Player of this new evidence. It claimed that it had spent considerable time and money establishing that the Player's accusations of forgery were false. Two independent experts had been appointed and instructed to address specifically all the allegations made until then by the Player, i.e. he did not sign the Statement and the document was not authentic. By submitting the new evidence only four days before the hearing, the Player hindered the Club from filing a proper defence and/or from obtaining another expert opinion on the new issue raised by the Player.

46. Article R56 of the Code of Sports-related Arbitration (hereinafter the "CAS Code") provides the following:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer".*

47. The evidence in question is an administrative form signed each year by all the players of the Club before they leave for winter break. The Player is familiar with this document and could have relied on it at a much earlier stage of the proceedings. As a consequence, the Panel finds that there are no exceptional circumstances justifying the admission of this new document. In addition and for the reasons outlined by the Club, the Panel holds that the prejudicial effect of the new evidence would out-weigh its probative value.

48. Based on article R56 of the Code and in the absence of exceptional circumstances, the Panel finds that the document presented by the Player on 24 May 2013 should be excluded from the proceedings.

VI. JURISDICTION

A. The Parties' submissions regarding the CAS jurisdiction

49. The Club's submissions, in essence, may be summarized as follows:

- Pursuant to the applicable FFU Regulations, appeals against decisions passed by the FFU DRC must be lodged with the CAS. This is furthermore confirmed by the operative part of the Appealed Decision, according to which *"this Resolution may be appealed at the International Court of Arbitration for Sports within 21 (…) days upon receipt thereof"*.

- The Appealed Decision is final *"because it conclusively determined a controversy between the parties regarding whether or not [the Player] was permitted to withdraw his claim regarding the validity of the Extension Agreement. (…) The fact that the decision of the DRC did not relate to the merits of the underlying Claim that was withdrawn by [the Player] (regarding the validity of the Extension Agreement) is irrelevant to whether or not it was a 'final' Decision"*.

- The Appealed Decision is final because it was not an interim or interlocutory decision and was not subject to potential revision by the FFU DRC.

- The *de novo* character of the CAS arbitration proceedings allows the Panel to issue a new decision to replace the Appealed Decision. *"It is submitted that this procedure entitles CAS to reconsider all matters falling within the ambit of the appealed decision"*.

- The accusations brought by the Player against the Club were not only false and unproven but they also received an important echo in the media. They caused significant damage to the image of the Club. By withdrawing his claim of 22 May 2012, the Player deprived the Club of the opportunity to present its case and to establish the Player's deliberate intent to deceive. As a result, the Club must be allowed to exercise its right to be heard.

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

- The CAS does not have jurisdiction because the Appealed Decision is not final.

- The Club's request for relief in its Statement of Appeal and in its Appeal Brief is not clear. If the Club's intent is to enter into the merits of the case, it must first exhaust all other available remedies prior to lodging an appeal before the CAS, which it did not.

- The Club's request for relief in the procedure before the CAS is apparently *"based on the analysis of the merits of the case. (…) However, this issue was not considered and decided by the FFU since the Player (…) withdraw his respective claim before final decision was proclaimed. (…) As a consequence, the [Appealed Decision] contains no ruling that affects the legal situation of [the Club]"*.

- The right for the Player to unilaterally withdraw the claim lodged by him before the FFU Dispute Resolution Chamber is explicitly authorized by the FFU Regulations.

- *"Even though the Panel can hear the case de novo, it does not have jurisdiction in the present dispute since (…) it would violate Articles 1 and 12 (3) of the FFU Regulations of Dispute Resolution Chamber and, therefore, the present affair is not under the scope of the Panel's review".*

- The Player terminated his employment contract with the Club for just cause and with immediate effect. In this regard, the proceedings which he initiated before the FIFA Dispute Resolution Chamber produced an effect of *lis pendens* on the present arbitration as there is a possible conflict between the two proceedings and there is a risk of contradictory judgement.

- The Club is exclusively seeking to obtain from the CAS a decision confirming the integrity of the Statement. Its appeal serves no purpose as the Player terminated his employment relationship, which was therefore not extended.

B. Competence of the CAS to rule on its own jurisdiction

51. It is generally accepted that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Private International Law Act (hereinafter "PILA") is the relevant arbitration law (DUTOIT B., Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 1 on article 176 PILA; TSCHANZ P-Y., in Commentaire romand, Loi sur le droit international privé – Convention de Lugano, 2011, n° 1, p. 1627, ad art. 186 LDIP). Article 176 par. 1 PILA provides that the provisions of Chapter 12 of PILA regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

52. The CAS is recognized as a true court of arbitration (ATF 119 II 271). It has its seat in Lausanne, Switzerland. Chapter 12 of the PILA shall therefore apply, the parties in the present dispute having neither their domicile nor their usual residence in Switzerland.

53. Pursuant to article 176 par. 2 PILA, the provisions of Chapter 12 do not apply where the parties have excluded its application in writing and agreed to the exclusive application of the procedural provisions of cantonal law regarding arbitration. There is no such agreement in this case. Therefore, articles 176 et seq. PILA are applicable.

54. In accordance with Swiss Private International Law, the CAS has the power decide upon its own jurisdiction. In this regard, article 186 PILA states:

> *"1. The arbitral tribunal shall rule on its own jurisdiction.*
>
> *1bis. It shall rule on its jurisdiction irrespective of any legal action already pending before a State court or another arbitral tribunal relating to the same object between the same parties, unless noteworthy grounds require a suspension of the proceedings.*

2. The objection of lack of jurisdiction must be raised prior to any defence on the merits.

3. In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision".

55. According to Swiss legal scholars, this provision *"is the embodiment of the widely recognized principle in international arbitration of 'Kompetenz-Kompetenz'. This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement"* (ABDULLA Z., The Arbitration Agreement, in: KAUFMANN-KOHLER/STUCKI (eds.), International Arbitration in Switzerland – A Handbook for Practitioners, The Hague 2004, p. 29). *"Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (…). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement"* (MÜLLER C., International Arbitration – A Guide to the Complete Swiss Case Law, Zurich et al. 2004, pp. 115-116). *"It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place (...). The arbitral tribunal thus has priority, the so-called own competence"* (WENGER W., n. 2 ad Article 186, in: BERTI S. V., (ed.), International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, Basel et al. 2000). The provisions of Article 186 are applicable to CAS arbitration (RIGOZZI A, L'arbitrage international en matière de sport, thesis Geneva, Basel 2005, p. 524; CAS 2005/A/952; CAS 2006/A/1187).

56. According to article R27 par. 1 of the CAS Code, the CAS has jurisdiction whenever the parties agreed to refer a dispute to the CAS:

- by means of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings), or

- by means of an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS (appeal arbitration proceedings).

57. In the present case, the jurisdiction of the CAS arises out of article 34 of the *"FFU Regulations of the Dispute Resolution Chamber"*, which states the following (as translated from Russian into English by the Club):

> *"Article 34. Appeal*
>
> *1. An appeal against decisions of DRC FFU may be filed with the International Court of Arbitration for Sports (CAS, Lausanne, Switzerland). In case of establishing All-Ukrainian Court of Arbitration for Sport the parties must resort to all possible internal means of dispute resolution before addressing CAS.*
>
> *2. The time limit for appeal starts from the day of receipt by the party of the full version of the FFU DRC decision. This period is 21 days".*

58. The CAS jurisdiction is also confirmed in the Appealed Decision, where it is stated that *"According to Article [34] of the Regulation of the FFU Dispute Resolution Chamber this Resolution may be appealed at the International Court of Arbitration for Sports within 21 (twenty-one) days upon receipt thereof".*

59. Furthermore, the Panel observes that the parties have expressly accepted the competence of the CAS to rule on its own jurisdiction in the present case. The Club has repeatedly recognised, in correspondence and submissions, the competence of the CAS to decide both the preliminary issue of jurisdiction as well as the substantive issues in question. In his answer and various submissions, the Player recognised the jurisdiction of the CAS, at least for the purpose of resolving the jurisdictional issue. He further responded to the merits of the appeal.

60. However, there is no consensus between the parties as to the interpretation of article 34 of the Regulation of the FFU Dispute Resolution Chamber and/or its scope.

C. In the present case

61. Article 34 of the Regulation of the FFU Dispute Resolution Chamber must be read together with article R47 par. 1 of the CAS Code which states the following:

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

62. Pursuant to article 34 of the Regulations of the FFU Dispute Resolution Chamber and to article R47 of the CAS Code, the CAS has the power to adjudicate appeals only if the following two conditions are met: a) there must be a decision of a federation, association or another sports-related body and b) the internal legal remedies must have been exhausted prior to appealing to the CAS.

63. The issues to be resolved by the Panel are:

a) Has the Club exhausted all the legal remedies available to it prior to the appeal?

b) Is the Appealed Decision a final decision and if yes, to what extent?

a) Has the Club exhausted all the legal remedies available to it prior to the appeal?

64. The FFU Regulations of Dispute Resolution Chamber provides, so far as material, as follows:

> *"Article 1* (as translated from Russian into English by the Player)

Dispute Resolution Chamber of [FFU] is exclusively competent to hear labour related and contractual disputes between clubs and players and coaches".

"Article 12. The Procedural Rights and Obligations of Parties (par. 1 and 2 are translated from Russian into English by the Club and par. 3 by the Player)

1. The rights of parties must be observed. In particular, right to equality, right to be heard (especially right to explain one's actions, examine case materials, right to submit proofs and participate in examining and estimation thereof, right to reasoned decision).

2. Parties have equal procedural rights and obligations.

3. The parties to the proceedings are entitled to be familiar with the case (…) Besides the Claimant is entitled to increase or decrease his prayer for relief, withdraw the claim, the Respondent can accept the claim partially and in full".

65. The Panel observes that the parties have not called into question the truthfulness of the translation of the above quoted provisions and finds therefore that it can rely upon it as being accurate.

66. In the present case, it is accepted that the dispute between the parties is over their respective contractual obligations arising from their employment relationship. As a consequence and on the basis of article 1 of the FFU Regulations of Dispute Resolution Chamber, the Player rightfully filed his claim before the FFU DRC, the jurisdiction of which has never been challenged.

67. In accordance with article 12 par. 3 of the FFU Regulations of Dispute Resolution Chamber, the Player withdrew his claim, with the consequence that the FFU DRC decided to ***"terminate*** *legal proceedings in the case regarding the claim of 22.05.2012 of [the Player] on recognizing as void the agreement on labour contract extension concluded on 01.09.2009 between the player and [the Club]".* The FFU DRC noted the fact that the termination of the proceedings following a claim withdrawal did not affect in any manner the Club's rights and interests. In particular, it confirmed that its decision *"does not establish existence or non-existence of facts of legal significance (legal facts)".*

68. In other words, with its Appealed Decision, the FFU DRC only decided to approve the withdrawal of the claim filed by the Player on 22 May 2012. It did not adjudicate any substantive right of either party.

69. The Club claims that the Appealed Decision hindered it from exercising its right to be heard. In this regard, during the hearing before the CAS, the Panel asked the Club whether there was any alternative remedy it could have pursued with the FFU DRC following the claim withdrawal. In response, the Club's representative accepted that, in theory, it could have filed a claim of its own before the FFU DRC but considered more appropriate to continue the initial discussion initiated with the Player's claim.

70. Based on the foregoing, the Panel finds that, following the Player's claim withdrawal, the FFU DRC indeed closed the case regarding the dispute between the parties. However, the position adopted by the FFU DRC was of a merely procedural nature and did not have the effect of

exhausting internal remedies pertaining to the substantive issues. As accepted by the Club itself, it was free to present its case before the FFU DRC, namely through a new claim, which could have been filed immediately after notification of the Appealed Decision. In this context, the Club could have exercised the rights listed in article 12 par. 1 of the FFU Regulations of Dispute Resolution Chamber, which are identical in content with the right to be heard.

71. In other words and as regards the merits of the dispute related namely to the authenticity and the legal consequences of the Statement, the Club has not exhausted all the internal remedies available to it prior to the appeal lodged before the CAS.

b) Is the Appealed Decision a final decision and if yes, to what extent?

72. On the basis of article 34 of the Regulation of the FFU Dispute Resolution Chamber as well as of the Appealed Decision itself, the Club maintains that a) it is granted the right to appeal before the CAS and that b) since the Panel has full power to review the facts and the law, it must issue a new decision which replaces the Appealed Decision.

73. For the reasons already identified, the FFU DRC confined its decision only to whether the Player was entitled to withdraw his claim of 22 May 2012 or not. It did not address any broader issue and in particular it did not render a decision on the merits of the employment-related dispute between the parties.

74. Under these circumstances, the Appealed Decision is final insofar as the consequences of the claim withdrawal are concerned. However, there is no final decision as regards the substance of the matter.

75. It follows that the CAS has jurisdiction to determine whether the FFU DRC adequately decided to *"**terminate** legal proceedings in the case regarding the claim of 22.05.2012 of [the Player] on recognizing as void the agreement on labour contract extension concluded on 01.09.2009 between the player and [the Club]"*.

76. However and at the hearing before the CAS, the Club confirmed that it was exclusively seeking to obtain from the CAS a decision establishing the integrity of the Statement. Hence, it is asking the Panel to enter into the merits of the dispute.

77. The Club's request leads to the following comments:

- If the Panel were to hear the substance of the case based under its *de novo* review, it would not respect the principle of exhaustion of internal remedies as recognised by article 34 of the FFU Regulations of Dispute Resolution Chamber and article R47 par. 1 of the CAS Code. It would also go against the principle of double instance.

- If the Club's approach and arguments in this respect were to be followed, it would mean that article 34 of the FFU Regulations of Dispute Resolution Chamber must be understood as an alternative path giving to the CAS the jurisdiction to decide on the merits

of any dispute, within the frame of the appeal arbitration procedure, regardless of the issue dealt with by the first instance, whether it is procedural or substantive.

The Club did not put forward any evidence in favour of this interpretation, which is quite unlikely. As a matter of fact, it would allow a party to convert its purely procedural claim (brought before the first instance) into a substantive claim, addressed for the first time before the CAS, escaping thereby the exclusive competence of the FFU DRC *"to hear labour related and contractual disputes between clubs and players and coaches"* (see article 1 of the FFU Regulations of Dispute Resolution Chamber).

78. Based on the foregoing, the Panel finds that all the internal remedies have not been exhausted and that the Appealed Decision is not a final decision as regards the substantive issues raised by the Club.

79. As a result, the CAS must decline jurisdiction as far as the Club's request for relief concerns an employment-related dispute between the parties and/or the integrity of the Statement. This conclusion makes it unnecessary for the Panel to consider the other requests submitted by the parties or whether the proceedings initiated by the Player before the FIFA Dispute Resolution Chamber produced an effect of *lis pendens* on the present arbitration.

80. The Panel expressly does not state an opinion on the ultimate outcome of the case.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The Court of Arbitration for Sport has no jurisdiction to decide the Club's request for relief as far as it concerns the substantive issues arising from the parties' employment relationship and/or in relation with the integrity of the Statement.

(…)

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