



**Arbitration CAS 2011/A/2635 Real Madrid Club de Futbol v. Confederação Brasileira de Futebol (CBF) & São Paulo FC, award of 25 July 2012**

Panel: Mr Michele Bernasconi (Switzerland), Sole Arbitrator

*Football*

*Solidarity contribution*

*Conditions for the payment of the solidarity contribution to a national association*

*Interpretation of the rules and the statutes of an association*

*Interpretation of the word “link” in Art. 2 para. 3 of Annex 5 of the RSTP*

*Interpretation of the notion of “club” used in Art. 2 para. 3 of Annex 5 of the RSTP*

*Interpretation of Art. 2 para. 3 of Annex 5 of the RSTP*

*Types of interest according to the Swiss Code of Obligations*

1. A National Football Association claiming solidarity contribution must provide evidence that the player was effectively trained within the organised football, i.e. within the scope of association football during the relevant period. *De facto*, in only two circumstances the subsidiary claim of a National Association shall be accepted: first, if the club that trained the player is no longer affiliated to the association or has ceased to exist and, second, if the club affiliated to the association has failed to claim the solidarity contribution within 18 months of the transfer. In case of a player's passport indicating “not registered with any club”, no association can claim solidarity contribution for that period.
2. The rules and the statutes of an association have to be interpreted either in accordance with the subjective will of the rulemaking persons or with the objective meaning that the addressees of the rule would give to that rule, in good faith. Swiss jurisprudence has applied from time to time one or the other principle. Furthermore, when interpreting a rule, the deciding body may consider whether, based on a systematic analysis, the interpretation given to the rules does or does not fit into the context of the whole regulation.
3. The wording of Art. 2§3 of Annex 5 of the FIFA Regulations on the Status and Transfer of Players (RSTP) is not clear, in particular when it uses the word “link”. The FIFA Commentary on this provision, which may show the association's intentions when establishing the rule, is itself somewhat contradictory. The only reasonable interpretation, which can be given to the term “link” used in Art. 2§3, is the one of “successful link”. A link is deemed successful if it allows reaching an existing club, affiliated to a national association. Such a successful link does not exist if a player's passport does not indicate where he was trained at all or omits mentioning one of the previous clubs.

4. Only affiliated clubs are entitled to solidarity contribution. Within the framework of Annex 5 of the RSTP, the term “club” can only designate a club affiliated to a national association, itself member of FIFA. In other words, non-affiliated clubs are not within the FIFA system. In fact, Art. 2 and Art. 3 of the RSTP clearly show that the regulations only concern “Organised Football”, i.e. association football organised under the auspices of FIFA, the confederations and the associations, or authorized by them.
5. The right interpretation of the relevant part of Art. 2§3 Annex 5 RSTP can be summarized as follows: *“If no successful link between the Professional and any of the clubs that trained him can be established within 18 months of his transfer, the solidarity contribution shall be paid to the Association(s) of the country (or countries) where the Professional was trained and to which the club(s) that trained the Professional was (or were) and/or still is (or are) affiliated”*.
6. Three types of interest must be distinguished. First, the restitution based on Art. 62 Swiss Code of Obligations (CO) includes the capital and the interest earned by the person enriched without just cause. However, the impoverished person must prove that interest was effectively earned, through an investment of the capital. The rate of this interest is not necessarily 5% p.a. Second, the enriched person owes interest on unpaid amounts (provided for by Art. 104 §1 CO), if he does not immediately repay the amount owed to the impoverished person when requested to do so. Third, in general, any debtor who is late in paying the amount he owes must pay interest on unpaid, overdue amounts, as stated by Art. 104 §1 CO.

## I. FACTS

### A. The Parties

1. Real Madrid FC (“Real Madrid” or the “Appellant”) is a Spanish professional football club, member of the Royal Spanish Football Federation (Real Federación Española de Fútbol) and therefore, indirectly, also a member of the Fédération Internationale de Football Association (“FIFA”).
2. Confederação Brasileira de Futebol (“CBF” or the “First Respondent”) is the national football association of Brazil and a member of FIFA.
3. São Paulo FC (“São Paulo” or the “Second Respondent”) is a Brazilian professional football club, member of CBF and therefore, indirectly, of FIFA.

**B. Facts of the case and origin of the dispute**

4. On 22 August 2005, Real Madrid and São Paulo signed a contract (the “Contract”), according to which São Paulo granted Real Madrid an option for the future transfer of the player C. (the “Player”).
5. Upon signature of the Contract, Real Madrid paid São Paulo an amount of USD 3’600’000, plus VAT. Further, according to the Contract, if Real Madrid exercised the option, it would have to pay an additional amount of USD 3’600’000, plus VAT (Art. 4.1 of the Contract).
6. Eventually, São Paulo and Real Madrid did agree upon the transfer of the Player and, on 2 January 2006, they signed a transfer agreement, according to which Real Madrid had to pay USD 3’600’000 to São Paulo.
7. When making the corresponding payment, Real Madrid retained as solidarity contribution an amount of USD 360’000 (*i.e.* 5% of the total transfer amount of USD 7’200’000) and examined the Player’s Passport in order to determine which entities would be entitled to receive that contribution or part of it, respectively.
8. On 2 March 2006, Real Madrid distributed the solidarity contribution in the following manner:
  - USD 45’000 (12,5%) to CBF;
  - USD 207’000 (57,5%) to Botafogo Futebol Clube;
  - USD 90’000 (25%) to Clube Atlético Mineiro;
  - USD 18’000 (5%) to Botafogo de Futebol e Regatas.
9. The disputed amount in the present case is the amount of USD 45’000 that Real Madrid paid to CBF.
10. Real Madrid paid the disputed amount to CBF because the Player’s Passport indicated that the Player was “*not registered with any club*” between 1 January 1992 and 15 May 1994. Real Madrid considered therefore that the payment corresponding to that period should be made to the relevant national football association, *i.e.* in the present case CBF. It may be noted that, as shown by evidence on the record and as the parties admitted at the hearing, during that period, the Player was playing football in an amateur club of his hometown.
11. On 7 December 2006, São Paulo submitted a complaint to FIFA against Real Madrid, claiming that the payment of USD 45’000 had been unduly made. According to São Paulo, the reasoning which led Real Madrid to make the payment to CBF was erroneous. By way of conclusion, São Paulo claimed the amount of USD 45’000 plus 5% interest *p.a.* as of 2 February 2006.

12. During the ensuing procedure before the Single Judge of the Players' Status Committee of FIFA (the "Single Judge"), Real Madrid and CBF opposed São Paulo's claim, for the reasons essentially identical to those in the present proceedings and which shall be described below.
13. The Single Judge consulted the FIFA Dispute Resolution Chamber ("DRC"), in order to obtain its position on the conditions under which an association is entitled to receive solidarity contribution on the basis of Art. 2§3 of Annex 5 of the FIFA Regulations for the Status and Transfer of Players (the "RSTP"). The DRC issued its position on 8 October 2010 and informed the Single Judge of its relevant jurisprudence (cf. below). The DRC's position was submitted to the parties for their comments.
14. On 24 January 2011 (the ruling only) and on 27 October 2011 (with the grounds), the Single Judge issued the decision which is the subject of the present appeal (the "Decision"). The Single Judge held that based on the DRC's "*well-established jurisprudence*", CBF did not prove that the Player had effectively been trained during the relevant period within the scope of association football. For that reason, the Single Judge considered that Real Madrid had mistakenly paid USD 45'000 to CBF. Therefore, the Single Judge held that, notwithstanding this first erroneous payment, Real Madrid was obliged to pay São Paulo the amount of USD 45'000, plus interest at 5% p.a. as of 3 March 2006 (*i.e.* the 31<sup>st</sup> day following the registration of the Player). Real Madrid was also condemned to pay the FIFA procedural costs amounting to CHF 5'000.
15. The DRC's jurisprudence referred to by the Single Judge and the reasoning contained in the Decision shall be examined below in the Legal Discussion part of this Award.
16. The Decision of the Single Judge was notified to Real Madrid on 27 October 2011.

### **C. Proceedings before the Court of Arbitration for Sport**

17. Real Madrid filed its statement of appeal with the Court of Arbitration for Sport ("CAS") on 17 November 2011 and requested the stay of the Decision. Real Madrid nominated Mr. Michele Bernasconi as Sole Arbitrator, respectively Mr. Carlos del Campo Colas as arbitrator in case the Respondents requested a three-member Panel.
18. On 23 November 2011, the CAS Court Office acknowledged receipt of the statement of appeal and invited Real Madrid to file its appeal brief within the time limit established by Art. R51 of the Code of Sports-related Arbitration (the "Code").
19. The CAS Court Office also asked the Respondents whether they agreed with the appointment of a sole arbitrator and, otherwise, to jointly nominate an arbitrator.
20. Regarding the stay of enforcement, the CAS Court Office informed the parties of the jurisprudence of the CAS according to which a financial decision issued by FIFA has not been considered enforceable when it is the subject of an appeal. The parties were nonetheless invited to inform the CAS of their position on this issue.

21. Finally, on the same day, the CAS Court Office sent a separate letter to FIFA, asking if it intended to participate in the proceedings.
22. Real Madrid filed its appeal brief on 25 November 2011. In this submission, Real Madrid did not refer to its request for stay of enforcement and it expressly withdrew that request in a letter dated 30 November 2011.
23. In a letter dated 29 November 2011, the CAS Court Office invited the Respondents to file their answer within twenty days.
24. On 5 December 2011, both Respondents agreed to the matter being decided by a sole arbitrator, as well as to the appointment of Mr. Michele Bernasconi.
25. The Second Respondent filed its answer on 20 December 2011.
26. Also on 20 December 2011, the First Respondent refused to pay its share of advance on costs and requested the setting of a new time limit for its answer after Real Madrid would have paid its share. The CAS Court Office granted this request on 21 December 2011 and, on 29 December 2011, informed the First Respondent that Real Madrid had paid the advance on costs and that the deadline to file the answer resumed.
27. The First Respondent filed its answer on 12 January 2012.
28. The Arbitration Panel constituted by Mr. Michele Bernasconi as Sole Arbitrator was duly appointed and its constitution was notified to the parties on 17 January 2012. On the same day, the parties were invited to express their preference for a hearing to be held or for the case to be decided on the basis of the written submissions.
29. In a letter dated 17 January 2012, the Second Respondent stated that a hearing was necessary and, on 20 January 2012, the First Respondent agreed with this position. On the contrary, Real Madrid stated in a letter dated 23 January 2012, that it wished to limit the costs of the proceedings and asked the Sole Arbitrator not to hold a hearing.
30. On 10 February, 2012, the CAS Court Office requested the parties' availabilities for a hearing. They were also informed of the appointment of Ms. Nora Krausz as ad hoc clerk. On the same day, the CAS Court Office sent FIFA a letter asking it to provide the CAS with the decisions constituting the so-called "well-established jurisprudence" referred to by the Single Judge in the Decision.
31. After the parties confirmed their availability, a hearing was scheduled for 30 March 2012.
32. On 28 February 2012, FIFA sent a letter to the CAS Court Office, enclosing five decisions as examples of the DRC's jurisprudence. FIFA Also submitted a copy of the letter that the DRC had sent on 8 October 2010 to the Single Judge.

33. On 7 March 2012, the CAS Court Office requested FIFA to provide it with a copy of the case file. Having received the file, the CAS Court Office sent a copy to the parties on 19 March 2012.
34. The parties received the Procedural Order on 8 March 2012 and they duly signed and returned a copy thereof within the set time limit.
35. The hearing took place in Lausanne on 30 March 2012. The parties were represented by the following persons: Mr. Alvaro García-Alamán de la Calle for Real Madrid, Messrs Marcelo Amoretty Souza, José Edgard Galvão Machado and Kalil Rocha Abdalla for São Paulo and Messrs Ivandro Sanchez and Ricardo Moreira for CBF. The parties all confirmed having no objection regarding the composition of the Panel.
36. The parties had the opportunity to present their case, comment on the DRC decisions submitted by FIFA, submit their arguments and answer the questions posed by the Sole Arbitrator. After their final oral submissions, the parties stated that they did not have any objection as to the respect of their right to be heard or the conduct of the proceedings. Thereafter, the Sole Arbitrator closed the proceedings.

#### **D. The parties' requests for relief**

37. In its appeal brief, Real Madrid requested the following reliefs:

*"In view of the above, Real Madrid asks the CAS:*

*1) to annul the appealed decision;*

*2) to declare that the payment carried out by Real Madrid to the CBF was correctly made.*

*3) Alternatively, if the previous petition is not accepted, to declare that the payment was erroneously done, and that the relevant amount does not correspond neither to São Paulo nor the rest of the forming clubs, but it is to be received by Real Madrid from CBF.*

*4) Alternatively, if the previous petition is not accepted, to declare that the payment was erroneously done, and that the relevant amount must be paid correspond either to São Paulo or to the rest of the forming clubs, but is to be paid directly by CBF.*

*5) Alternatively, if the previous petition is not accepted, to declare*

*a. that the payment was erroneously done, and that the relevant amount must be paid correspond neither to São Paulo or to the rest of the forming clubs, and it is to be paid by Real Madrid, and at the same time*

*b. that CBF is obliged to pay exactly the same amount to Real Madrid.*

*6) To decide that the costs of the arbitration and those imposed in the Single Judge's decision are to be entirely born by:*

*a. In case it is decided as per 2) above, by São Paulo.*

*b. In the rest of the cases, divide the costs of the (arbitration) in equal parts between all the parties".*

38. In its statement of appeal, Real Madrid had also requested, in case the CAS does not annul the Decision, that CBF should be ordered to pay São Paulo the amount of USD 45'000 with the relevant interest.

39. The First Respondent's answer contains the following prayers for relief:

*"For all the above-stated, the First Respondent kindly requests this honorable Court of Arbitration for Sport to pronounce the decision:*

*i) Reforming the decision passed by the Dispute Resolution Chamber of the Fédération Internationale de Football Association – FIFA in its meeting held on 24 January 2011;*

*ii) Declaring that the payment carried out by the Appellant to the CBF was correctly made;*

*iii) Recognizing the First Respondent's right to participate in the distribution of the solidarity contribution for the Player in connection with his transfer to the Appellant;*

*iv) Determining the conclusions of the Award to be applicable to any claim for solidarity contribution submitted to the DRC by National Associations, including, but not limited, to the present claim;*

*v) Condemning the Second Respondent to the payment, in favor of the CBF, of all the legal expenses incurred; and*

*vi) Condemning the Second Respondent to the payment of all the costs derived from the proceeding before this honorable CAS".*

40. The Second Respondent's answer contains the following prayers for relief:

*"In view of all the above, São Paulo requests this Court of Arbitration for Sport to:*

*a) reject all the requests made by Real Madrid and to maintain the decision passed by the Single Judge of the Players' Status Committee from FIFA, dated October 27<sup>th</sup>, 2011, condemning Real Madrid CLUB DE FUTBOL to pay USD 45'000 (forty five thousand North American dollars), plus 5% interest p.a. as from March 3<sup>rd</sup>, 2006, to São Paulo FUTEBOL CLUBE;*

*b) condemn Real Madrid to pay all the CAS costs regarding this arbitration;*

*c) recognize the entitlement of São Paulo to be reimbursed of all the amounts spent in the present proceeding, including those regarding travels abroad, if necessary, expenses with translations, remittance of documents by mail, as well as lawyers' fees, in the percentage of 20% (twenty per cent), etc."*

## II. LEGAL DISCUSSION

### A. Jurisdiction of the CAS

41. As the CAS is an arbitral tribunal with seat in Switzerland and as neither party has its domicile or habitual residence in Switzerland, pursuant to Art. 176 of the Swiss Private International

Law Act (“PILA”), chapter 12 of this act (Articles 176 to 194 PILA) is applicable to the present arbitration<sup>1</sup>.

42. According to Art. 186 PILA, the arbitral tribunal shall rule on its own jurisdiction. Therefore, the Sole Arbitrator is competent to rule on his own jurisdiction.
43. Art. R47 (first paragraph) of the Code provides the following: *“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”*.
44. According to Art. 23 §3 of the RSTP (in their 2005 edition, applicable to the present case, cf. *infra*), *“decisions reached by the single judge or the Players’ Status Committee may be appealed before the Court of Arbitration for Sport (CAS)”*.
45. In the case under scrutiny, the Decision, rendered by the Single Judge of the FIFA Player’s Status Committee, is therefore capable of appeal before the CAS. In addition, none of the parties raised any objection regarding the jurisdiction of the CAS to decide on all the prayers for relief submitted to it.
46. In conclusion, the Sole Arbitrator finds that he has jurisdiction to rule upon the present dispute.

## **B. Admissibility of the appeal**

47. Art. 63 §1 of the FIFA Statutes provides that *“appeals against decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”*.
48. In the case at hand, Real Madrid lodged its statement of appeal on 17 November 2011, i.e. 21 days after having received notification of the Decision (on 27 October 2011).
49. The statement of appeal further respects the formal conditions set by Art. R48 of the Code.
50. The appeal is therefore admissible.

## **C. Applicable law**

51. According to Article R58 of the Code, *“the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision*

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<sup>1</sup> CAS 2005/A/983 & 984; CAS 2006/A/1180.



*is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision”.*

52. In the case under scrutiny, the Sole Arbitrator will decide the appeal according to the applicable FIFA rules, in particular the RSTP. The case having been brought to FIFA on 7 December 2006, the 2005 edition of the RSTP is applicable to the merits of the case (cf. Art. 26 §1 RSTP edition 2008).
53. Subsidiarily, Swiss law is applicable to the merits, according to Art. 62 §2 of the FIFA Statutes.
54. The Sole Arbitrator shall accordingly apply the RSTP 2005 edition, as well as Swiss law when necessary.

#### **D. Merits of the case**

55. Given the parties’ submissions, the Sole Arbitrator shall answer the following main questions:  
a) Was the amount of USD 45’000 correctly paid by Real Madrid to CBF? b) If not, which consequences should be drawn?

##### **a) Was the amount of USD 45’000 correctly paid by Real Madrid to CBF?**

56. The amount under dispute of USD 45’000 is part of the solidarity contribution set out by Art. 21 RSTP, which provides: *“If a Professional is transferred before the expiry of his contract, any club that has contributed to his education and training shall receive a proportion of the compensation paid to his previous club (solidarity contribution). The provisions concerning solidarity contributions are set out in annex 5 of these Regulations”.*
57. The payment of the solidarity contribution is regulated by Art. 2 of Annex 5 of the RSTP. Art. 2 §3 of Annex 5 reads as follows: *“If a link between the Professional and any of the clubs that trained him cannot be established within 18 months of his transfer, the solidarity contribution shall be paid to the Association(s) of the country (or countries) where the Professional was trained. This solidarity contribution shall be earmarked for youth football development programmes in the Association(s) in question”.*
58. The FIFA Commentary on the RSTP contains the following remarks on Art. 2 §3 of Annex 5: *“If the career of the player cannot be traced back to the age of 12, the amount for any “missing years” will be distributed to the association of the country where the player was registered and shall be used for youth development programmes”.* At footnote 181 the Commentary adds: *“Typical situations in which an association has an entitlement to a solidarity contribution are when the training club no longer exists, e.g. due to bankruptcy, or when the training club does not claim the solidarity contribution (for whatever reason, i.e. no knowledge of its entitlement or no interest) and when there are no records regarding the registration of the player for this club at the association or league concerned”.*
59. The parties are at dispute regarding the interpretation of Art. 2 §3 of Annex 5 of the RSTP.
60. According to Real Madrid, this provision establishes a presumption that if no record can be found regarding the player’s formation, the national association shall always be entitled to

receive the corresponding part of the solidarity contribution. Real Madrid further explains that the FIFA Commentary is not exhaustive and that other cases are not excluded by the text of Art. 2 §3 of Annex 5. Therefore, if nobody requests the payment of a portion of the solidarity contribution, then that portion must be paid to the national association, even if there are no indications as to the player having been trained in a club at all. Indeed, according to Real Madrid, the purpose of Art. 2 §3 of Annex 5 of the RSTP shall be to reward the efforts carried out by the association of the country where the player lived.

61. At the hearing, Real Madrid added that it was obvious at the time of the Player's transfer that he had been trained between 1 January 1992 and 15 May 1994, period for which his Passport indicated "*not registered with any club*". When Real Madrid received a request from CBF regarding that period, it paid the corresponding portion of the solidarity contribution to CBF in good faith. Real Madrid further explained that proving the training for that period is not an imperative precondition. In addition, at the time when Real Madrid paid USD 45'000 to CBF, the RSTP edition 2005 had just come into force and no case-law of FIFA existed regarding Art. 2 §3 of Annex 5. Accordingly, when deciding the case, the Single Judge should have taken into account the situation prevailing in 2006 and should not have based the Decision on the subsequent jurisprudence of the DRC. Regarding the influence of Art. 1 and 2 of the RSTP and the notion of "club" referred to by these provisions<sup>2</sup>, Real Madrid argued that, in its view, Art. 1 and 2 RSTP only have a limited effect on the dispute at hand.
62. According to CBF's written and oral submissions, the solidarity mechanism grants national associations a general subsidiary right to claim a portion of the solidarity contribution, 18 months after the registration of a player with a new club. In CBF's view, such right is subject to the condition that the training club no longer exists or does not claim the solidarity contribution, alternatively that there are no records regarding the registration of the player for any club in the association concerned. This latter condition can exist in two set of circumstances: firstly, if the player was trained by an amateur club and secondly, if the player was not trained at all by a club. CBF further argued that, in its view, national associations must not prove that training effectively occurred during the relevant period. In its written submissions, CBF referred to a previous CAS decision<sup>3</sup>, which in its opinion recognizes the right of national associations to claim a portion of solidarity contribution without having to prove an effective training. Finally, CBF produced evidence regarding the Player's training in an amateur club even before the age of 12 (and in particular before 15 May 1994). Regarding the concept of "club" as foreseen by Art. 1 and 2 of the RSTP, CBF explained that it would only refer to clubs affiliated to a national association, *i.e.* that this notion would be restricted to organized football. Nonetheless, training can take place by a non-affiliated club, in which case the player's passport would indicate "no record found". In such a case, the national

<sup>2</sup> The relevant parts of these provisions read as follows: "*These Regulations establish global and binding rules concerning the status of players, their eligibility to participate in Organised Football, and their transfer between clubs belonging to different Associations*" (Art. 1 §1 RSTP) and "*Players participating in Organised Football are either Amateurs or Professionals*" (Art. 2 §1 RSTP).

<sup>3</sup> Award in the case CAS 2008/A/1751. CBF produced a complete copy of the award, including the parties' names. The parties to the present case agreed at the hearing that despite the violation of the confidentiality clause by CBF, the Sole Arbitrator can refer to the award CAS 2008/A/1751, if necessary.

association would be entitled to receive the corresponding part of the solidarity contribution, in lieu of the non-affiliated club.

63. On its side São Paulo submitted that if a player has not been trained by any club, there is no right to a solidarity contribution, as the DRC itself explained in its letter to the Single Judge of 8 October 2010. Given this interpretation and the fact that there was no proof that the Player had been trained in an affiliated club from 1 January 1992 to 15 May 1994, São Paulo was of the view that it was entitled to the amount of USD 45'000. At the hearing, São Paulo further stressed that FIFA is free to interpret its own rules and argued therefore that the Sole Arbitrator shall follow the well-established jurisprudence of FIFA regarding Art. 2 §3 of Annex 5 of the RSTP. São Paulo also explained that the concerned rules had not been modified since 2005. Regarding the influence of Art. 1 and 2 of the RSTP and the notion of “club”, São Paulo considered that non-affiliated clubs are not subject to the RSTP, because FIFA deliberately only regulates organized football. São Paulo argued therefore that Art. 2 §3 of Annex 5 only concerns a case in which no link can be established between a player and an affiliated club. If that is not the case, no solidarity contribution is due to the national association.
64. In the Decision the Single Judge basically followed the interpretation of Art. 2 §3 RSTP of the DRC, as outlined by the DRC itself in its letter to the Single Judge. The Single Judge held that a National Football Association claiming solidarity contribution must provide evidence that the player was effectively trained within the organised football, i.e. within the scope of association football during the relevant period. De facto, in only two circumstances the subsidiary claim of a National Association shall be accepted: first, if the club that trained the player is no longer affiliated to the association or has ceased to exist and, second, if the club affiliated to the association has failed to claim the solidarity contribution within 18 months of the transfer. In connection to the present case the Single Judge considered that from January 1, 1992 to May 15, 1994, the Player’s passport indicated “*not registered with any club*” and that, for this reason, no association could claim solidarity contribution for that period. None of the two above stated circumstances existed, in the Single Judge’s opinion, and CBF was therefore not entitled to receive the amount of USD 45'000 from Real Madrid.
65. The Sole Arbitrator shares to a great extent the position of the Single Judges, for the following reasons:
66. It is undisputed by the parties that the Player played from 1 January 1992 to 15 May 1994 in a non-affiliated club (amateur football club in the Player’s hometown in Brazil). The question which must be answered is therefore whether, in such a situation, CBF, as the national association of that territory, is entitled to solidarity contribution.
67. The Sole Arbitrator holds that it is fair to argue that Art. 2§3 of Annex 5 of the RSTP is not clearly drafted and that it leaves room for interpretation.
68. According to previous CAS jurisprudence, as well as the principles of Swiss law, the rules and the statutes of an association have to be interpreted “*either in accordance with the subjective will of the rulemaking persons (the so-called “Willensprinzip”, i.e. principle of the will) or with the objective meaning*

*that the addressees of the rule would give to that rule, in good faith (the so-called “Vertrauensprinzip”, i.e. principle of confidence or of good faith). Swiss jurisprudence has applied from time to time one or the other principle (cf. H.M. Riemer, Berner Kommentar, Systematischer Teil vor Art. 60 ZGB, N 329 et seq.)*<sup>4</sup>. Furthermore, when interpreting a rule the deciding body, may consider whether, based on a systematic analysis, the interpretation given to the rules does or does not fit into the context of the whole regulation<sup>5</sup>.

69. In the present case, the Sole Arbitrator is satisfied that the rule at stake, i.e. Art. 2§3 of Annex 5 of the RSTP Rule, can and shall be interpreted in the same way, independently on which principle is applied.
70. The wording of Art. 2§3 of Annex 5 of the RSTP is not clear, in particular when it uses the word “link”. The FIFA Commentary on this provision, which may show the association’s intentions when establishing the rule, is itself somewhat contradictory. For instance, if this provision were applied in a situation where the training club went bankrupt (as suggested in the Commentary), the literal meaning of the term link would not be respected. Indeed in such a case, the link between the Professional and the club that trained him can be made; it is only the club itself that does not exist anymore. Therefore, the only reasonable interpretation, which can be given to the term “*link*” used in Art. 2§3, is the one of “successful link”. A link is deemed successful if it allows reaching an existing club, affiliated to a national association.
71. Such a successful link does not exist if a player’s passport does not indicate where he was trained at all or omits mentioning one of the previous clubs. These are real “no link” cases and only in such situations is it useful to provide for a time limit of 18 months, during which a club can try to establish a successful link. Contrary to CBF’s contention, it could happen in practice that an affiliated club does not claim the contribution during this deadline.
72. The Sole Arbitrator shall now turn to interpret the notion of “club” used in Art. 2§3 of Annex 5 of the RSTP. As the parties admitted, only affiliated clubs are entitled to solidarity contribution. Indeed, within the framework of Annex 5 of the RSTP, the term “club” can only designate a club affiliated to a national association, itself member of FIFA. Put it simple: Non-affiliated clubs are not within the FIFA system. In fact, Art. 2 and Art. 3 of the RSTP clearly show that the regulations only concern “*Organised Football*” (i.e. “*association football organised under the auspices of FIFA, the confederations and the Associations, or authorized by them*”, as determined in the Definitions section of the RSTP).
73. If a non-affiliated club trained a player, it would be useless to wait 18 months for that club to claim solidarity contribution, which it has no right to demand. As CBF recognized, the national association’s claim is subsidiary within the system of Art. 2§3 of Annex 5; however, a subsidiary claim requires a primary claim to exist. In this context, a subsidiary claim of a national association requires a valid primary claim, i.e. a claim of an affiliated club.

<sup>4</sup> CAS 2011/A/2563, at para. 8.45.

<sup>5</sup> CAS 2009/A/1810 & 1811 13, marg. no 45; see also: BERNASCONI M., When is a « decision » an appealable decision?, in: RIGOZZI/BERNASCONI (eds), The Proceedings before the Court of Arbitration for Sport, 2007, p. 262 - 263.

74. The fact that the provisions of Art. 21 and Art. 2§3 Annex 5 are interpreted by the DRC also as referring to affiliated clubs only, comes as an additional confirmation of the interpretation made by the Sole Arbitrator. In fact, it is admitted under Swiss law and it has been confirmed by CAS in many cases, that the way how a rule is interpreted, lived, administrated within an association is possibly not a decisive, but still an important element when the application of such rule must be reviewed<sup>6</sup>.
75. The Sole Arbitrator considers, therefore, that the right interpretation of the relevant part of Art. 2§3 Annex 5 RSTP can be summarized as follows: *"If no successful link between the Professional and any of the clubs that trained him can be established within 18 months of his transfer, the solidarity contribution shall be paid to the Association(s) of the country (or countries) where the Professional was trained and to which the club(s) that trained the Professional was (or were) and/or still is (or are) affiliated"*.
76. Based on this interpretation, the Sole arbitrator holds that CBF is not entitled to receive part of the solidarity contribution due by Real Madrid, because no affiliated club trained the Player during the relevant period.
77. Whether Art. 2§3 of Annex 5 of the RSTP, in its current form, is the most appropriate rule in order to help the development of youth programs is another issue, which the Sole Arbitrator has no power to decide. The Sole Arbitrator is not indifferent to the reality of youth football nor to the important work of national associations such as CBF in the development of football. Without doubt, non-affiliated clubs can be important for the life and the development of a player. And one cannot deny that in some countries it is thank to the work carried on by many non-affiliated institutions that many children and young boys and girls are brought in contact with football and other sports. It is therefore nothing else than important and good when confederations, national associations and affiliated clubs support also the hard work of non-affiliated institutions and groups. However, whether such support shall be achieved by granting to national associations a general right to always claim solidarity contribution when players were trained by non-affiliated clubs is a policy issue that may be considered *de lege ferenda*. But, again, de Sole Arbitrator is satisfied that *de lege lata*, there is no rule in the FIFA Statutes or in the RTSP that determines that in exchange of such supporting activities in favor of non-affiliated football, a national association shall have a general, subsidiary right to automatically claim part of the solidarity contribution when a player played in a non-affiliated club.
78. The fact that the payment took place before the end of the 18-months period, as pointed out by the Second Respondent, can be disregarded at this stage. Indeed, it would only have played a role if CBF had been entitled to receive part of the solidarity contribution instead of an affiliated club.
79. As to the award in the case CAS 2008/A/1751, to which CBF referred, the following shall be noted. That award does not bind the Sole Arbitrator, who is free to adopt a new interpretation of Art. 2§3 of Annex 5, based on the evidence submitted and the arguments made by the parties and his own interpretation of the relevant rules. The Sole Arbitrator notes that the two

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<sup>6</sup> TAS 2004/A/589 para. 68 et seq.

cases described by the Panel in the award 1751 (at para. 8.13) were rather meant as *obiter dicta*, because the Panel in the 1751 case finally left the issue open and did not decide which was applicable (at para. 8.14). Already for this reason, the Sole arbitrator does not feel compelled to follow the 1751 Award.

80. The Sole arbitrator further notes, as mentioned above, that the stable jurisprudence of the DRC may not be decisive, but still is important, because it shows the association's own interpretation of its rules<sup>7</sup>. This jurisprudence can therefore be taken into account, despite the fact that it may not be that extended at the time when Real Madrid paid CBF the amount of USD 45'000. Indeed, a CAS Panel is asked to take a *de novo* decision (cf. Art. R57 of the Code), issued on the basis of the current state of the facts and the law and taking into account the applicable rules."
81. The Sole Arbitrator notes that the interpretation of the rule by the DRC 'is close to that reached by the Sole arbitrator.
82. Additionally, the results are quite identical. This is the case despite (a) the fact that the DRC's jurisprudence only stresses that training must be proved, without emphasizing that such training must be provided within the structures of "Organised Football" and (b) despite the fact that the interpretation of the DRC' refers to a somewhat illogical interpretation of the term "link", as shown above.
83. The Sole Arbitrator shares the view of the DRC and of the Single Judge that the proof of effective training *in an affiliated club* is a valid precondition. However, the Sole Arbitrator notes that such proof can be difficult to obtain in certain countries and that FIFA should very carefully evaluate which level of evidence shall be required on a case-by-case basis in order not to make impossible for clubs of rather poor countries or for unsophisticated associations to claim the right to a part of the solidarity contribution.
84. In view of the above, the Sole Arbitrator holds that Real Madrid, albeit in good faith, did not apply correctly Art. 2§3 of Annex 5 of the RSTP and that, instead of paying USD 45'000 to CBF, it should have paid that amount to São Paulo.
- b) *If the payment was not correctly paid, which consequences should be drawn regarding the Decision?***
85. After having confirmed that the Decision was correct and that Real Madrid should have paid USD 45'000 to São Paulo, it is now necessary to review the consequences of such ruling for all the involved parties.

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<sup>7</sup> TAS 2004/A/589, at para. 68 et seq.; CAS 2007/A/1359, at para. 124.

86. Real Madrid's first subsidiary claim is that, based on Art. 63 of the Swiss Code of Obligations ("CO")<sup>8</sup>, it would be entitled to receive from CBF the amount of USD 45'000 and would not have to repay it to São Paulo.
87. However, this point of view cannot be shared. Indeed, if Real Madrid does not have to pay that amount to CBF, it must not deduct it from the transfer fee due to São Paulo, in accordance with Art. 1 of Annex 5 of the RSTP *a contrario*. This first subsidiary claim is therefore rejected.
88. Real Madrid's second subsidiary claim is that CBF was enriched without just cause within the meaning of Art. 62 CO<sup>9</sup> and that it would therefore have to reimburse Real Madrid or, alternatively, pay USD 45'000 to São Paulo.
89. The Sole Arbitrator notes that Real Madrid claims having paid in error, believing that it was paying its real creditor. The facts of the case show that Real Madrid was indeed in error. It is therefore entitled to the reimbursement based on Art. 62 and 63 CO. This conclusion does not alter the fact that in any event, Real Madrid owes the amount of USD 45'000 to São Paulo.
90. During the proceedings, and in particular at the hearing, CBF declared, very elegantly, that, if the Sole Arbitrator decided so, CBF would agree to reimburse the amount to Real Madrid by forwarding it' to São Paulo directly. Accordingly, at the hearing the parties agreed to extend the adjudicatory power of the Sole Arbitrator, asking him to set in the Award any possible directions for a possible reimbursement.
91. By accepting to do so, CBF and the parties contribute to simplify the matter. In legal terms, CBF assumes Real Madrid's debt, within the meaning of Art. 175 CO<sup>10</sup> and must accordingly pay USD 45'000 to São Paulo instead of Real Madrid. On its side, São Paulo recognizes that by receiving said amount from CBF, any obligation of Real Madrid and/or CBF strictly in connection with the solidarity contribution arising out of the transfer of the Player is settled (with other indirect issues like interests and expenses not be touched by such reimbursement, though).
92. Accordingly, the Sole Arbitrator shall order CBF to pay the amount of USD 45'000 to São Paulo.
93. This conclusion is in line with Real Madrid's second subsidiary claim. Therefore, its third subsidiary claim does not need to be examined.

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<sup>8</sup> Art. 63 §1 CO: "A person who has voluntarily satisfied a non-existent debt has a right to restitution of the sum paid only if he can prove that he paid it in the erroneous belief that the debt was owed".

<sup>9</sup> Art. 62 §1 CO: "A person who has enriched himself without just cause at the expense of another is obliged to make restitution".

<sup>10</sup> Art. 175 §1 CO: "A person who promises to answer for the debt of another assumes an obligation to release the debtor from his obligation either by satisfying the creditor or by taking the debtor's place with the consent of the creditor".

94. The Decision, in line with the wish of the parties to facilitate the execution and implementation of this Award, is therefore partially annulled, insofar as it orders Real Madrid to pay São Paulo the amount of USD 45'000.
95. The Sole Arbitrator shall now turn to the issue of interest.
96. Real Madrid did not claim the payment of interest in the request for relief contained in its appeal brief, although in its statement of appeal it had requested that CBF should pay to São Paulo with the relevant interest.
97. As to São Paulo, it claimed that Real Madrid should pay interest of 5% p.a. as from 3 March 2006.
98. Three types of interest must be distinguished.
99. First, the restitution based on Art. 62 CO includes the capital and the interest earned by the person enriched without just cause. However, the impoverished person must prove that interest was effectively earned, through an investment of the capital. The rate of this interest is not necessarily 5% p.a.<sup>11</sup>.
100. Second, the enriched person owes interest on unpaid amounts (provided for by Art. 104 §1 CO<sup>12</sup>), if he does not immediately repay the amount owed to the impoverished person when requested to do so<sup>13</sup>.
101. Third, in general, any debtor who is late in paying the amount he owes must pay interest on unpaid, overdue amounts, as stated by Art. 104 §1 CO.
102. In the present case, if the erroneous payment to CBF had not taken place and if Real Madrid was simply late in paying the amount of USD 45'000, Real Madrid would have to pay São Paulo that amount with interest of 5% p.a., in accordance with Art. 104 §1 CO. Accordingly, it is up to Real Madrid (and not to CBF) to pay interest.
103. The first type of interest is not owed, because no evidence has been submitted that CBF earned interest thanks to the amount of USD 45'000 which it had unduly received. The second type of interest is not owed either, because Real Madrid never clearly requested CBF to repay the amount of USD 45'000. Indeed, its primary claim before the Single Judge, as well as before the CAS, has always been that the payment was correct. Under these circumstances, CBF was not late in repaying this amount. As to the third type of interest, it is due, because Real Madrid is late in paying the amount of USD 45'000 it owes to São Paulo. It is an objective fact that this payment is late, independently from the issue of reimbursement by CBF.

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<sup>11</sup> Decision of the Swiss Federal Tribunal of September 7, 2009, in the case 4A\_59/2009, §5.3.3.2; Decision of the Swiss Federal Tribunal of June 14, 2004, in the case B 77/03, §5.2.

<sup>12</sup> Art. 104 §1 CO: "*A debtor in default on payment of a pecuniary debt must pay default interest of 5% per annum even where a lower rate of interest was stipulated by contract*".

<sup>13</sup> Decision of the Swiss Federal Tribunal of September 7, 2009, in the case 4A\_59/2009, §5.3.3.2; Decision of the Swiss Federal Tribunal of June 14, 2004, in the case B 77/03, §5.1.



104. Therefore, Real Madrid must pay to São Paulo the legal interest on the unpaid amount of USD 45'000 of 5% p.a.
105. In the Decision, based on Art. 2 §1 of Annex 5 of the RSTP, the Single Judge considered that the interest should start running the day after the expiry of the 30 days' time limit in order to proceed to the payment of the solidarity contribution. That time limit begins from the player's registration with the new club.
106. Given the fact that the parties had not provided evidence proving the effective date of registration of the Player, the Single Judge held that Real Madrid had to pay this interest starting from 3 March 2006. This date was indeed the last possible date which could be considered as the 31<sup>st</sup> day following the registration of the Player with Real Madrid.
107. This reasoning is correct and the Sole arbitrator shall apply it in order to determine the date when the interest start running.
108. Before the CAS, the parties did not provide any evidence as to the effective date of registration of the Player with Real Madrid. Therefore, the Sole Arbitrator shall confirm the date retained by the Single Judge.
109. Accordingly, Real Madrid shall pay to São Paulo interest of 5% p.a. on the amount of USD 45'000 starting from 3 March 2006 and until São Paulo receives the amount of USD 45'000 from CBF. In order for Real Madrid to be able to determine this date, CBF and São Paulo shall inform Real Madrid as soon as São Paulo receives the payment from CBF.
110. As to CBF's claim requesting an award with an *erga omnes* effect, CBF recognized during the hearing that it is not an admissible prayer for relief before the CAS and declared that this was not an actual claim any longer. The Sole arbitrator shall therefore not deal with this prayer for relief.
111. Regarding the costs of the first instance proceedings, Real Madrid requested that, if the Sole arbitrator held that the payment had not been correctly made to CBF, then the costs imposed in the Single Judge's decision should be divided in equal parts between all the parties.
112. In accordance with Art. R57 of the Code, "*the Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance*".
113. The Sole Arbitrator's award is accordingly a new decision, which replaces the decision challenged and he has the full power to review all the legal issues (correctly) put before him, including that of costs of the first instance proceedings.
114. The Sole Arbitrator notes that although the Decision is partially annulled, most of its reasons are confirmed, given the fact that Real Madrid loses on its primary prayer for relief. Therefore, it is not necessary to modify the allocation of costs decided by the Single Judge.

115. The Decision is therefore confirmed insofar as it condemns Real Madrid to pay the costs of the first instance proceedings in the amount of CHF 5'000.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. The appeal filed by Real Madrid against the decision of the Single Judge of the Player's Status Committee dated January 24, 2011 (notified on October 27, 2011) is admissible.
2. The decision of the Single Judge of the Player's Status Committee dated January 24, 2011 (notified on October 27, 2011) is partially annulled.
3. Confederação Brasileira de Futebol (CBF) is ordered to pay to São Paulo FC the amount of USD 45'000, upon notification of this award.
4. Real Madrid CLUB DE FUTBOL is ordered to pay to São Paulo FC interest of 5% p.a. on the amount of USD 45'000, running from 3 March 2006 until the day on which São Paulo FC receives the amount of USD 45'000 from Confederação Brasileira de Futebol (CBF).
5. Confederação Brasileira de Futebol (CBF) and São Paulo FC shall inform Real Madrid CLUB DE FUTBOL as soon as São Paulo FC receives the payment provided for under n°3.
6. The remainder of the decision of the Single Judge of the Player's Status Committee dated 24 January 2011 (notified on 27 October 2011) is confirmed.
7. (...).
8. (...).
9. All other or further claims are dismissed.