Arbitration CAS 2018/A/5585 Konstantin Dudchenko v. Public Fund Football Club Irtysh & Kazakhstan Football Federation (KFF), award of 12 October 2020

Panel: Mr Bernhard Welten (Switzerland), Sole Arbitrator

Football
Outstanding salaries and costs related to the termination of the employment contract
Scope of review of the CAS
Powers to revoke a decision of the national DRC
Registration of the employment contract

1. **Based on Article R57 of the CAS Code, the CAS has full power to review the facts and the law (*de novo* hearing*)*. However, there are some general limits to CAS' full power of review, inherent to the nature of Article R57 and CAS as an arbitral institution. The *de novo* power of review cannot be construed as being wider than that of the appellate body and it is, therefore, limited to the issues addressed in the challenged decision and not to the decisions prior to that.**

2. **In order for the national Dispute Resolution Chamber (DRC) to be competent to revoke its own decisions, the applicable regulations of the national federation must grant the DRC such a right or duty. Moreover, the applicable regulations of the national federation must expressly allow it for the DRC to have the right to do it without any request from an involved party (*"ex officio"*).**

3. **Article 8 para. 2 of the Regulations on the Status and Transfer of Players of the national federation states that one original of the employment contract shall be filed by the club to the national federation. The duty to register the document is the club's obligation, first as the club is a member of the national federation and with this has to follow the federation's rules and second, it is the club's main interest to comply with all obligations of the national federation in order to get a license and be allowed to field a team playing in the national league. Such obligation can obviously not be shifted to the player. Although no rule in the regulations of the national federation so provides, this means that in case the registration with the national federation would be considered a condition for an employment contract or amendment to be valid, the consequences of the non-registration could not be to the player's disadvantage.**

I. PARTIES

1. Mr. Konstantin Dudchenko ("Appellant" or "Player") is a professional football player of

Ukraine nationality. In the saison 2018/19 he was playing for FK Taraz, first division in Kazakhstan.

2. Public Fund "Football Club Irtysh" ("First Respondent" or "Club") is a professional football club based in Pavlodar, Kazakhstan, affiliated to the Kazakhstan Football Federation. The Club plays in the Kazakhstan premier league which is the first division in Kazakhstan.

3. Kazakhstan Football Federation ("Second Respondent" or "KFF") is the football governing body in Kazakhstan, affiliated to the Fédération Internationale de Football Association ("FIFA") and the Union of European Football Associations ("UEFA"). KFF is organizing the Kazakhstan premier league as well as the Kazakhstan national football team.

II. FACTUAL BACKGROUND

A. Facts

4. On 12 March 2014, the Player and the Club signed an employment agreement for the time period of 12 March 2014 until 31 October 2015 (the "Employment Agreement"). The monthly basic salary was agreed to be Kazakhstani Tenges ("KZT") 3,700,000 net.

5. On 12 March 2014 as well, the Player and the Club signed an additional agreement to the Employment Agreement ("Additional Agreement no. 1") in which a bonus payment was foreseen of USD 20,000 paid in Kazakhstani Tenges in the moment when the Player scores 15 or more goals for the Club in official matches. The monthly net salary to be paid in Kazakhstani Tenges was stipulated at USD 20,000 for the time period of 12 March to 31 December 2014 and USD 25,000 from 1 January to 31 October 2015.

6. On 3 June 2015, the Player and the Club signed another additional agreement to the Employment Agreement ("Additional Agreement no. 2") stipulating that the Employment Agreement shall be valid until 15 November 2015 and, thereafter, the employment relation shall continue if no party is terminating the Employment Agreement; the Employment Agreement shall then be considered as closed for an unlimited time period.

7. On 13 November 2015, the Club sent an order to the Player terminating the Employment Agreement on 15 November 2015.

8. On 13 November 2015 as well, the Club sent a "Guarantee Letter" to the Player stating that the remaining payments of USD 76,086 for salary, USD 4,200 for bonus and RUB 244,200 for the Player's medical care will be paid before 15 December 2015.

B. Proceedings before the KFF Dispute Resolution Chamber ("DRC")

9. On 26 January 2016, the Player filed a claim against the Club before the DRC for the payment of the outstanding salary, bonus and costs for his medical care.

10. On 1 April 2016, the DRC held a hearing and decided to approve the Player's claim and condemn the Club to pay USD 78,477 in salary and RUB 244,200 for medical costs (the "DRC Decision").

11. On 12 April 2016, the DRC Decision entered into force as neither the Club nor the Player filed an appeal.

12. On 27 October 2016, the Player complained before the DRC that the Club did not pay its debts based on the DRC Decision of 1 April 2016. Several more statements were filed by the Player in February and March 2017.

13. In October 2016, the Player submitted a request against the Club with the Pavlodar City Court to enforce the DRC Decision of 1 April 2016. In its response, the Club filed a counterclaim and requested that the Additional Agreement no. 1 shall be declared invalid.

14. On 10 November 2016, the Pavlodar City Court decided to partially accept the Player's claim and, on the counterclaim, declared the Additional Agreement no. 1 as invalid.

15. On 28 February 2017, the Pavlodar Regional Court decided based on the Player's appeal to confirm the decision of the Pavlodar City Court of 10 November 2016.

16. On 10 April 2017, the Supreme Court of the Republic of Kazakhstan dismissed the Player's appeal and confirmed the decision of the Pavlodar City Court of 10 November 2016.

17. On 23 May 2017, the DRC revoked its decision of 1 April 2016 based on the decision of the Supreme Court of the Republic of Kazakhstan of 10 April 2017 which was sent to the Club and Player on 26 May 2017 (the "DRC Decision II").

18. On 30 May 2017, the Player requested the reasoning of the DRC Decision II.

19. On 6 June 2017, the Player filed an appeal to the KFF Appeals Committee ("AC") against the DRC Decision II.

20. On 26 July 2017, the AC dismissed the Player's appeal.

21. On 24 January 2018, the DRC sent the reasoning of its decision of 23 May 2017 (the "Appealed Decision") to the Player and the Club. The Appealed Decision stated:

    "1. To cancel the execution of the decision of the DRC dated 1 April 2016 about the repayment of debts by the "Irtysh" football club to the player Dudchenko Konstantin Aleksandrovich, based on the decision of Pavlodar city court dated 10.11.2016, Decree of Pavlodar regional court dated 28.02.2017, Decree of Supreme court dated 10.04.2017.

    2. To inform all interested parties about the decision".

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

22. On 14 February 2018, the Player filed his Statement of Appeal against the Club and the KFF regarding the Appealed Decision pursuant to Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code").

23. On 5 March 2018, the CAS Court Office confirmed that the Statement of Appeal was designated by the Player as his Appeal Brief. Further, the CAS Court Office requested the Respondents to file their Answers within 20 days and asked for a feedback if they agree to submit the case to a sole arbitrator.

24. On 6 March 2018, the Club replied to the CAS Court Office in asking for a panel of 3 arbitrators to decide this case.

25. On 16 March 2018, the KFF agreed that the case shall be decided by a sole arbitrator.

26. On 16 March 2018 as well, the CAS Court Office informed the Parties that it will be for the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the number of arbitrators to decide this case.

27. On 22 March 2018, the CAS Court Office informed the Parties that pursuant to Article R50 of the Code, the President of the CAS Appeals Arbitration Division has decided to submit the present case to a sole arbitrator.

28. On 28 March 2018 respectively on 2 April 2018, the Club respectively the KFF filed their Answers pursuant to Article R55 of the Code.

29. On 10, 12 respectively 15 April 2018, the Club, the KFF respectively the Player replied to the CAS Court Office regarding the question if a hearing shall be held. The KFF and the Player did not request for a hearing to be held, meanwhile the Club requested for a hearing to be held in this case.

30. On 22 May 2018, the CAS Court Office informed the Parties that the present dispute will be submitted to Mr. Bernhard Welten, attorney-at-law, Berne, Switzerland, as Sole Arbitrator.

31. On 1 June 2018, the CAS Court Office informed the Parties about the Sole Arbitrator's decision not to hold a hearing in this case in accordance with Articles R44.2 and R57 of the Code. Nevertheless, the Sole Arbitrator gave the Parties the opportunity to address a few topics in a final round of written submissions.

32. On 10 June 2018, the Appellant filed his final written submissions.

33. On 20 June 2018, the KFF filed its final written submissions.

34. On 26 June 2018, the Club filed its final written submissions. However, as this submission was not timely, the other Parties were invited by the CAS Court Office to state whether they have any objection to the Club's late filing.

35. On 27 June 2018, the KFF as well as the Appellant replied to the CAS Court Office. Meanwhile the KFF stated that it has no objections to the late filing of the Club, the Appellant opposed to this late filing and asked to declare this submission as inadmissible.

36. On 29 June 2018, the CAS Court Office informed the Parties about the Sole Arbitrator's decision to declare the late filing by the Club as untimely and, therefore, not to accept this filing to the file in accordance with article R32 of the Code.

37. On 27 July 2018, the Appellant signed the Order of Procedure.

38. On 30 and 31 July 2018, the Club filed the same letter stating that it is unable to sign the Order of Procedure as there is a court decision of the Supreme Court of the Republic of Kazakhstan in force and the Club is bound by this decision. It further sent translations of the court decisions together with its statement to the CAS Court Office.

39. The KFF did neither send back a signed Order of Procedure nor did it make any comments to such Order.

IV. SUBMISSIONS OF THE PARTIES

40. In the following summaries the Sole Arbitrator will not include every argument put forward to support the Parties' prayers for relief. Nevertheless, the Sole Arbitrator has carefully considered and taken into account all of the evidences and arguments submitted by the Parties but limits his explicit references to those arguments that are necessary in order to justify his decision.

A. Appellant's Submissions and Requests for Relief

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

- As he received the Appealed Decision on 24 January 2018, the Appeal to the CAS of 14 February 2018 was made within the 21-days deadline stated in Article R48 of the Code.

- Based on the Club's counterclaim filed on the Appellant's request for enforcement of the DRC Decision, the Pavlodar City Court decided that the Additional Agreement no. 1 is invalid as it was not registered with the KFF. However, the Additional Agreement no. 1 cannot be invalid only based on the lack of registration with the KFF; the Pavlodar City Court's decision is therefore legally wrong and breaches the KFF Regulations. A missing registration can only lead to sports sanctions based on the KFF Regulations.

- The Club's allegation to not be able to find its copy of the Additional Agreement no. 1 was just made to mislead the court in order to avoid any payments to the Player. The Club never rebutted the authenticity of the Additional Agreement no. 1 and its former general director was not able to give any witness statement as he allegedly deceased before the court hearing was held.

- The obligation to register the Additional Agreement no. 1 is with the Club based on the KFF Regulations (Article 8 para. 2 Regulations on the Status and Transfer of Players, "RSTP"). It is not possible that the lack of fulfilling the Club's obligation serves as a reason to relief the Club from paying the outstanding amounts to the Player. Article 33 para. 1, 2 and 4 of the Labour Code ("LC") of Kazakhstan state that employment agreements shall be made in writing and amendments and modifications shall be made in the form of an additional agreement. Further it states in paragraph 4: *"Invalidity of the employment agreement through employer's fault shall not entail the loss of right to salary, compensation for unused days of the payable annual leave, other payments and benefits"*.. This is further confirmed in Article 39 para. 2 LC. Therefore, even if the Additional Agreement no. 1 should be invalid, this will not lead to the result that the Club is relieved to pay the outstanding salaries, bonus and medical costs to the Player.

- With letter of 13 November 2015, the Club, through its new general director, confirmed the outstanding salary (USD 76,086) and the bonus payments (USD 4,200) as well as the costs for medical care (RUB 244,200) to be paid to the Player until 15 December 2015. This confirmation was never contested by the Club in the court proceedings.

- The Additional Agreement no. 1 cannot be invalid based on the salary stated in USD as the Parties, in accordance to the LC, agreed that such salary shall be paid in the local currency (Article 3 para. 3.2 Additional Agreement no. 1).

- The Club and the KFF breached the KFF, UEFA and FIFA Regulations when the Club did not file an appeal against the DRC Decision but filed a counterclaim with the Pavlodar City Court to declare the Additional Agreement no. 1 as invalid in October / November 2016, more than 6 months later.

- The DRC revoked its own decision of 1 April 2016 which is against Article 79 para. 1 KFF Disciplinary Regulations ("DR") as only the AC has this competence. The state court decisions rendered in this case are not considered "newly discovered evidence". Further, the DRC is not able to revoke its own decisions under Article 45 para. 1 and 2 KFF Regulation on the Status and Transfer of Players ("RSTP") as neither the Player nor the Club filed any application to the DRC to revoke the DRC Decision. In addition, the DRC Decision refers to Article 21 Kazakhstan Civil Code ("CC"). However, based on Kazakh law, on employment matters only the LC shall be applied, but not the CC.

- In CAS 2016/A/4733, the Panel decided that the decision of the DRC of the Russian Football Federation to revoke its own decision based on a Russian court decision declaring a bonus plan as invalid was an illegal action.

42. In his prayers for relief, the Player requests as follows:

"1) To revoke the challenged KFF Dispute Resolution Chamber Decision dated May 23, 2017.

2) To uphold the Decision by KFF Dispute Resolution Chamber dated April 01, 2016.

3) To condemn Public Fund "Football Club "Irtysh" and the Association of Legal Entities "Association "Kazakhstan Football Federation" to the payment of the whole CAS administrative costs, the costs and

fees of the arbitrators, or, more generally, the final amount of the cost of arbitration as per Article R64.4 of the Code of Sports-related Arbitration (edition 2017).

4) To condemn Public Fund "Football Club "Irtysh" and the Association of Legal Entities "Association "Kazakhstan Football Federation" to pay wholly any expenses, connected to the arbitration proceedings, and to pay Mr. Konstantin Dudchenko wholly all his expenses connected to this proceeding, including the costs of legal services and the costs of the services of the interpreters".

43. In the second round of submissions, the Appellant's statements to the topics raised by the Sole Arbitrator in his letter of 1 June 2018, in essence, may be summarized as follows:

- It was the First Respondent's duty to register the Additional Agreement no. 1 with the KFF. This Additional Agreement no. 1 is fully valid, the First Respondent did not bring any proof of the alleged forgery of the signature of its general director. Further, the First Respondent acknowledged the Appellant's claims and guaranteed to pay them in its letter of 13 November 2015. The First Respondent missed the one-year period of limitations to file a claim regarding the possible invalidation of the Additional Agreement no. 1. It was the Pavlodar City Court which decided that the Additional Agreement no. 1 is invalid as it is not registered with the KFF, the signature of the First Respondent's general director is not authentic based on the First Respondent's allegations, however, the court refused to conduct a hand writing analysis requested by the Appellant. Further, the court decided that the guarantee letter of 13 November 2015 does not deserve any attention.
- Article 29 para. 1 of the Law on Physical Culture and Sports ("PCS") grants a professional sports federation amongst others the right to accept documents within the limits of its competence which are mandatory for execution by the subjects of professional sports being members of this sports organization or recognizing it, to organize and conduct sports competitions, to conduct the organization of judging of sports competitions and to exercise control over sports competitions held by professional sports clubs. Therefore, the decisions of KFF authorities are enforced solely by applying disciplinary measures. However, in the case at hand no disciplinary measures were applied on the First Respondent.
- It is important to acknowledge that neither the Appellant nor the First Respondent appealed the DRC Decision to a state court. No state court verified the legality of the DRC Decision. Decisions of KFF authorities cannot be appealed to state courts, but only to the CAS. A state court decision contradicting a decision of a KFF authority does not lead to the nullity of the KFF authority's decision, but only deprives the interested party of the opportunity to use measures of public enforcement for this KFF authority decision.

B. First Respondent's Submissions and Requests for Relief

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

- The Additional Agreement no. 2 was registered with the KFF and, therefore, the Employment Agreement was extended until 15 November 2015. On the other hand, the Additional Agreement no. 1 was not registered with the KFF as foreseen in Articles 11 para. 1 and 12 para. 2 of the Employment Agreement. Therefore, it has no legal binding effect on the Parties. This was confirmed by the Pavlodar City Court which further stated that

salary payments were fully made by the Club and bonus payments could not be asked for by the Player as they should have been detailed in an additional agreement to be an integral part of the Employment Agreement. However, such valid documents could not be provided by the Player.

- The Pavlodar Regional Court confirmed the first instance decision that the Additional Agreement no. 1 is invalid. This was confirmed by the Kazakhstan Supreme Court deciding not to review the case.
- The Additional Agreement no. 1 is not an integral part of the Employment Agreement as it was not registered with the KFF. The Additional Agreement no. 2 which has the same number ("no. 1"), was registered with the KFF and is, therefore, valid.
- The Player missed the deadline to appeal the DRC Decision II; first, he should have appealed the decision to the AC. However, the Player did not appeal the DRC Decision II to the AC; therefore, his appeal to CAS is not possible. Based on Article 83 para. 2 DR, the Player should have appealed the DRC Decision II to the AC within 7 calendar days after having received the reasoning (Appealed Decision). The Player filed his appeal to CAS after 9 months only. He missed the deadlines.

45. In its prayers for relief, the Club requests as follows:

"- To withdraw in full volume consideration of appeal of Dudchenko K. to FC "Irtysh" and FFK, because of absence of order of appeal by authorities established by legislation and provided by rules of FFK and FIFA;

- *To withdraw in full volume consideration of appeal of Dudchenko K., because of breach of procedural deadlines for appeal the decision, provided rules of FFK, FIFA and by the Code of CAS;*
- *To withdraw in full volume consideration of appeal of Dudchenko K., because dispute was resolved by state courts. State courts accepted juridical decisions, which were entered into legal force.*
- *To withdraw in full volume consideration of appeal of Dudchenko K., because he breached all rules for appeal and also illegally abused his right".*

46. As the Club filed its final submission after the deadline set by the CAS Court Office, the Sole Arbitrator decided on 29 June 2018 that this untimely submission will not be accepted in the file in accordance with Article R32 of the Code.

C. Second Respondent's Submissions and Requests for Relief

47. KFF's submissions, in essence, may be summarized as follows:

- Based on Article 37 RSTP, the DRC is competent to decide on all disputes between football entities in connection with violations of regulations. Based on Article 22 FIFA RSTP, FIFA is competent to decide on disputes, but a player or club has the possibility without prejudice to go in front of civil courts for employment-related disputes. Therefore, the Player and Club did not breach FIFA and KFF Regulations when they went before the civil courts in this employment-related matter.

- Based on Article 1 para. 3 CC, civil law in general may be applied on employment matters in case when such relations are not regulated by the LC, codes etc. Therefore, the court was

correct in applying civil law in this case.

- Any state body or legal entity like the KFF and the Club have to follow the judicial acts entered into force like the Supreme Court decision of 10 April 2017 based on Article 21 of the Civil Procedure Code ("CPC") of Kazakhstan. Therefore, the KFF and its organ, the DRC, have to follow such state court decisions which became enforceable.

- The state courts have jurisdiction in civil cases like e.g. employment matters based on Article 2 para. 2 CPC. Therefore, the state courts were competent to decide this case.

48. In its prayers for relief, the KFF requests as follows:

"1. To reject the Appellant's demands, claims regarding the cancellation of the decision of the KFF DRC dated 23 May 2017;

2. To keep in force the decision of the KFF DRC dated 23 May 2017".

49. In the second round of submissions, the Second Respondent's statements to the topics raised by the Sole Arbitrator in his letter of 1 June 2018, in essence, may be summarized as follows:

- It cannot comment on the proceedings before the Pavlodar City Court as it was not a party in these proceedings.

- Based on Article 29 para. 1 PSC, of 3 July 2014, sports federations like the KFF have within the limits of its competence *"the right to accept the documents, which are obligatory for execution by subjects of professional sports, who are members of this sports federation or who recognize this federation"*. The Appellant used his constitutional rights in accordance to Article 13 of the Constitution to protect his rights and freedoms when claiming before the Pavlodar City Court to get paid by the First Respondent. Based on the applicable Civil Code and Civil Procedure Code, the First Respondent was able to file a counterclaim. After the Appellant has filed an "appeal" to the Pavlodar City Court, the DRC could no longer apply Article 29 para.1 PCS and, therefore, had no opportunity to take the necessary measures for implementing its decision of 1 April 2016 (DRC Decision). As the Supreme Court decision became enforceable, the DRC could not keep in force the DRC Decision.

- As the KFF is a non-commercial organization and not a state body, the Civil and Civil Procedure Law do not provide for a procedure to appeal a decision of such non-commercial organization before state courts. Based on Article 17 of the KFF Statutes all appeals against final and binding decisions of the KFF shall be filed to the CAS. Important to consider is that the Appellant and the First Respondent filed their claims before the Pavlodar City Court within a labor dispute and not within the framework of the appeal against the DRC Decision.

- The Pavlodar City Court had the competence to review the claim of the Appellant and the counterclaim of the First Respondent and with this deciding that the Additional Agreement no. 1 was invalid. Apparently, the Appellant was not able to proof that this Additional Agreement no. 1 was valid.

V. JURISDICTION

50. Article R47 of the Code provides as follows:

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

51. Article 17.1 KFF Statutes provides that against final and binding decisions of KFF authorities an appeal to the CAS is possible. In this relation, the Club points out that Article 79 para. 3 DR states that decisions made by the AC are final and binding on all interested parties, subject to an appeal to the CAS.

52. Formally, the Appellant appealed the DRC decision of 24 January 2018 which is, based on the KFF regulations, not the final and binding decision based on Article 79 para. 3 DR. However, the DRC Decision II and the Appealed Decision are exactly the same decisions with the only difference that the Appealed Decision included the reasoning. As the AC did already dismiss the Appellant's appeal against the DRC Decision II (no reasoning contained) on 26 July 2017 and, therefore, without having the reasoning of the DRC, it did not make sense for the Appellant to file a second appeal to the AC against the same DRC decision, even if on 24 January 2018 the Appealed Decision included the reasoning. It is obvious that the AC would have rejected such second appeal against the "same" decision as well.

53. The Sole Arbitrator concludes that based on the before stated facts which have been confirmed by the Parties, the proceedings before the KFF authorities do not fully comply with a due process. It remained uncontested by the Parties that generally CAS has jurisdiction to decide on appeals against final decisions of KFF authorities. This is confirmed by Article 17 KFF Statutes and Article 79 para. 3 DR. In its written submissions, the Club and KFF mainly pointed out that there is an enforceable state court decision from the Kazakhstan Supreme Court which, in their view, excludes the appeal to CAS. This is also the reason given by the Club to not sign the Order of Procedure. The KFF, on the other hand, never replied to the CAS Court Office regarding the Order of Procedure to be signed.

54. MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Article R47, n. 12 states: *"In summary, if the legal remedies have not been exhausted prior to the appeal at CAS, the door is closed and CAS cannot entertain such appeal. The consequence is that the appeal would be dismissed for lack of jurisdiction".* In relation to the exhaustion of legal remedies they further state in n. 35: *"However, the fulfilment the exhaustion of legal remedies may be waived if the remedies do not exist or are illusory. Specifically, for sporting disputes, the obligation to exhaust internal remedies does not apply in certain circumstances where it could not be reasonably requested. ... Therefore, only if the association's internal instances are willing and able to grant effective legal protection do the appellant have the right to impose the exhaustion of internal remedies prior to the appeal to the CAS (CAS 2008/A/1583&1584). The Appellant should show that he exhausted the legal remedies, their non-existence or their illusory character (CAS 2003/A/534)".*

55. The Respondents do not bring forward any allegations that the Appeal to the CAS is premature. Only the Club alleged that the Appellant did file his Appeal to CAS too late as such appeal

should have been filed against the decision issued by the DRC on 23 May 2017 (DRC Decision II), in its view. As the Sole Arbitrator has pointed out before, this allegation is wrong and the Appellant followed the KFF regulations in first asking the DRC to issue the reasonings to its decision and second appealing the DRC Decision II to the AC. The Sole Arbitrator is further of the opinion that the Appellant was not able to appeal the AC decision of 26 July 2017 to CAS, on one hand, as there was no reasoning, neither of the DRC Decision II, nor of the AC decision of 26 July 2017 and, on the other hand, as based on Article 83.2 DR – stating that within seven days after receiving a decision of the first instance, the interested party can ask for the reasoning of such decision –, theoretically, the Appellant should be able to ask for the reasoning of the AC decision. However, reading this article makes it clear that it is not applicable on AC decisions, as it explicitly refers to the first instance authority only. The Appellant, therefore, followed correctly the KFF regulations in filing an appeal to the AC against the DRC Decision II, even if such decision did not include any reasoning so far. The reasoning of a decision is a part of the outcome of the common principle of the right to be heard (see also Article 6 para. 1 European Convention on Human Rights). Therefore, the Appellant kept his right to appeal to CAS against the Appealed Decision which was issued on 24 January 2018 only.

56. In the Sole Arbitrator's view, a correct due process followed by the AC would have been that the AC should have suspended the appeal proceedings requested by the Appellant until the reasoning of the DRC Decision II was issued and, thereafter, grant the Appellant another deadline to amend his appeal filed on 6 June 2017. In order to protect the involved Parties in such proceedings not corresponding to a due process, the Sole Arbitrator is of the opinion, that even if the Appealed Decision is formally not the final and binding decision of a KFF body (Article 79 DR), the competent AC decided prematurely on the Appellant's appeal against the DRC Decision II (with no reasoning included) on 26 July 2017 and with this violated the standards of a due process and the Appellant's right to be heard. A second appeal to the AC against the Appealed Decision would just have an illusory character as the AC already decided such appeal on 26 July 2017; the DRC Decision II and the Appealed Decision are the same decisions with the sole difference of the reasoning included in the Appealed Decision.

57. The Sole Arbitrator is, therefore, of the opinion that based on Article 17 KFF Statutes and Article 79 para. 3 DR, the CAS has in fact jurisdiction to hear the Appeal.

VI. ADMISSIBILITY

58. The Club alleges that the Appellant did miss the deadline to appeal the DRC Decision II issued on 23 May 2017 as such decision was first not appealed to the AC and the appeal to CAS was only filed nine months after such decision.

59. This allegation of the Club is refuted by the KFF's confirmation that the Appellant timely filed an appeal against the DRC Decision II to the AC on 6 June 2017 and such appeal was rejected with the AC decision of 26 July 2017.

60. The Sole Arbitrator takes from the documents on file that the DRC Decision II was sent to the

Parties on 26 May 2017. On 30 May 2017, the Appellant requested the DRC to send a fully reasoned decision to the Parties. Further, on 6 June 2017, the Appellant filed his appeal to the AC. On 26 July 2017, the AC decided not to accept the appeal of the Player; no reasoning was given by the AC. Finally, on 24 January 2018, the fully reasoned Appealed Decision was sent to the Parties. Within 21 days, respectively on 14 February 2018, the Appellant filed his Appeal to the CAS. Beside the Player's request for the reasoning of the DRC Decision II, filed within 7 days of its receipt, the Appellant further filed an appeal to the AC on 6 June 2017 and, therefore, within the 10-days deadline stated in Article 83 para.1 DR. The AC dismissed such appeal on 26 July 2017, without waiting for the DRC to send the reasoning of its decision to the Parties.

61. In view of the before stated facts which have been confirmed by the Parties, the Sole Arbitrator holds that it is uncontested that the Appellant filed his Appeal within the 21-days deadline of the Appealed Decision received on 24 January 2018. Formally, the Appellant, therefore, acted within the deadlines stated in the KFF regulations as well as in Article R49 of the Code.

62. Based on the before stated facts, it follows that the Appeal is admissible.

VII. APPLICABLE LAW

63. The law applicable in the present arbitration is identified by the Sole Arbitrator in accordance with Article R58 of the Code, which provides the following:

"The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

64. The Appellant refers to several articles of the Employment Agreement and concludes that beside the FIFA, UEFA and KFF regulations, subsidiarily, the law of the Republic of Kazakhstan shall be applicable. In their written submissions, neither the Club nor KFF refer to the applicable law.

65. The Employment Agreement states in Articles 2.2.20 and 2.5.21 that the Parties shall comply with the FIFA, UEFA and KFF regulations. Further, Articles 2.3 and 2.6 state that the Parties shall have other rights stipulated in the Labour Code of the Republic of Kazakhstan and, finally, Article 12.3 of the Employment Agreement states that *"All relations between the Parties, not regulated hereby, shall be regulated by the current legislation of the Republic of Kazakhstan".*

66. The Sole Arbitrator is, therefore, of the opinion that based on the Employment Agreement primarily the FIFA, UEFA and KFF regulations and, subsidiarily, Kazakh law shall apply.

VIII. MERITS

67. The Sole Arbitrator recalls that it is undisputed by the Parties that with the decision of 1 April 2016 (DRC Decision), the DRC decided a litigation between the Player and the Club in favor

of the Player. Further, as the Club did not pay the amount awarded to the Player in the DRC Decision, the Player tried to enforce this DRC Decision in front of the competent state courts. During these proceedings, the Club filed a counterclaim before the Pavlodar City Court in October/November 2016, some 7 or 8 months after having received the DRC Decision. On 10 November 2016, the Pavlodar City Court as first instance court accepted this counterclaim and declared the Additional Agreement no. 1 as invalid. This was confirmed by the Pavlodar Regional Court with decision of 28 February 2016 as well as on 10 April 2017 by the Supreme Court of the Republic of Kazakhstan. Based on this Supreme Court decision, the DRC revoked its decision of 1 April 2016 in its decision of 23 May 2017 (DRC Decision II). Against this DRC Decision II, the Player filed an appeal to the AC which dismissed the appeal on 26 July 2017. Upon the Players request of 30 May 2017, the DRC sent the reasoning of its decision to the Parties on 24 January 2018 (Appealed Decision). Against this reasoned DRC decision, the Player filed his Appeal to CAS. The DRC Decision II and the Appealed Decision are the same decision with the difference that the latter includes a reasoning. Based on these facts and the prayers filed by the Appellant, the Sole Arbitrator has to specially look at the competences he has based on Article R57 of the Code in considering the competences of the KFF authorities and the state courts as well as the procedural rights of the Parties. The main question to be answered will be if the DRC Decision II respectively the Appealed Decision are legally binding and if not what the consequences are.

68. The Sole Arbitrator sees, therefore, the following issues to be resolved:
    1. Scope of review of the CAS in this matter?
    2. DRC decision of 1 April 2016 as final and binding?
    3. Enforcement of the DRC Decision / counterclaim filed by the Club
    4. Validity of the DRC decision of 23 May 2017
    5. Validity of Additional Agreement no. 1
    6. Consequences

1. Scope of review of the CAS in this matter?

69. Based on Article R57 of the Code, the Sole Arbitrator has the full power to review the facts and the law (*de novo* hearing). However, there are some general limits to CAS' full power of review, inherent to the nature of Article R57 of the Code and CAS as an arbitral institution. The *de novo* power of review cannot be construed as being wider than that of the appellate body and it is, therefore, limited to the issues addressed in the challenged decision and not to the decisions prior to that (s. MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Article R57, n. 54 s.).

70. Therefore, in the case at hand the Sole Arbitrator is limited to the issues raised in the DRC decision of 23 May 2017 (DRC Decision II and Appealed Decision) being the appealed decision and he has the competence to decide if such decision is legally binding or null and void. Important is, however, that the Sole Arbitrator cannot look into the reasoning of the DRC decision of 1 April 2016 (DRC Decision) as this is a decision prior to the DRC Decision II respectively the Appealed Decision. The Sole Arbitrator is limited to review the DRC Decision

II and the Appealed Decision which are the same decision.

71. Looking at the prayers filed by the Appellant, the Sole Arbitrator is satisfied to see, in view of the before mentioned limitations to the *de novo* hearing, that such prayers, especially no. 1 and 2, do fully respect his competence limited to decide on the validity of the DRC Decision II respectively the Appealed Decision and its consequences.

2. DRC decision of 1 April 2016 as final and binding?

72. On 1 April 2016, the DRC issued its decision in which it stated that the Club has to pay to the Player an amount equivalent to USD 78,477 for salaries and RUB 244,200 for the medical treatment incurred by the Player and such payment shall be made until 30 April 2016 the latest. Further, in accordance to the applicable KFF regulations, it stated that this decision may be appealed to the AC.

73. The Club, in its Answer pointed out to Articles 79 and 83 DR in which is stated that decisions of the DRC may be appealed to the AC within 10 days after having received such decision.

74. It remained uncontested by the Parties that the DRC decision of 1 April 2016 was not appealed to the AC, and, therefore, 10 days later respectively on 12 April 2016, this DRC Decision became final and binding in accordance to the KFF regulations. The Sole Arbitrator, therefore, confirms that the DRC decision of 1 April 2016, possibly received by the Parties on 2 April 2016, became final and binding on 12 April 2016 as no appeal was filed to the AC within the deadline of 10 days foreseen in the KFF regulations.

3. Enforcement of the DRC Decision / counterclaim filed by the Club

75. The Appellant points out in his submission of 10 June 2018 that the KFF as a sports federation is a non-commercial organization having the rights based on Article 29 PCS to amongst others determine the structure for conducting sports competitions, conduct the organization of judging of sports competitions and exercise control over sports competitions held by professional sports clubs. In the Appellant's view, this shows that the KFF is not an authority having state power like e.g. to apply measures of public enforcement like arrest, foreclosure sale etc. The KFF has, therefore, only the power to issue disciplinary measures against non-complying members like professional sports clubs as the First Respondent. As the Club did not pay him the amounts stated in the DRC Decision, the Player had no other choice than to go in front of state courts in order to enforce the DRC Decision with the scope to get paid by the Club.

76. The KFF in its submission of 22 June 2018 states that based on Article 29 para.1 PCS, it has *"within the limits of its competence, the right to accept the documents, which are obligatory for execution by subjects of professional sports, who are members of this sports federation or who recognize this federation. That is, the KFF DRC, having made a decision dated 1 April 2016, accepted a document which are obligatory for the FC "Irtysh", that is, for the entity that recognizes the KFF"*. In other words, the KFF states that the DRC had the right to accept the Additional Agreement no. 1. However, the KFF further

explains that in its view, based on the hierarchy of applicable legal norms, the Appellant was free to file his claim before the Pavlodar City Court in order to enforce his claim against the Club. The KFF states that the Appellant "appealed" to the Pavlodar City Court and for this reason, the DRC had no opportunity to take the necessary measures for implementing and enforcing its decision of 1 April 2016. On the other hand, the KFF points out that the DRC was not allowed based on the hierarchy of applicable legal norms within Kazakhstan to keep its decision of 1 April 2016 in force as state court decisions are binding on all state bodies and legal entities. In relation to the possible appeal against a DRC decision before a state court, KFF states that Kazakh law does not foresee any procedure to appeal final decisions of non-commercial organizations to state courts. Further, in accordance with Article 17 KFF Statutes *"all appeals against for final and binding decisions of the KFF are considered by the CAS"*. The KFF is of the opinion that the Appellant and the Club filed their claims before the Pavlodar City Court as labor disputes and not as appeals against the DRC Decision. For the Sole Arbitrator this is a clear contradiction in the reasoning of the KFF as it mentioned before that the Player and Club did appeal the DRC Decision to the Pavlodar City Court. The Sole Arbitrator, however, acknowledges that no appeal or claim against the DRC Decision as a decision of a non-commercial association to a state court is possible respectively foreseen in the law of Kazakhstan.

77. As the Club filed its statement only on 26 June 2018 and, therefore, outside of the time limit set by the CAS Court Office, the Sole Arbitrator decided on 29 June 2018 to not accept this statement to the file. Therefore, the Club's statement cannot be considered in this decision.

78. The Sole Arbitrator takes note that between the Parties it is uncontested that the KFF is a non-commercial association and the DRC is an organ within such association. In looking at this structure, the Sole Arbitrator is satisfied to see that also under the laws of Kazakhstan an association has certain rights to freedom and is able to organize and govern itself within the boundaries of the laws of Kazakhstan. Based on the statements filed by the KFF, it is clear to the Sole Arbitrator that in the laws of Kazakhstan there does not exist any rule regarding the legal respectively procedural possibility to appeal a decision of an association, such as the KFF, to a state court. It is uncontested by the Parties that no legal remedies were filed by any Party against this DRC Decision. Based on these statements and facts, the Sole Arbitrator is of the opinion that the DRC Decision entered into force, became a final and binding decision of an organ of the KFF, and, therefore, could in principle no longer be appealed to the AC and subsequently to the CAS, respectively to state courts, in lack of any legal basis in Kazakh law. This means that the Pavlodar City Court had theoretically no legal basis to entertain the same matter and, therefore, was not allowed to review and change the final and binding DRC Decision. However, it is not the Sole Arbitrator's task in these proceedings to decide on the validity of the state court decisions, as he is restricted to the questions if the DRC Decision II respectively the Appealed Decision is valid and legally binding.

79. Based on the applicable KFF regulations, the correct proceedings after having received a reasoned DRC decision are: appeal to the AC within 10 days or the decision becomes final and binding; after receiving a reasoned AC decision: appeal to CAS within 21 days. Based on the statements received by the KFF, there exists no rule in Kazakh law to allow an appeal or claim against the decision of a non-commercial organization like the KFF. Therefore, the Sole

Arbitrator has serious doubts that the counterclaim filed by the Club seven or eight months (April to October/November 2016) after having received the DRC Decision is possible, also because it clearly exceeded any deadlines of the KFF regulations mentioned before. In other words, when the Pavlodar City Court accepted the Club's counterclaim, it most probably went against a *res judicata*. The Sole Arbitrator is of the opinion that the DRC Decision did become final and binding and, therefore, enforceable.

4. Validity of the DRC Decision of 23 May 2017

80. With its decision of 23 May 2017, the DRC has revoked its own decision of 1 April 2016. This was done based on the Supreme Court decision of Kazakhstan of 10 April 2017. The Parties have received the DRC Decision II respectively the reasoning of this decision on 24 January 2018 (Appealed Decision). The DRC refers in its decision to Article 21 Civil Code of the Republic of Kazakhstan and Article 37 RSTP. Article 37 RSTP gives the authority to the DRC to decide any dispute between football entities, like the Player and the Club, in connection with the violation of provisions of the KFF regulations. The Sole Arbitrator, however, is of the opinion that this Article gives no power to the DRC to revoke its own decision, even more without any request of an interested party to do so. Para. 2 of Article 37 RSTP states that the DRC decisions are binding for all football subjects. Nevertheless, the Club filed a counterclaim against the Player's request of enforcement respectively against the DRC Decision. Based on the before mentioned Articles, this should be considered as a breach of the KFF regulations committed by the Club. However, as the Sole Arbitrator is limited to look into the DRC Decision II respectively the Appealed Decision, no further reasoning is given in relation to the court proceedings caused by the Club's counterclaim and with this the possible breach of KFF regulations.

81. In order for the DRC to be competent to revoke its own decision, the applicable KFF regulations must grant the DRC such a right or duty to revise its own decisions based on new facts and possibly without any request from an involved party (*"ex officio"*). It remained uncontested that none of the Respondents did file any such request to the DRC to revoke the DRC Decision. In these proceedings, neither the Club nor the KFF have provided any applicable rule giving the DRC the competence to revoke its own decision. The Appellant, however, points out to Article 79 DR which states: *"The Appeal Committee may confirm, change, revoke or submit decisions of the legal bodies for a new revision"*. Based on this Article, it is for the AC to confirm, change, revoke or submit decisions of the DRC. The Sole Arbitrator understands Article 79 DR in the sense that any such decision of the AC is only done based on a party's formal appeal or request for revision. However, the AC is never acting *ex officio*, unless any clause in the applicable KFF regulations would foresee such acting *"ex officio"*. The Sole Arbitrator has not seen any such clause giving the AC the right to act *"ex officio"*. Further, the Respondents have not alleged or brought any proofs that such a clause exists in the KFF regulations.

82. Based on the general rule of the burden of proof, which lies regarding the alleged acting *"ex officio"* of the DRC with the Respondents, the Sole Arbitrator is of the opinion, not checking if the state court proceedings were done in breach of the applicable rules of law in Kazakhstan,

the DRC acted at will and outside of the applicable KFF regulations when revoking its decision of 1 April 2016 *ex officio*. Further, based on the applicable KFF regulations, it is clear to the Sole Arbitrator that the DRC does not have jurisdiction to revoke its own decision, not even based on a request of an involved party. It is up to the AC to take such a decision. As mentioned before, it is uncontested by the Parties that the Respondents did not file such a request to the AC. Therefore, the Sole Arbitrator is of the opinion that the DRC Decision II respectively the Appealed Decision was taken in breach of the applicable KFF regulations and, as a consequence, it has to be considered as null and void.

5. Validity of Additional Agreement no. 1

83. The Respondents refer to the state court decisions which, in short, declare the Additional Agreement no. 1 as invalid as it was not registered with the KFF. In other words, all of the involved state courts considered the registration requirement as a condition for the validity of such agreements.

84. The Appellant on the other hand, alleges that the KFF can only impose disciplinary measures in case employment contracts and/or amendments are not registered with the KFF, however such documents remain valid anyway.

85. Even if the scope of the Sole Arbitrator's review in these proceedings is limited to the DRC Decision II respectively the Appealed Decision and with this excludes a decision about the validity of the Additional Agreement no. 1, the Sole Arbitrator thinks that it is important to state a few principles regarding the not registered Additional Agreement no. 1. Articles 11.1 and 12.2 of the Employment Agreement state that the registration of the Employment Agreement as well as amendments thereto are mandatory. However, the Employment Agreement does not state if such mandatory registration with KFF is a condition for its validity, respectively what the consequences are if they are not registered. Neither Party did bring any proof that such registration with the KFF is a condition for the validity of an employment contract or its amendments. The law in Kazakhstan does further not foresee any such condition for an agreement to be valid. The DRC Decision did accept the Appellant's claim and with this considered the Additional Agreement no. 1 as valid. In this relation it is important that the duty to register a document is the Club's obligation, first as the Club is a member of the KFF and with this has to follow the federation's rules and second, it is the Club's main interest to comply with all obligations of the national federation in order to get a license and be allowed to field a team playing in the national league. Article 8 para. 2 RSTP states that one original of the employment contract shall be filed by the club to the KFF. Such obligation can obviously not be shifted to the player. This means that in case the registration with the KFF would be a condition for an employment contract or amendment to be valid, the consequences of the non-registration cannot be to the player's disadvantage. This is further confirmed by Article 33 para. 4 LC in which is stated that in case of the invalidity of the employment contract through the employer's fault, the employee shall not lose his rights to salary, compensation for unused holidays or other payments and benefits. The Player, therefore, would still be entitled to get his salary payment, even if the Additional Agreement no. 1 or even the Employment Agreement as such would be considered as null and void based on the Club's lack to register it with the KFF.

86. In the case at hand, the Sole Arbitrator can leave the question open if the Additional Agreement no. 1 is considered as valid or not based on the lack of registration with the KFF. It seems that this question was already decided in a final and binding way by the DRC on 1 April 2016. As stated before, the Sole Arbitrator has no competence to look into this DRC Decision or the state court decisions, but considering amongst others, Article 33 para. 4 LC, he has certain doubts that based on the non-registration the Additional Agreement no. 1 could be invalid and deprive the Player from receiving his salary and bonus payments.

6. Consequences

87. Based on the statements made before, it is clear to the Sole Arbitrator that the DRC Decision entered into force and became binding on the involved Parties. In the light of the limited CAS jurisdiction in this case, the Sole Arbitrator is not entitled to rule on the validity of the state courts' decisions leading to the Appealed Decision. However, the Sole Arbitrator agrees with the Player's requests that the DRC Decision II respectively the Appealed Decision, being the DRC Decision II with reasoning, are null and void based on mainly two reasons: First, the DRC has no competence to revoke its own decisions, as the abrogation lies within the competence of the AC. Second, the AC did not receive a request from any Party to revoke the DRC Decision and no proofs were given by the Respondents that the DRC or the AC have the competence to revoke a former decision *"ex officio"*. In addition, the DRC Decision entered into force as no appeal to the AC or subsequently to the CAS were filed by the Respondents.

88. As a consequence, the Sole Arbitrator is accepting the Appeal against the DRC Decision II respectively the Appealed Decision and declares it as null and void.

DECISION

The Court of Arbitration for Sports rules that:

1. The appeal of Konstantin Dudchenko against Public Fund "Football Club Irtysh" and Kazakhstan Football Federation is partially upheld.

2. The decision of the Kazakhstan Football Federation's Dispute Resolution Chamber of 23 May 2017 revoking its decision of 1 April 2016 is declared as null and void.

3. (…).

4. (…).

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