Arbitration CAS 2010/A/2091 Dennis Lachter v. Derek Boateng Owusu, award of 21 December 2011

Panel: Prof. Massimo Coccia (Italy), President; Mr Tal Lavie (Israel); Mr Dirk-Reiner Martens (Germany)

Football
Players' agent commission
Lis pendens
No legal interest, no standing
Res judicata
Arbitral character of awards issued by the Israeli Football Association's Arbitration Institute
National or international character of the dispute
Statutory arbitration clause

1. **Once a parallel case ends with a final award, the issue of *lis pendens* is not relevant anymore as there is no parallel case still pending. Therefore the issue then centres only on *res judicata*.**

2. **If a party does not have a cause of action or legal interest ('intérêt à agir') to act against the Appealed Decision, such party would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing ('pas d'intérêt, pas d'action'). Therefore, if a body has ruled on the merits of the case in favour of that party, the latter has no standing to appeal such decision because it has no legal interest in doing so. However, this does not mean that the party is estopped from raising a *res judicata* exception because such party did not appeal the part of the body's decision that examined and discarded the *res judicata* exception.**

3. **The principle of *res judicata* is a fundamental principle of Swiss procedural public policy whose violation would yield the nullity of the award. If arbitral proceedings in Switzerland involve the same subject matter, the same legal grounds and the same parties as previous foreign arbitral proceedings terminated with an award, the so-called "triple identity" test – used basically in all jurisdictions to verify whether one is truly confronted with a *res judicata* question – is thus indisputably met. The principle of *res judicata* is only applicable if the foreign judgment could be recognized in Switzerland.**

4. **The IFA Statutes provide that the Arbitration Institute is independent in its decisions, provide for a mechanism to appoint the arbitrators for the individual cases, provide that the appointed arbitrators are subject to the arbitration laws of Israel and provide the Arbitration Institute regulations to establish a procedure to solve disputes between**

players and players' agents. Furthermore, two Israeli state courts have unequivocally found that the IFA Arbitration Institute's proceedings were genuine arbitral proceedings governed by Israeli arbitration laws. The IFA Arbitration Institute thus administers true arbitral proceedings and delivers fully fledged arbitral awards, capable of being recognized and enforced outside of Israel pursuant to the New York Convention.

5. **It is a general procedural principle that jurisdictional issues must be addressed taking into account the moment when a claim is first filed. Therefore, the pertinent point in time to establish whether a dispute is national or international is the moment when the dispute arises, that is, more precisely, the moment when a claim by either party is first filed, rather than when the contract giving rise to the dispute was signed. This is all the more so in case the dispute is based on the FIFA Agents Regulation, as the text of Article 22.1 clearly makes reference to the moment when the dispute arises (*"In the event of disputes (…)"*).**

6. **When an individual such as a player or an agent registers with a national federation by his deliberate act of registering, he has contractually agreed to abide by the statutes and regulations of the national federation, thus pledging to comply with an arbitration clause included therein. This is in line with the established case law of the Swiss Federal Tribunal, which has considered the arbitration clauses contained in the statutes of sports associations to be valid.**

Mr Dennis Lachter (the "Appellant" or the "Agent") is a players' agent licensed by and registered with the Israeli Football Association (IFA).

Mr Derek Boateng Owusu (the "Respondent" or the "Player") is a football player of Ghanaian nationality. From July 2006 to January 2009 he played for Beitar Jerusalem FC in the Israeli Premier League. In the seasons 2009/2010 and 2010/2011 the Respondent played for Getafe CF – a club registered with the Spanish Football Association – in the Spanish football league *Liga*. The Respondent is also a player of the Ghanaian national team, with which he participated in the FIFA World Cup in 2006 and 2010.

On 19 February 2006, while the Respondent was playing for the Swedish club AIK Football AB of Solna ("AIK Solna"), the parties signed a representation contract (the "Contract") for two years, from 19 February 2006 to 19 February 2008, whereby Mr Lachter became the agent of Mr Boateng Owusu.

The parties agreed on an exclusivity clause, stating that *"the placement rights be transferred exclusively to the player's agent* [*i.e.* the Appellant]*"* and that *"no other person or entity other than the Agent shall have the same rights in representing the Player"* (article 3 of the Contract).

Article 2 of the Contract provided that the Agent's remuneration *"as a result of the employment contract negotiated by the player's agent"* had to be calculated as follows: 10% of the Player's salary for a salary up to 200,000 USD; 15% for a salary between 250,000 USD and 500,000 USD; 20% for a salary between 500,000 USD and 1,000,000 USD; 25% for a salary over 1,000,000 USD. In addition, the Player had to pay the Agent 50% of any remuneration received on account of a possible sponsorship or advertising contract.

The Parties also declared, in Article 4.1 of the Contract, to be *"subject to the FIFA Licensed Players' Agents Regulations (hereinafter referred to as the FIFA Regulations)"*.

Article 4.28 of the Contract set forth the following dispute resolution clause:

> *"In case the disputes and differences are not settled by means of negotiations, the parties shall have the right to address to competent FIFA bodies. (All in accordance with the provisions stipulated under Article 22 of the FIFA Regulations)"*.

Article 5 of the Contract, entitled "Mandatory legislation", set forth the following clause:

> *"The parties agree to adhere to the public law provisions governing job placement and other mandatory national legal provisions in force in the country concerned as well as in international law and applicable treaties"*.

On 16 July 2006, AIK Solna and the Israeli club Beitar Jerusalem FC ("Beitar FC") signed an agreement concerning the transfer of the Player to Beitar FC. On the same date the Respondent signed a termination agreement with AIK Solna.

On 30 July 2006, the Respondent signed a three-year employment contract with Beitar FC. The contract entitled the Respondent to a basic salary to be calculated as follows: 3,135,996 New Israeli Shekels (NIS) for the season 2006/2007, to be paid in twelve (12) monthly instalments of 261,333 NIS each; 3,135,996 NIS for the season 2007/2008, to be paid in twelve (12) monthly instalments of 261,333 NIS each; 4,032,000 NIS for the season 2008/2009, to be paid in twelve (12) monthly instalments of 336,000 NIS each. In the contract it was further provided that each instalment had to be paid *"until the 15th of the month following the month, for which the payment is made" and that the first instalment "shall be paid for July 2006"*. The contract contained no reference to the Appellant's involvement in the negotiations between the Respondent and Beitar FC.

On 3 March 2007, the Agent filed with the District Court of Tel Aviv-Jaffa (Israel) an application for an interim attachment order against the Player for the alleged unpaid commission fees. Such attachment was first granted and subsequently revoked.

On 4 March 2007, the Agent submitted a claim to the Players' Status Committee of FIFA (the "FIFA-PSC"), requesting it to order the Respondent to *"fulfil all his contractual obligations, under the Representation Contract"* and to pay him the sum of 786,477 USD for commission fees, penalty and interest.

On 21 June 2007, the Player lodged a claim with the IFA Arbitration Institute, asking for declaratory relief ascertaining that he did not owe anything to the Agent.

On 3 September 2007, the first arbitral hearing was held in Israel before a sole arbitrator appointed in accordance with IFA arbitration rules (the "IFA Arbitrator"). The Agent's counsel appeared at the hearing asking for an extension of the time limit to file the statement of defence. The extension was granted by the IFA Arbitrator and a new hearing was thus fixed for 16 October 2007.

On 10 September 2007, the Player filed an answer with the FIFA-PSC contesting the jurisdiction of FIFA to rule on the dispute. The Player based his objection on the basis that the same dispute was pending before the competent IFA arbitral tribunal in Israel, and that the dispute was a "national dispute" in accordance with article 22.1 of the 2001 edition of the FIFA Players' Agent Regulations (the "FIFA Agents Regulations") providing that in *"the event of disputes between a players' agent and a player, a club and/or another players' agent, all of whom are registered with the same national association (national disputes), the national association concerned is responsible. It is obliged to deal with the case and pass a decision, for which service it is entitled to charge an appropriate fee"*.

On 16 October 2007, a second hearing was held before the IFA Arbitrator. The Agent decided not to appear, communicating his decision via fax to the IFA Arbitrator on the day of the hearing. In the same communication the Agent contested the jurisdiction of the IFA Arbitration Institute.

On 22 October 2007, the IFA Arbitrator issued an arbitral award retaining his jurisdiction and establishing that *"the player owe[d] the agent nothing"* as the Agent *"never took an active part in the deal transferring the player to Beitar"* and was thus *"not entitled to receive any commission"*.

On 8 November 2007, the Agent appealed the IFA Arbitrator's decision before the Tel Aviv-Jaffa District Court (Israel), requesting that the IFA Arbitrator's award be set aside.

On 21 November 2007, the Agent filed with the FIFA-PSC a reply to the Respondent's answer (see *supra*) contending, *inter alia*, that: a) the claim before the FIFA-PSC had been filed by him four months prior to the claim lodged by the Player with the IFA Arbitration Institute; b) in the Contract (at article 4.28) the dispute settlement clause explicitly made reference to *"FIFA bodies"*; c) the IFA Arbitrator had no authority to rule upon the matter; and d) the proceedings before the IFA Arbitrator had taken place without the participation of the Agent.

On 7 February 2008, the Player submitted to the FIFA-PSC a rejoinder maintaining that the IFA arbitral tribunal was the convenient forum for deciding the dispute and that, in the meanwhile, the IFA Arbitrator had issued an award in his favour.

On 11 January 2009, the District Court of Tel Aviv-Jaffa dismissed the Agent's application to set aside the IFA award, finding that the IFA Arbitrator *"was competent, and even obliged, to adjudicate on the [Player]'s claim against the [Agent]"*. The District Court affirmed the jurisdiction of the IFA Arbitrator on the basis of the Contract, of Israeli law, of the IFA regulations and of the FIFA Agents Regulations.

On 22 February 2009, the Agent filed with the Israeli Supreme Court an application for leave to appeal against the decision issued on 11 January 2009 by the District Court of Tel Aviv-Jaffa.

On 26 June 2009, the Single Judge of the FIFA-PSC dismissed the Agent's claim. On 6 July 2009, the parties were notified of the operative part of the decision.

On 4 November 2009, the Israeli Supreme Court dismissed the Agent's application for leave to appeal against the decision of the Tel Aviv-Jaffa District Court, stating that the IFA Arbitrator did possess jurisdiction. The IFA Arbitrator's award thus became final in the Israeli legal order.

On 17 March 2010, FIFA communicated to the parties the grounds of the decision adopted by the Single Judge of the FIFA-PSC. The Single Judge examined first of all his jurisdiction to rule upon the dispute. The relevant part of the decision reads as follows:

> *"Turning his attention to the question of competence, the Single Judge noted that the [Player] had sought to argue that FIFA should not be competent to hear the present matter since it had already been submitted to an arbitration tribunal in Israel. In this respect, taking into account that the [Agent] had stated that his claim had been lodged with FIFA before the matter was referred to the relevant instance in Israel and that the aforementioned allegation had not been denied by the [Player] during the course of this proceeding, as well as taking into account art. [4.]28 of the Contract which explicitly allowed the parties to have recourse to FIFA's decision-making bodies in case of a dispute between them, the Single Judge decided that he was competent to decide on the present matter. This established, the Single Judge recalled that in accordance with the provisions set out by both the 2001 and 2008 edition of the FIFA Players' Agents Regulations, FIFA has jurisdiction on matters relating to licensed players' agents, i.e. on those individuals who hold a valid players' agent license issued by the relevant member Association. Consequently, and since the present matter concerned a dispute between a players' agent licensed by the Israel Football Association and a Ghanaian player, regarding an alleged outstanding commission, the Single Judge held that he was thus competent to pass a decision in the case at hand which had an international dimension".*

On the merits, the Single Judge of the FIFA-PSC considered that (i) *"he was not satisfied that the evidence provided by the Claimant was sufficient to corroborate the fact that his involvement was crucial to the signing of the employment contract in question"*, (ii) *"nor had it been proven that another agent had been involved in the negotiations leading to the signature of the employment contract [and] it could therefore not been concluded that the Respondent had breached any of the terms of the representation contract"*, and (iii) *"the percentage of commission due was clearly abusive since it disproportionately favoured the Claimant to the detriment of the Respondent"*.

As a consequence, the Single Judge of the FIFA-PSC rejected on the merits the Agent's claim and ordered him to pay to the Player the costs of the proceedings in the amount of CHF 20,000.

On 7 April 2010, pursuant to Article R47 of the Code of sports-related arbitration (the "CAS Code"), the Agent filed an appeal with the CAS to challenge the decision adopted by the Single Judge of the FIFA-PSC on 26 June 2009 and notified with grounds to the parties on 17 March 2010.

On 15 April 2010, the Agent filed his Appeal Brief setting forth the grounds for the Appeal.

On 1 July 2010, in compliance with the extension of the deadline previously granted by the President of the CAS Appeals Division, the Player filed his Answer.

On 12 August 2010, the CAS Court Office communicated to the parties the Panel's decision to grant the Appellant the possibility to comment on the issues of *res judicata* and FIFA's jurisdiction, raised by the Respondent in his Answer.

On 13 September 2010, the Appellant submitted his position on the issues of *res judicata* and FIFA's jurisdiction.

On 15 October 2010, the CAS Court Office communicated to the parties the Panel's decision to bifurcate the case and to decide on a preliminary basis the issues of *res judicata* and FIFA's jurisdiction. By the same communication, the parties were also asked to file a further written submission to state their opinion as to whether the IFA award would be recognizable or not in Switzerland under Swiss law and the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the "New York Convention").

The additional submissions requested by the Panel were submitted by the Respondent on 21 October 2010 and by the Appellant on 16 November 2010.

By letter of 1 December 2010, the CAS Court Office informed the parties that, in the Panel's opinion, the Appellant's submission dated 16 November 2010 went further than the Panel's instructions, as in addition to addressing the question of whether the Israeli award would be recognizable in Switzerland under Swiss law and the New York Convention, the Appellant had also addressed the issues of *res judicata* and of FIFA's jurisdiction, on which the Appellant had already been granted time to comment. However, the Panel decided to admit the entire Appellant's submission, but at the same time it granted a further deadline of ten days for the Respondent to comment on the Appellant's latest remarks.

On 8 December 2010, the Respondent filed with the CAS Court Office his final submission on the issues of *res judicata* and of FIFA's jurisdiction.

By letter of 14 January 2011, the CAS Court Office communicated to the parties that, in principle, the Panel considered itself to be sufficiently well informed on the basis of the parties' written submissions and that it did not deem it necessary to hold a hearing for adjudicating the preliminary issues of *res judicata* and of FIFA's jurisdiction. Nevertheless, the Appellant was granted a five-day time-limit to inform the CAS of whether he insisted on his position of holding the hearing.

On 20 January 2011, the Appellant sent a letter to the CAS, confirming his request for a hearing on the preliminary issues. In the letter the Appellant maintained that it was *"of the outmost importance"* to hold a hearing in the presence of the parties.

On 31 January 2011, the CAS communicated to the parties the Panel's decision to hold a hearing on the preliminary issues.

The hearing took place in Lausanne on 8 April 2011.

After the parties' final pleadings, the Panel closed the hearing and announced that its deliberation would be made and a reasoned award would be rendered. Upon closure, both parties expressly stated that they did not have any objection in respect to their right to be heard and to be treated equally in these arbitration proceedings.

On 5 May 2011, the Respondent sent to the CAS an English translation of some excerpts of the Israeli arbitral legislation, of the Israeli sports law and of the IFA Players' Agents Regulations (the "Israeli Agents Regulation"). The Appellant did not raise any objection as to the accuracy of the English translation provided by the Respondent.

However, on 12 June 2011, the Appellant objected that the Respondent had not provided all of the 2008 amendments to the Israeli Arbitration Law and submitted those amendments, together with a translation of the full text of the Israeli Sports Law of 1988. The Appellant also submitted some comments on the submitted legal texts.

On 20 June 2011, the Respondent expressed its assent to the translations provided by the Appellant, but objected to the admissibility of the comments. The Panel, considering that the Appellant's comments simply describe some relevant rules and in any event do not state anything which could hurt the Respondent's position, has decided to admit them, thus rejecting the Respondent's objection.

LAW

1. In view of the above, this award is concerned solely with the issues of *res judicata* and FIFA's jurisdiction.

Power of the Panel to decide on its own jurisdiction

2. The Panel observes that this arbitration is seated (as all CAS proceedings) in Lausanne, Switzerland and involves two parties – an Israeli agent domiciled in Israel and a Ghanaian player domiciled in Spain – that are neither domiciled nor habitually resident in Switzerland. This arbitration procedure is thus governed by Chapter 12 of the PILA, in accordance with Article 176 thereof.

3. It is undisputed that, pursuant to Article 186 para. 1 of the PILA, the Panel has the so-called *Kompetenz-Kompetenz*, *i.e.* the authority to determine whether it has jurisdiction to adjudicate the merits of the appeal (see CAS 2004/A/748, para. 81 *et seq.*). In view of the Respondent's preliminary objections, the Panel has decided to bifurcate the proceedings and adjudicate the preliminary issues by means of an arbitral award in accordance with Article 186 para. 3 LDIP.

The preliminary objections raised by the Respondent

4. The essence of the Respondent's preliminary objections is that the CAS may not entertain the merits of this case because the same matter has already been heard and decided by an Israeli arbitral tribunal with a binding award which has been confirmed by the competent Israeli state courts and has thus become final. It is a typical *res judicata* exception.

5. In addition, the Respondent argues that the FIFA Single Judge erred in hearing and adjudicating the case because it should have deferred to the Israeli arbitral tribunal, either because it did not have jurisdiction in the first place or because, if it did have a parallel jurisdiction, it should have declined to render a decision once the Israeli arbitrator had rendered his award.

6. The Panel will address the issue of *res judicata* first because, should such claim be upheld, there would be no need to ascertain whether the FIFA Single Judge had to decline to adjudicate the matter.

7. As a preliminary consideration, the Panel notes that it is discussed in the legal literature whether a well-founded exception of *res judicata* implies the lack of jurisdiction or the inadmissibility of the claim. In either case, the practical result would be the same, as the Panel would be prevented from dealing with the merits of the case. Indeed, in the *Final report on res judicata and arbitration* of the International Commercial Arbitration Committee of the International Law Association ("ILA"), the following can be read:

   "In this respect, the Committee does not express an opinion as to the question whether preclusive effects of a prior arbitral award go to jurisdiction or to admissibility. Jurisdictions give different answers to this question and the Committee prefers to leave this question to the applicable law. On the other hand, the question is to a large extent moot since under both characterizations a preclusion defense is to be raised early in proceedings" (www.ila-hq.org/en/committees/index.cfm/cid/19, Toronto Conference [2006], para. 68).

8. The Panel notes that in the well-known *Fomento* judgment of 14 may 2001 the Swiss Federal Tribunal appears to make reference to *res judicata* as a matter of jurisdiction (*"compétence"* in French) rather than of admissibility:

   "Quant à l'autorité de chose jugée, ce principe interdit au juge de connaître d'une cause qui a déjà été définitivement tranchée; ce mécanisme exclut définitivement la compétence du second juge"; freely translated: *"With regard to* res judicata*, this principle precludes a judge from entertaining a case that has already been finally decided; such mechanism definitively excludes the jurisdiction of the second judge"* (ATF 127 III 279, at 283).

9. However, in a judgment of 3 November 1995, the Swiss Federal Tribunal appears to make reference to *res judicata* as an exception rendering the claim inadmissible (*"unzulässig"* in German) rather than depriving the adjudicating body of jurisdiction:

"die Klage für unzulässig zu erklären ist, wenn der Anspruch bereits rechtskräftig beurteilt worden ist"; freely translated: *"the action must be declared inadmissible if the claim has already been decided in a legally binding manner"* (ATF 121 III 474, at 477).

10. In view of the above, the Panel – also for the sake of simplicity – will leave this theoretical issue open throughout the award, since there is no need to address it. As said, the practical consequences are the same in either case: if the Panel ends up sustaining the *res judicata* objection, it would be precluded from entering into the merits of the present dispute, regardless of a qualification of the decision in terms of lack of jurisdiction or in terms of inadmissibility of the claim.

11. As a further preliminary consideration, the Panel observes that the issue of *lis pendens*, to which the parties also made some reference in their submissions, is not relevant in the present case as there is no parallel case still pending. Once the parallel case ends with a final award the issue centres only on *res judicata* (see KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international – Droit et pratique à la lumière de la LDIP*, 2nd ed., Bern 2010, p. 262). Therefore, it is irrelevant that the FIFA-PSC proceedings started before the IFA arbitration proceedings and that there were for some time two parallel proceedings, given that the Israeli award was pronounced and became final long before the beginning of this CAS arbitration.

12. As a final preliminary consideration, the Panel must address the counter-exception raised by the Appellant, who argues that the Respondent is estopped from raising the *res judicata* exception because he did not appeal the part of the FIFA Single Judge's decision that examined and discarded the *res judicata* exception.

13. In the Panel's opinion, the Appellant's argument is flawed. Indeed, given that the FIFA-PSC Single Judge ruled on the merits of the case in favour of the Player, the latter had no standing to appeal such decision because he had no legal interest in doing so. It was (and is) in the Player's interest that the Single Judge's decision be confirmed; hence, it would have been pointless to appeal against it. The CAS has already clarified that if a party does *"not have a cause of action or legal interest ('intérêt à agir') to act against the Appealed Decision [such party] would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing ('pas d'intérêt, pas d'action')"* (CAS 2009/A/1880-1881, at para. 152 *et seq.*). In such a situation, if the Player had filed an appeal against the decision of the Single Judge of the FIFA-PSC the Panel would have had to declare such appeal inadmissible for lack of legal interest and standing to appeal.

14. Consequently, the Panel holds that the Respondent has rightfully raised the *res judicata* exception before the CAS. This is, in fact, a preliminary exception which a party has always the right to invoke, given that it tends to protect a fundamental principle pertaining to Swiss procedural public policy (see *infra* at 18).

Applicability of the *res judicata* principle

15. The Panel has no doubt, and it is common ground between the parties, that the merits of the dispute before it – does the Player owe money or not to the Agent on the basis of the Contract in relation to the Agent's alleged work in promoting the Player's transfer to and employment with Beitar FC? – were already litigated by the same parties in Israel and dealt with and adjudicated by an Israeli arbitral tribunal.

16. In other words, these arbitral proceedings involve the same subject matter, the same legal grounds and the same parties as the Israeli arbitral proceedings terminated with the award issued on 22 October 2007. The Panel thus finds that the so-called "triple identity" test – used basically in all jurisdictions to verify whether one is truly confronted with a *res judicata* question (cf. ILA, International Commercial Arbitration Committee, Berlin Conference [2004], *Interim Report: "Res Judicata" and Arbitration*, p. 2, in *www.ila-hq.org/en/committees/index.cfm/cid/19*) – is indisputably met.

17. It is also undisputed that the Appellant did not succeed in his attempts before the Israeli courts to invalidate the IFA Arbitrator's award. Indeed, the evidence before this Panel proves that the competent Israeli state judges – the District Court of Tel Aviv-Jaffa and the Supreme Court – ascertained and declared the effectiveness and validity of that arbitral award under Israeli law, stating that the IFA arbitrator did have jurisdiction and rejecting the Appellant's request to set aside the award.

18. Accordingly, the IFA Arbitrator's award of 22 October 2007 is final and binding under Israeli law; in other terms it is *res judicata* in the Israeli legal system. As a consequence, the crucial issue to be solved by this Panel is whether, as an arbitration panel sitting in Switzerland, it must also consider that foreign award as *res judicata*. If the answer is in the affirmative, the Panel would be precluded from adjudicating again the same matter, given that the principle of *res judicata* is a fundamental principle of Swiss procedural public policy whose violation would yield the nullity of the award (see the decision of the Swiss Federal Tribunal of 13 April 2010, 4A_490/2009, which set aside a CAS award for violation of the *res judicata* principle).

19. In order to consider the IFA Arbitrator's award as *res judicata*, the Panel must first check whether such award is recognizable in Switzerland. Indeed, as the Swiss Federal Tribunal has stated, *"le principe de la chose jugée [ne s'applique] qu'à l'égard d'un jugement étranger susceptible d'être reconnu en Suisse"* (ATF 127 III 279, at 285; freely translated: *"the principle of res judicata [is] only applicable if the foreign judgment could be recognized in Switzerland"*).

20. Pursuant to Article 194 PILA, the recognition and enforcement of foreign arbitral awards are governed by the New York Convention. Given this direct reference by Swiss law to the New York Convention, the latter's provisions apply vis-à-vis any other country. In any event, Israel has been a party to the New York Convention since 7 June 1959.

21. In order to recognize a foreign award under the New York Convention, the first element to check is whether the decision under scrutiny is a true "arbitral award". On the basis of the

evidence before it, the Panel finds that the proceedings before the IFA Arbitrator must be considered as true arbitral proceedings.

22. The Panel notes that throughout the whole litigation in Israel – during the arbitration proceedings first and during the judicial proceedings later – the Appellant never raised any objection as to the arbitral character of the proceedings administered by the IFA Arbitration Institute (he did raise objections as to the jurisdiction of the IFA Arbitration Institute, but this is another issue altogether). Even more significantly, the Appellant did not raise any such objection during these CAS proceedings and always made reference in all his written submissions to the IFA Arbitrator's award as a true arbitral award issued by a true arbitral tribunal.

23. Only during the CAS hearing, for the first time, the Appellant raised some doubts on the IFA Arbitration Institute and asserted that there is no certainty that the IFA Arbitrator's decision is a true arbitral award. The Panel holds that, pursuant to Article R56 of the CAS Code, this argument was belatedly raised and is thus inadmissible. In any event, the Panel is of the view that, even if the argument had been timely submitted, it would not be supported by the evidence on file.

24. Indeed, as the Appellant acknowledges in its submission of 12 June 2011, the IFA Statutes provide that the Arbitration Institute is independent in its decisions, provide for a mechanism to appoint the arbitrators for the individual cases (the appointing authority being the IFA presidency), provide that the appointed arbitrators are subject to the arbitration laws of Israel and provide the Arbitration Institute regulations to establish a procedure to solve disputes between players and players' agents. Furthermore, and decisively, two Israeli state courts have thoroughly scrutinized the IFA Arbitrator's award and have unequivocally treated such decision as a true arbitral award and the IFA Arbitration Institute's proceedings as genuine arbitral proceedings governed by Israeli arbitration laws. In particular, the Israeli Supreme Court has *"not found that there were significant procedural defects in the arbitration proceedings"* (see last page of the translated Israeli Supreme Court's judgment of 4 November 2009).

25. The Appellant has not submitted to the Panel any proof – for instance, an expert opinion on Israeli law – which could contradict the above significant evidence. The Panel thus concludes that the IFA Arbitration Institute administers true arbitral proceedings and the IFA Arbitrator's decision dated 22 October 2007 is a fully fledged arbitral award, capable of being recognized and enforced outside of Israel pursuant to the New York Convention.

26. Parenthetically, the Panel notes that, contrary to what both parties seemed to imply in their submissions, the same may not be said for the FIFA-PSC proceedings and decisions. In fact, as the CAS noted on several occasions, the proceedings administered by the FIFA adjudicating bodies are not true arbitral proceedings but rather "intra-association" proceedings (CAS 2009/A/1880-1881, para. 50), and the decisions issued by those bodies are not arbitral awards but decisions of a Swiss private association (CAS 2003/O/460, para. 5.3). This has been confirmed by the Swiss Federal Tribunal, which has often made reference to

any FIFA-PSC decision as *"a decision of a Swiss association"* (Judgment of 13 April 2010, 4A_490/2009).

The jurisdiction of the IFA Arbitrator

27. The crux of the Appellant's case is the alleged lack of jurisdiction of the IFA Arbitrator. The Appellant argues that the Contract provided solely for the jurisdiction of FIFA bodies and, indirectly, of the CAS as the appellate instance vis-à-vis the FIFA bodies.

28. The Appellant relies on Article 4.28 of the Contract, which sets forth the following dispute settlement clause (already quoted *supra*):

"In case the disputes and differences are not settled by means of negotiations, the Parties shall have the right to address to competent FIFA bodies. (All in accordance with the provisions stipulated under Article 22 of the FIFA Regulations)".

29. The Panel notes that two important elements can be ascertained from the very text of Article 4.28 of the Contract. First, the jurisdiction of FIFA bodies is not indicated as a mandatory exclusive jurisdiction, given that the parties are attributed "the right" rather than the duty to bring the dispute before FIFA. Second, the right to address the FIFA bodies is qualified by the necessary compliance ("all in accordance") with Article 22 of the FIFA Agents Regulations (for the contractual definition of the expression "FIFA Regulations" see *supra*). This means, in the Panel's view, that the right granted by Article 4.28 of the Contract may be lawfully exercised only if it is in compliance with Article 22 of the FIFA Agents Regulations. This construction is strengthened by the fact that, pursuant to Article 4.1 of the Contract, the Parties have contractually agreed that their relationship is subject to the FIFA Agents Regulations (see *supra*).

30. Article 22 of the FIFA Agents Regulations – the 2001 edition, which is applicable in the present case given that the dispute arose in 2007, before the entry into force of the 2008 edition – so provides:

"1. In the event of disputes between a players' agent and a player, a club and/or another players' agent, all of whom are registered with the same national association (national disputes), the national association concerned is responsible. It is obliged to deal with the case and pass a decision, for which service it is entitled to charge an appropriate fee.

2. Any other complaint not covered by par. 1 shall be submitted to the FIFA Players' Status Committee".

31. The Panel observes that Article 22 of the FIFA Agents Regulations confers mandatory jurisdiction on national federations whenever disputes arise between individuals or entities that are registered with the same national federation. Those are defined as "national disputes". All other disputes are considered as international disputes and are residually attributed to the jurisdiction of the FIFA-PSC. Therefore, the only relevant criterion is the common registration of the disputing parties with the same national federation; nationality, domicile or other criteria are utterly irrelevant under Article 22. Accordingly, in the present case the fact

that the Player is of Ghanaian nationality or has been playing with the Ghana national team is immaterial.

32. In the Panel's view, the pertinent point in time to establish whether a dispute is national or international is necessarily the moment when the dispute arises, that is, more precisely, the moment when a claim by either party is first filed. This occurred in March 2007, when the Agent filed his claim with the FIFA-PSC against the Player. At that time, both the Agent (who had received his agent's licence from the IFA) and the Player (who had signed a contract with the Israeli club Beitar FC) were undoubtedly registered with the IFA. The Panel does not share the Appellant's view that the relevant moment in time would rather be when the Contract was signed – with the consequence that, as the Player was registered at that time with the Swedish federation, the dispute would be "international" and the FIFA-PSC would have jurisdiction – because (i) the text of Article 22.1 of the FIFA Agents Regulation clearly makes reference to the moment when a dispute arises (*"In the event of disputes (…)"*; see *supra* at 30), and (ii) it is a general procedural principle that jurisdictional issues must be addressed taking into account the moment when a claim is first filed.

33. Accordingly, the Panel finds that, when the present dispute arose, Article 22 of the FIFA Agents Regulations pointed to the IFA as the organization having the authority to solve the dispute. The Panel observes, however, that this would not have been enough in and of itself if the IFA did not have a dispute settlement system in place and if the parties were not bound to it. In fact, Article 22 requires all national federations to establish such a dispute settlement system but, if the competent federation has not established it, the parties would necessarily have to submit their complaint to the FIFA-PSC even in case of a national dispute (as it would be under Article 22.2 a *"complaint not covered by par. 1"*; see *supra* at 30).

34. The Panel has already noted that the IFA did put in place an arbitration mechanism to deal with national disputes and thus did comply with Article 22 of the FIFA Agents Regulations. Indeed, Article 14, paras.1, 2 and 3, of the Israeli Agents Regulations reads as follows (as translated from Hebrew):

"14.1 Any disagreement or dispute between a players' agent and a player, or between a players' agent and a club or another players' agent (…) operating under the auspices of the Association [IFA] and which concerns their activities as players' agents shall be referred to the Arbitration Institute for resolution. (…)".

"14.2 The obligation to refer the dispute to arbitration is mandatory, and arbitration proceedings shall be conducted in accordance with all the provisions contained in the Arbitration Institute's articles".

"14.3 Any disagreement or dispute as stated in paragraph 14.1 above concerning an international transfer, shall be adjudicated by FIFA's Player's Status Institute, unless all the parties to the dispute or disagreement are registered with and/or operate under the auspices of the Association [IFA], in which case the matter shall be referred to the [IFA] Arbitration Institute for determination".

35. The above provisions clearly set forth an arbitration clause in favour of the IFA Arbitration Institute when all the parties are registered with the IFA. As already stated, it is undisputed that at the time of the dispute both the Player and the Agent were registered with the IFA. As another CAS panel has clearly stated, when an individual such as a player or an agent registers

with a national federation *"by his deliberate act of registering, he has contractually agreed to abide by the statutes and regulations of the [national federation]"* thus pledging to comply with an arbitration clause included therein (CAS 2007/A/1370-1376, para. 91). This is in line with the established case law of the Swiss Federal Tribunal, which has considered the arbitration clauses contained in the statutes of sports associations to be valid (see e.g. Judgment of 9 January 2009, 4A_460/2008, para. 6.2, and the previous jurisprudence quoted therein).

36. Accordingly, the Panel finds that both the Appellant and the Respondent were contractually bound to arbitrate their dispute before the IFA Arbitrator appointed in accordance with the rules of the IFA Arbitration Institute. In other words, the Panel finds that the IFA Arbitrator did have jurisdiction to entertain the said dispute and adjudicate the parties' claims. The Panel is comforted in this finding by the fact that both the District Court of Tel Aviv-Jaffa and the Israeli Supreme Court expressly held that the IFA Arbitrator lawfully retained his jurisdiction.

37. The Panel notes that the Appellant also argued that jurisdiction could not be conferred by the parties upon the IFA Arbitration Institute because the IFA Arbitrator's award could not enjoy the enforcement mechanism provided by FIFA. The Panel cannot concur with this argument. First, concerns about the possibility to enforce a decision do not change the substance of the provisions which confer jurisdiction. Second, the IFA Arbitrator's award, being a normal arbitral award (see *supra* at 25), is easily enforceable (like any commercial arbitral award) in any country which is a party to the New York Convention. Finally, given that the IFA Arbitration Institute's jurisdiction is recognized by FIFA rules (see *supra* at 30-33), it is possible that FIFA would provide its mechanisms in aid of enforcement if so requested.

38. In conclusion, the Appellant's submission that the award is not recognizable in Switzerland because the IFA Arbitrator had no jurisdiction fails.

Possible recognition under Article V, para. 1, of the New York Convention

39. Article V, para. 1, of the New York Convention reads as follows:

> *"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or*
>
> *(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or*
>
> *(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated*

from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

40. The Appellant argues that the IFA award is not recognizable in Switzerland on the basis of Article V, paras. 1(b) and 1(d), of the New York Convention. The Appellant contends, in reference to lit. (b), that the IFA Arbitrator decided *ex parte* without examining the Appellant's evidence on the merits of the case and, in reference to lit. (d), that the composition of the IFA arbitral tribunal and the arbitral procedure adopted by the latter were not in accordance with the agreement of the parties.

41. With respect to Article V, para. 1(b) of the New York Convention, the Panel notes that the Appellant was given ample opportunity by the IFA Arbitrator to present his case on the merits, even postponing the deadline to file his submission and the hearing date. It is clear from the IFA Arbitrator's award that, in such arbitral forum, the Appellant chose (i) to defend himself only on a procedural basis, (ii) not to submit any evidence or arguments on the merits, and (iii) not to attend the hearing. Accordingly, on the basis of the evidence on file, the Panel finds that the Appellant was given proper notice of the appointment of the arbitrator and of the arbitration proceedings and was given ample opportunity to present his case. This Appellant's argument based on Article V, para. 1(d) of the New York Convention thus fails.

42. Then, the Panel observes that both Appellant's contentions based on Article V, para. 1(d), of the New York Convention unequivocally rest on the assumption that the parties had not agreed to refer their dispute to the IFA Arbitration Institute. However, the Panel found that the IFA Arbitration Institute did have jurisdiction based on the agreement of the parties.

43. As a result, the Panel finds that the composition of the IFA arbitral tribunal (*i.e.* the appointment of a sole arbitrator) and the arbitral procedure followed by the IFA Arbitrator were in accordance with the agreement of the parties. Indeed, Article 14.2 of the Israeli Agents Regulations, which has been contractually binding for both parties since the respective moments when they deliberately registered with the IFA, provide that *"arbitration proceedings shall be conducted in accordance with all the provisions contained in the Arbitration Institute's articles"* (see *supra* at 34). The Panel observes that this is what normally happens in arbitration when an arbitration institution is chosen: the parties are automatically bound to follow the procedural rules of that arbitration institution.

44. The Panel remarks that the Appellant does not contend that the IFA Arbitration Institute did not compose the arbitral authority in accordance with its own rules or that the IFA Arbitrator did not follow the IFA Arbitration Institute's procedural rules. The Appellant rather complains about the non-compliance of the arbitral authority and the arbitral procedure with the FIFA-PSC rules, resting on the underlying premise that the parties had agreed to submit

the dispute to the FIFA-PSC and not to the IFA Arbitration Institute. As the premise is fallacious, the Appellant's argument based on Article V, para. 1(d) of the New York Convention is bound to fail.

Possible recognition under Article V, para. 2, of the New York Convention

45. Article V, para. 2, of the New York Convention sets forth further reasons why an arbitral award may not be recognized:

> *"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:*
>
> *(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
>
> *(b) The recognition or enforcement of the award would be contrary to the public policy of that country".*

46. The Appellant did not invoke Article V, para. 2 of the New York Convention at all. The Panel notes, however, that the requirements set forth by Article V, para. 2, must be checked *ex officio*.

47. As to lit. (a), the Panel notes that in Switzerland all matters having a pecuniary character, such as the present one, are capable of being solved through arbitration (Article 177.1 PILA).

48. As to lit. (b), the Panel cannot see how the recognition and enforcement of the IFA Arbitrator's award, which has stated that the Player owes no money to the Agent, could in any possible way breach Swiss public policy.

49. As a result, Article V, para. 2 of the New York Convention might not impede the recognition of the IFA Arbitrator's award in Switzerland.

The letter allegedly signed by the Player on 2 June 2008

50. The Appellant also argues that the Panel should disregard the IFA Arbitrator's award, and should thus reject the *res judicata* exception, because the Respondent signed a letter on 2 June 2008 by which he recognized that he owed the Agent 807,000 USD as commission fee for his transfer from AIK Solna to Beitar FC. In the Appellant's view, this commitment was undertaken by the Player after the publication of the IFA arbitral award (which is dated 22 October 2007) and, therefore, prevails over it.

51. The Panel must point out that it has some doubts as to the authenticity of such letter as, strangely, the Appellant never mentioned it in his submissions to the FIFA-PSC after 2 June 2008. In any event, the Panel need not decide on the authenticity of such letter. Indeed, even if it were authentic, it could only be relevant to the merits of the case, but it is not relevant at this preliminary stage and it cannot invalidate the procedural exception of *res judicata*. Indeed,

in the letter the IFA Arbitrator's award is not even mentioned and there is no language which could imply that the Player waived his rights deriving from the award; in other words, the IFA Arbitrator's award maintains its full binding force vis-à-vis the parties to the arbitration.

52. Accordingly, the Panel holds that the letter is simply a piece of evidence which perhaps could be relevant to decide whether the Player owes some money to the Agent in connection with his transfer to Beitar FC; however, as already pointed out, due to *res judicata* the Panel may not adjudicate the merits of this case and, thus, may not evaluate the evidentiary value and the relevance of such letter.

Conclusion

53. In conclusion, the Panel has found that the arbitral award issued by the IFA Arbitrator is recognizable in Switzerland and, therefore, it represents a *res judicata* which prevents the Panel from adopting another decision in the same matter.

54. It follows that there is no need for the Panel to address the issue whether the FIFA-PSC could perhaps have a parallel jurisdiction or whether it had no jurisdiction at all. Indeed, once the Panel has found that the IFA Arbitrator's award must be considered as *res judicata* in Switzerland, and the Appellant's claim must thus be dismissed, this becomes a moot issue which the Panel need not adjudicate.

55. For the above reasons, the Panel concludes that it may not entertain the claim filed by the Appellant and must decline to decide upon the merits of the present case.

56. All other arguments or requests or prayers for relief submitted by the parties are hereby rejected.

The Court of Arbitration for Sport rules:

1. The Panel declines to adjudicate the dispute between Mr Dennis Lachter and Mr Derek Boateng Owusu upon its merits.

2. The appeal filed by Mr Dennis Lachter against the decision adopted on 26 June 2009 by the Single Judge of the FIFA Players' Status Committee is dismissed.

(…)

6. All other requests or motions submitted by the parties are dismissed.