



Arbitration CAS 2007/A/1322 Giuseppe Giannini, Corrado Giannini & Pasquale Cardinale v. S.C. Fotbal Club 2005 S.A., award of 15 April 2008

Panel: Prof. Ulrich Haas (Germany), President; Prof. Massimo Coccia (Italy); Mr Stuart McInnes (United Kingdom)

Football

Termination of employment contracts with coaches

CAS power of review

Notification of the decision for the purposes of the time-limit to appeal to the CAS

Choice of law made during the course of proceedings

Interpretation of a contractual clause

Application of the RSTP to coaches

Absence of just cause

Compensation for termination of contract

1. **The CAS, acting as a genuine appeal instance, can set aside, amend or uphold the initial decision and this power does not depend on whether the appeal is (also) directed against the legal entity, whose judicial organs made the appealable decision.**
2. **For the purposes of the running of time for the deadline for appealing to the CAS, “notification of the decision” can only mean the announcement of the full decision; for it is only with the full decision that the person affected can assess the litigation risk associated with a further judicial instance. However, if it is only then that he is able to review the chances of his appeal succeeding, he can only be expected to undertake that review after that point in time with the consequence that the period does not start to run before then.**
3. **A choice of law made during the course of the proceedings is perfectly lawful under Swiss arbitration law. This is also the case for the choice of a non-national law, such as the sports rules and regulations of sports associations.**
4. **The interpretation of a contractual clause depends primarily on the concurring subjective wills of the parties and not on the will that was declared objectively.**
5. **Although the FIFA Regulations for the Status and Transfer of Players (RSTP) only regulates the status and the transfer of football players, the case law of the CAS treats coaches and players equally when contract disputes with the clubs are concerned. Furthermore, the provisions on contractual stability in the RSTP contain general legal principles which require the RSTP to be applied analogously to coaches in view of the identical interest that players and coaches have.**

6. **A sporting ground such as the weak performance of a coach does not give rise to “just cause” for the termination of a contract. A coach does not owe a particular outcome, rather only the rendering of services.**
7. **It follows from Article 17(1) RSTP that the amount of the compensation claim depends on, *inter alia*, the remaining term of the contract. This makes it clear that the obligation to pay compensation is in any event intended to replace the prime obligation of occupying the athlete and the rendering of the sporting performance owed. If, therefore, a party has terminated the contract without “just cause”, then according to Article 17(1) RSTP the contract is deemed to have terminated at that moment. In lieu of a claim for remuneration the other party has a claim to compensation from that moment onwards. Notwithstanding the claim for compensation, the claims to remuneration that are attributable to the period prior to termination of the contracts remain.**

Mr Giuseppe Giannini (the First Appellant”), was born on 20 August 1964 and is a first category professional coach registered with the Italian Football Federation (FIGC). Mr. Corrado Giannini was born on 21 January 1971 and is a second category professional coach registered with the FIGC. Mr Pasquale Cardinale was born on 4 February 1974 and is a fitness coach registered with the FIGC. The First, Second and Third Appellants (the “Appellants”) are Italian citizens. The FIGC is a member of the Fédération Internationale de Football Association (FIFA). The latter is an association established in accordance with Article 60 of the Swiss Civil Code and has its seat in Zurich (Switzerland).

S.C. Fotebal Club 2005 S.A. Piteste (“the Respondent”) is a football club in the city of Piteste, which is situated in the region of Arges in Romania. The Respondent is a member of the Romanian Football Federation (RFF), which in turn is also a member of FIFA.

On 7 June the First Appellant concluded a contract with the Respondent. The contract was drawn up in Romanian and in Italian. The English translation of the contract, which remains undisputed by the parties, reads – *inter alia* – as follows:

“Article 1 Object

1.1 The object of this hereby Convention is the provision of sport services by the Trainer / sportsman to the Club, for the training and the participation to the football competitions, respectively the training and the exercise of the senior team participating at the Championship of the A Division, as well as the participation to the training meetings (exercises) and the effective participation (according to the arbitration sheet) to the football games performed by the teams of the Club, with the respect and conditions of the status and the regulations of the Romanian Football Federation, of the Professional Football League, of the FIFA and of the UEFA ...

Article 2 Duration

2.1 This hereby Convention is concluded on a period between July 1st, 2006 until June 30th, 2007, under the reserve of the fulfilment of the following cumulative conditions:

a. *The holding of the trainer licence according to the requirements of the sport Regulation of the FRF, LPF, FIFA and the UEFA.*

b. *The obtaining from the FRF of the professional player licence.*

(...)

Article 3 Price

In exchange of the provision by the Trainer / sportsman of the services making the object of this hereby Convention, respectively those indicated at article 1.2 Letter a), the Club shall pay to this one the following gross amounts, where the Club shall calculate and shall transfer to the state budget the income tax with retention at the source, respectively 10% representing the incomes from independent activities:

a) *on a monthly basis: 8667 Euro, payable until the date of 10th of each contracting month, for the previous month;*

b) *100.000 Euro for the classification of the senior team of the company S.C. Fotbal Club 2005 S.A. Arges on one of the 1-3 places at the end of the National Championship A Division –edition 2006/2007;*

c) *50.000 Euro for the classification of the senior team of the company S.C. Fotbal Club 2005 S.A. Arges on one of the 4-6 places at the end of the National Championship A Division –edition 2006/2007.*

3.2 In addition to the amounts provided at point 3.1., the Club shall bear, based on justifying documents, the following costs:

- expenditures with accommodation and lunch, with an apartment rented by the club and dwelled by the trainer;*
- expenditures representing the counter value of 20 aerial bouts on the route Bucharest – Rome business class;*
- expenditures with a cell phone with the possibilities of international calls.*

3.3 The Club shall make available to the Trainer / sportsman a vehicle for internal transportation.

(...)

Article 4 Payment

4.1 The amounts calculated and due to the Trainer / sportsman according to this hereby Convention shall be paid in lei, at the reference exchange rate of the National Bank of Romania from the day of payment.

(...)

Article 8 Cessation

8.1 This hereby Convention is ceasing within the following situations:

a) *on the expiration of the period for which it has been concluded, if the parties do not agree its extension;*

b) *through the written agreement of the parties;*

c) *through termination by the Club if the Trainer is not holding the trainer licence according to the requirements of the sport Regulations or if the Sportsman does not obtain the professional player licence or if these Licences are retired or cease.*

(...)"

The Second Appellant likewise concluded a contract with the Respondent on 7 June 2006. Said contract was also drawn up in Romanian and in Italian and is almost the same, word-for-word, as the First Appellant's contract. However, there are differences – inter alia – with regard to the following provisions:

“Article 1 Object

1.1 The object of this hereby Convention is the provision of sport services by the second Trainer / sportsman to the Club, for the training and the participation to the football competitions, respectively the training and the exercise of the senior team participating at the Championship of the A Division, as well as the participation to the training meetings (exercises) and the effective participation (according to the arbitration sheet) to the football games performed by the teams of the Club, with the respect and conditions of the status and the regulations of the Romanian Football Federation, of the Professional Football League, of the FIFA and of the UEFA ...

Article 3 Price

In exchange of the provision by the Trainer / sportsman of the services making the object of this hereby Convention, respectively those indicated at article 1.2 Letter a), the Club shall pay to this one the following gross amounts, where the Club shall calculate and shall transfer to the state budget the income tax with retention at the source, respectively 10% representing the incomes from independent activities:

a) on a monthly basis: 2.500 Euro, payable until the date of 10th of each contracting month, for the previous month;

b) 15.000 Euro for the classification of the senior team of the company S.C. Fotbal Club 2005 S.A. Arges on one of the 1-3 places at the end of the National Championship A Division –edition 2006/2007;

3.2 In addition to the amounts provided at point 3.1., the Club shall bear, based on justifying documents, the following costs:

- expenditures representing the counter value of 20 aerial bouts on the route Bucharest – Rome;

- expenditures with a cell phone with the possibilities of international calls.

(...)”

Finally, the Third Appellant also concluded a contract with the Respondent on 7 June 2006. Said contract is also in Romanian and in Italian. Said contract also largely corresponds to the others, but contains - inter alia - the following special terms:

“Article 1 Object

1.1 The object of this hereby Convention is the provision of sport services by the athletic preparer / sportsman to the Club, for the training and the participation to the football competitions, respectively the training and the exercise of the senior team participating at the Championship of the A Division, as well as the participation to the training meetings (exercises) and the effective participation (according to the arbitration sheet) to the football games performed by the teams of the Club, with the respect and conditions of the status and the regulations of the Romanian Football Federation, of the Professional Football League, of the FIFA and of the UEFA ...

Article 3 Price

In exchange of the provision by the Trainer / sportsman of the services making the object of this hereby Convention, respectively those indicated at article 1.2 Letter a), the Club shall pay to this one the following gross

amounts, where the Club shall calculate and shall transfer to the state budget the income tax with retention at the source, respectively 10% representing the incomes from independent activities

a) on a monthly basis: 2.500 Euro, payable until the date of 10th of each contracting month, for the previous month;

b) 15.000 Euro for the classification of the senior team of the company S.C. Fotbal Club 2005 S.A. Arges on one of the 1-3 places at the end of the National Championship A Division –edition 2006/2007;

3.2 In addition to the amounts provided at point 3.1., the Club shall bear, based on justifying documents, the following costs:

- expenditures representing the counter value of 20 aerial bouts on the route Bucharest – Rome;*
- expenditures with a cell phone with the possibilities of international calls.*

(...)”.

It is not disputed between the parties that the Appellants started work for their employer and also had work permits issued on 4 August 2006 by the Ministry of Labour, Social Solidarity and Family. The said permits showed the First Appellant to be the “head coach”, the Second Appellant to be a “football coach” and the Third Appellant to be a “physical trainer”.

The contracts between the Respondent and the Appellants were processed without there being any complaints from either side up until 5 October 2006. By letter of 5 October 2006, however, the Respondent informed the RFF, that it was terminating the contracts with the Appellants because they had breached Article 2.1 (b) of the contract. By letter of the same date to the Appellants the Respondent informed the latter that it was terminating the contracts early upon the expiry of a period of 20 working days beginning on 5 October 2006.

By letter of 18 October 2006 to the Respondent the Appellants disputed the lawfulness of the termination of the contracts and, *inter alia*, protested that they no longer had access to the Respondent's stadium and training site. Thereupon the Respondent for its part once again confirmed its unilateral termination of the contracts by letter of 3 November 2006 and advised that the contracts would be annulled upon the expiry of 3 November 2006.

The Appellants filed an “appeal” against this with the Comisia pentru Statul Jucatorului (the “CSP”). According to Article 44 of the Statutes of the RFF the CSP is a jurisdictional body of the RFF. In three decisions dated 9 November 2006, the CSP, *inter alia*, set aside termination of the contracts by the Respondent and held that the contracts between the Appellants and the Respondent were legally effective. In addition the CSP ordered the Respondent to pay the Appellants the salary instalments for the months of September and October that were due at the time of the decision.

On 14 November 2006 the Respondent filed an appeal against the decision of the CSP with the “Appeal Commission” (the “CA”). According to Article 44 of the Statutes of the RFF, the CA is a judicial organ of the RFF. According to Article 56(1) (c) of the Statutes of the RFF the CA is competent to decide appeals against decisions of the CSP. The CA decided the matter on 5 February 2007 and allowed the Respondent's appeal. In this regard the operative part of the decision reads as follows:

“For the reasons, based on Article 56 of the Statute of the Romanian Football Federation, the Appeal Commission of the Romanian Football Federation – Panel 1 decides:

Based on art. 30 point 10 of RSTIF.

Admits the appeal.

Cancels the decision of the first court.

Rejects the request for the cancellation of the decision of unilateral termination of the convention of sporting services ... and ascertains as terminated the convention starting with the date of 5 October 2006”.

The Appellants filed further appeals against these decisions with the Romanian Court of Arbitration for Football (CAF). This is the highest judicial organ of the RFF (cf. Article 44, 56(1) of the Statutes of the RFF). By decisions nos. 41, 42 and 43 of 22 March 2007 the CAF set aside the three rulings by the CA and held that the contracts between the Appellants and the Respondent were legally effective and ordered the Respondent to pay the amounts owed under the contracts to the Appellants.

By letter of 16 May 2007 and of 5 June 2007, the Respondent filed a “*petition for review*” with the CAF. In its decisions nos. 71, 72 and 73 of 14 June 2007 the CAF allowed the petition and decided that the CAF considers, “*the decision on the unilateral termination of the Convention legal and grounded*” and that, therefore, the “*club owes the Appellants no amounts of money*”. In conformity with Article 54 of the CAF-Regulations, only the operative part of the CAF decision was initially served on the Appellants and the Appellants did not receive the full and reasoned CAF decision until 6 December 2007.

By letter dated 5 July 2007, the Appellants filed their Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decisions (nos. 71, 72, 73) rendered by the CAF.

By letter dated 13 July 2007, the Appellants filed their Appeal Brief with the CAS. They request the CAS to:

- (1) “*declare its competence on the risen controversy*”;
- (2) “*verify the illegitimate, invalidity and/or existing of the revision judgements*”;
- (3) “*in the secondary way, verify the validity and the force of the working contracts*”;
- (4) “*in a secondary way, verify the breach of contract of Romanian Club S.C. Fotbal Club 2005 S.A. Arges towards the Appellants and*
- (5) “*order to Romanian Club S.C. Fotbal Club 2005 S.A: Arges to pay in favour of [the Appellants] the monthly payments from September 2006 to June 2007*”.

In the oral hearing, when asked by the Panel, Counsel for the Appellants specified his requests under (2) – (4) to the effect that he was asking for the decisions of the CAF nos. 71, 72 and 73 to be set aside. In addition Counsel for the Appellants made it clear that he was basing the claim to remuneration for the months of September and October 2006 on contract and for the rest of the months up to (and including) June 2007 on considerations under the law of damages. Furthermore, Counsel for the Appellants be awarded damages for intangible loss, suffered because they were

ultimately without employment in the 2006/2007 season and that consequently their “market value” had diminished. The Appellants left the quantum of the claim to the discretion of the court. Finally, Counsel for the Appellants also requested that the Respondent be ordered to pay “a minimum of 10% interest in accordance with the EC rules about payments of debts between employer and workers”.

By letter dated 7 August 2007, the Respondent filed its answer. It requests CAS “*to reject the appeal and to maintain the decision of the CAF*”.

On 25 February 2007 the CAS Court Office, on behalf of the President of the Panel, issued an Order of Procedure, which was signed by all the parties.

On 26 February 2008, a hearing was held at the CAS premises in Lausanne.

LAW

CAS Jurisdiction

1. In its letter dated 10 July 2007 to the parties the CAS Court Office informed the parties that it had assigned the matter in dispute to the Appeals Arbitration Division of the CAS in accordance with Article S20 of the Code of Sports-related Arbitration (“the Code”) and that the matter would, therefore, be dealt with in accordance with the Arts. R47 *et seq.* of the Code. This decision is in principle not subject to review by the Panel (cf. RIGOZZI A., *L’arbitrage international en matière de sport*, Bâle 2005, no. 930) with the consequence that in the present case Arts. R47 *et seq.* of the Code apply to the proceedings.
 2. Whether, and the extent to which, the Panel is competent to decide the present dispute is governed by Article R47 of the Code. The provision stipulates three pre-requisites, namely:
 - there must be a “decision” of a federation, association or another sports-related body,
 - the parties must have submitted to the competence of the CAS and
 - “the legal remedies available” must have been exhausted prior to appealing to the CAS.
- A) *Decision by a federation*
3. It is undeniable that the subject matter of the dispute in the present case is a “decision” by a federation, association or a sports-related body, for the appeal is directed against a decision by the CAF. According to Article 44 of the Statutes of the RFF this is a judicial organ of the RFF. The first pre-requisite of Article 47 of the Code is thereby met.

B) *Consent to arbitrate*

4. Article R47 of the Code stipulates various possibilities of how the parties can agree to arbitration proceedings before the CAS. Firstly, this can happen by the statutes and regulations of the RFF - to which the parties have submitted - containing an arbitration clause. Secondly, however, the parties can also conclude a specific arbitration agreement.

5. In the present case the competence of the CAS derives from the statutes and regulations of the RFF, as Article 57 of the Statutes of the RFF reads:

“(1) Conflicts arising from or related to the football events in Romania, engaging affiliate clubs and officials, officials of ... [RFF/LPF/AJF], players, player agents or match agents shall be exclusively settled by the competent instances stipulated at Article 56 of this Statute. ...

(2) Only those decisions of the appeal commissions with the ... [RFF/AJF] where there is an element of extraneity (cases of international character) may be attacked to CAS. ...

b) TAS is also competent to settle any case of international character that engages national federations, leagues, clubs, players or officials. Only TAS is empowered to judge appeals against decisions taken by a FIFA or UEFA body, once all the attack ways existing at the level of FIFA and UEFA have been exhausted. The appeal shall be submitted to TAS within 10 days from the communication of the decision. (...).”

6. It follows from the above provision that in “*cases of international character*”, not only is recourse to the national judicial instances available, but so is recourse to the CAS. On the other hand, the Respondent claims that - according to Article 57(2) of the Statutes of the RFF - recourse to the CAS is only available against decisions by the CA. In the present case, however, the CAF decided the dispute, and according to the Respondent, the Appellants, at the time, had the choice of whether to appeal against the decision of the CA before the CAS or before the CAF. The two forms of recourse were mutually exclusive. By appealing to the CAF the Appellants had therefore deliberately waived the possibility of bringing the dispute before the CAS.

7. The viewpoint argued by the Respondent is not supported by Article 57 of the Statutes of the RFF. Although Article 57(2) of the Statutes of the RFF speaks (in the English translation) of “appeals commissions”, this term may not be equated with the CA. This follows, firstly, from the fact that Article 57(2) of the Statutes of the RFF speaks not of the “Appeals Commission”, but of the “commissions” in the plural. Furthermore, it is noteworthy that in Article 44 of the Statutes of the RFF, where the judicial organs of the RFF are listed, the word “Appeals Commission” is written with capitals, but in Article 57(2) of the RFF Statutes the term “appeals commissions” is written in lower case. All this indicates that the term “appeals commissions” in Article 57(2) of the Statutes of the RFF and the term “Appeals Commission” in Article 44 of the RFF Statutes are not identical. Rather the term “appeals commissions” in Article 57(2) of the Statutes of the RFF is to be interpreted broadly, more particularly in the sense of “jurisdictional bodies”. If one agrees with this opinion the appeal to the CAS is not limited to decision by the CA. Rather, an appeal against decisions of the CAF can then also be filed with the CAS.

7. This interpretation is also supported by the fact that the Statutes of the RFF – for example in Article 56(1) or Article 56(3) – describes all of the judicial organs (including the CAF) with the term “*commissions*”. Another reason not to agree with the Respondent is that in Article 56(1)(c) of the Statutes of the RFF, although the CAF is designated as the highest judicial organ, this is only the case “*in cases of national character*”. However, in the present case the matter in dispute has an international character because of the nationality of the Appellants. Furthermore, another argument against the Respondent's opinion is that, in the decisions of the CA, the Appellants were only advised of the possibility of an appeal to the CAF but not of an appeal to the CAS, for the notice on the right to appeal in the decision of the CA merely states:

“Recourse at the Arbitrage Court for Football in 5 days from the communication. ...”.

8. Finally, the fact that it was the will of the parties that the CAS was to have authority to make the final decision in the event of contract disputes is also reflected in the contracts between the Respondent and the Appellants. Said contracts contain the following clause:

Article 9 Litigation Solving

9.1 Any litigation arisen between the parties, from or related to this hereby agreement, including the one referring to the validity, interpretation, development or its dissolution, shall be solved amiably. If the parties do not agree amiably, the litigations shall be submitted to the judicial bodies of the Romanian Football Federation, the Professional League, the FIFA and UEFA. (TAS)”.

C) *Exhaustion of legal remedies*

8. The last prerequisite required by Article R47 of the Code is that there is no further legal remedy available against the decision in question, in other words that the legal remedies against the decision are exhausted. This is also so in the present case; for there is no further judicial organ within the RFF to which the Appellants could appeal in order to have the decisions by the CAF reviewed.

D) *Summary*

9. To sum up therefore, the Panel is competent pursuant to Article R47 of the Code to decide the dispute between the parties in the present case.

Mission of the Panel

10. The mission of the Panel follows, in principle, from Article R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Article R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance.

11. Whether the Panel in fact has the above powers in full in the present case could be questionable at first glance; for the Appellants have not (also) taken action against the RFF, whose decision was after all the subject of the present case. However the appeal is only directed against the Respondent, which in turn cannot be attributed with the decision of the CAF.
12. However, it must be considered in the present case that the RFF, with the help of its judicial organs, is not pursuing any interest of its own in relation to the parties, rather the parties are merely provided with a dispute resolution mechanism or instance for resolving their contract disputes. The CAS panels sometimes also distinguish this particular type of case linguistically by speaking of an “*appeal arbitration proceeding, in a non-disciplinary case*” (CAS 2005/A/995, no. 36; CAS 2005/A/1123 & 1124, no. 57; CAS 2005/A/835 & 942, no. 73). It is typical for these cases that the parties have to pursue their petition before the CAS against one and the same party, not only in the initial instance but also in the appeal instance (cf. CAS 2006/A/1031, no. 27 *et seq.*; CAS 2005/A/835 & 942, no. 85 *et seq.*). Ultimately, the CAS does, in these cases, act as the highest instance on points of law and fact in a hierarchy of judicial instances. This position of the CAS as a genuine appeal instance, which has the mission - like in the previous instance - of completely reviewing the action between the parties both in law and in fact, necessarily also includes the power to decide the fate of the decision of the previous instance. Therefore, in actions of the present kind, whether the CAS can set aside, amend or uphold the initial decision does not depend on whether the appeal is (also) directed against the legal entity, whose judicial organs made the appealable decision.
13. To sum up, in the present case the Panel's mission is governed completely by Article R57 of the Code, even if the RFF is formally not bound by the outcome of the case because it is not a party.

Admissibility of the Appeal

14. The appeal filed by the Appellants is timely. Article 57(2) of the Statutes of the RFF provides for a deadline of “*10 days from the notification of the decision*”. In the present case the operative parts of decisions nos. 71, 72 and 73 of the CAF were announced first. This is admissible, as can be seen from Arts. 54 and 55 of the Regulations on the Organization and Operation of the CAF (the “CAF Rules”). In this regard Article 54 of the CAF Rules provides:

“After deliberating and establishing the solution, the Panel of arbitrators shall prepare the operative part of the sentence, which shall be signed by the members and communicated to the parties within three days from deliberations”.
15. The full and reasoned decision, which must comply with the formal requirements of Article 55 of the CAF Rules, can be served on the parties at a later point in time. Precisely this is what happened in the present case; for the full decision was not served on the Appellants until 6 December 2007. Insofar as Article 57(2) of the Statutes of the RFF refers to “*notification of the decision*” for the purposes of the running of time for the deadline for appealing to the CAS, this can only mean the announcement of the full decision; for it is only with the full decision that the person affected can assess the litigation risk associated with a further judicial instance.

However, if it is only then that he is able to review the chances of his appeal succeeding, he can only be expected to undertake that review after that point in time with the consequence that the period does not start to run before then.

16. A further question must be distinguished from the question of the running of time for the purposes of the deadline for an appeal, namely whether the Appellants could file the appeal with the CAS after the operative part of the decision had been announced but before the beginning of the period for appeal. This must be answered in the affirmative because with the pronouncement of the operative part of the decision the decision is, so to speak, “out in the world”, i.e. no longer internal to the courts and can therefore also in principle be appealed against. To sum up, the appeals filed by letter of 13 July 2007 were filed in time. This is not altered by the fact that the CAF breached its own rules by the late notification of the full decision (see in this regard Article 55(3) of the CAF Rule.

Applicable Law

17. Article R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.
18. In the present case the parties made an express choice of law in the oral hearing. That choice was that the action should be decided solely in accordance with the sports rules of the RFF and the statutes and regulations of FIFA, in particular the Regulations on the Status and Transfer of Players (“the RSTP”) and the regulations of UEFA. Such a choice of law - made during the course of the proceedings - is perfectly lawful under Swiss arbitration law (KAUFMANN-KOHLER/RIGOZZI, *Arbitrage International, Droit et pratique à la lumière de la LDIP*, Berne, 2006, no. 612; BERGER/KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 2006, no. 1273). The choice of a non-national law, such as for example the sports rules and regulations of sports associations is also covered (both by Article 187 of the Swiss Act on Private International Law as well as by Article R58 of the Code). This is expressed in the wording of Article R58 of the Code, which stipulates the parties' possibility of determining the applicable “rules of law” (cf. KAUFMANN-KOHLER/RIGOZZI, *Arbitrage International*, 2006, no. 597, 636 *et. seq.*; BERGER/KELLERHALS, *Internationale und interne Schiedsgerichtsbarkeit in der Schweiz*, 2006, no. 1265; POUURET/BESSON, *Droit comparé de l'arbitrage international*, 2002, no. 679).

Merits

19. The Appellants are pursuing various requests with their action:

A. *Setting aside the CAF's decisions nos. 71, 72, and 73*

20. The CAF's decisions nos. 71, 72 and 73 are to be set aside if the CAF was not authorized to revise its original decisions. Arguments in favour of this could be that the CAF, with decisions nos. 41, 42 and 43, had in fact already decided the subject matter of the dispute and decisions by the CAF are, according to Article 59 of the CAF Rules, final and binding - if one disregards the possibility of appealing to the CAS. The provision expressly stipulates:

“(1) The arbitral resolution is final, irrevocable and enforceable. It shall be immediately executed by the party it was pronounced against”.

21. This finality of the decisions by the CAF expressed in Article 59(1) of the CAF Rules does not sit well with the approach taken by the CAF in the present case, namely its subsequent revision of the decision on the matter in dispute after it had been pronounced. The CAF bases its power to change its own decision on Article 322 of the Romanian Code of Civil Procedure (CCP), which – according to the CAF – via Article 60 of the CAF Rules, also applies analogously to the proceedings before the CAF. Article 322 CCP regulates the conditions under which it is lawful in civil cases before the state courts to break the substantive finality of a decision.

22. The Panel is of the opinion that there is no scope for the analogous application of Article 322 CCP in the present case; for, according to Article 60 of the CAF Rules, recourse to the provisions of the CCP is only permitted to the extent this is *“compatible with the RFF/AJF, FIFA and UEFA arbitration and Statutes, regulations and norms”*. In the present case the Respondent, with its *“petition for review”*, is pursuing the objective of having the decision by the CAF completely reviewed again. The Respondent ought, however, to have pursued this objective of seeking judicial relief with the legal remedy expressly intended for this, namely with an appeal to the CAS. However, the Respondent did not do this. This power of the CAS to render a final decision that is provided in the rules and regulations of RFF and FIFA cannot be avoided by invoking Article 322 CCP.

23. The Panel additionally points out that even if one were to allow a supplementary application of Article 322 CCP, its prerequisites are not met. Like most other national procedural rules, the provision limits the breaking of the finality of a decision for reasons of legal certainty to blatant miscarriages of justice, which are simply unconscionable and unreasonable. In this regard the provision stipulates, for example, the case where the court awards more than, or something different to, that which the claimant requested and thereby breaches the principle of party disposition or, the case where the decision is contradictory and therefore not suitable to bring about law and order between the parties. However, these prerequisites are not met in the present case with the consequence that, from the outset, the CAF did not have the power to subsequently revise its own decision.

24. It must therefore be found that the Appellants' petition for the decisions by the CAF nos. 71, 72 and 73 be set aside is to be allowed.

B. *Payment of the remuneration for 10 months*

25. It is a prerequisite for a payment claim by the Appellants that a valid contract was concluded between the parties and if so that it was not lawfully terminated by the Respondent prior to expiry of the term.

C. *Valid conclusion of a contract?*

26. In the present case the Respondent disputes that a contract was validly concluded and points out that the contracts were subject to two conditions, namely firstly that the Appellants hold a “*coaching licence*” and secondly that the Appellants were issued with a “*professional player licence*” by the RFF.
27. According to Article 2.1 (a) the contracts are subject to the condition that the Appellants are “*holding a licence according to the provisions of the RFF, PFL, FIFA and UEFA Regulations*”. The Respondent is of the opinion that this prerequisite is not met because the Appellants never submitted or provided proof of the licences. However, this cannot be accepted. The Respondent's opinion does not find any support even in the wording of the contracts, for the clause does not require the licences to be submitted to the Respondent. Rather, the deciding factor is solely whether the Appellants are the “holders” of the corresponding licence. However, that is the case, for the Appellants had each been issued with a corresponding licence by the Italian football federation, FIGC. As both the FIGC and the RFF have signed the UEFA Convention on the Mutual Recognition of Coaching Qualifications, the Appellants are – as required by the contract clause – the holders of a coaching licence in accordance with the respective regulations.
28. Pursuant to Article 2.1 (b) the contracts are also subject to the condition that the RFF issues the Appellants with a “*professional player licence*”. Counsel for the Respondent submits that the Respondent wanted to sign the Appellants as coaches and as players. That is why the contracts with the Appellants were concluded not only subject to the condition that they hold a coaching licence but that they are holders of a player licence. However, the Appellants would never have obtained a player licence so consequently the contracts were not validly created. Counsel for the Appellants disputes this and submits that it had never been intended that the Appellants also be employed as players. Rather the clause had been incorporated into the contract at the Respondent's request for tax reasons.
29. The significance of Article 2.1 (b) of the contract is to be determined by interpretation. This depends primarily on the concurring subjective wills of the parties and not on the will that was declared objectively. The Panel is satisfied that - contrary to the will that was declared objectively - the parties never had the intention of also signing the Appellants as players.
30. The reasons for this are firstly the Appellants' personal circumstances. As regards this the Counsel for the Appellants submitted - without being contradicted - that the Third Appellant had never played professional football in his life. Although the Second Appellant had previously

played professional football, he never went beyond the third Italian division. Only the First Appellant had according to Counsel for the Appellants been a professional player at national and international level. However, consideration has to be given to the fact that his active period had been many years ago. At the time when the Respondent employed him, the First Appellant was 42 years old and had not been active as a player for more than 10 years. The Panel considers these submissions by Counsel for the Appellants, which the Respondent did not contradict, to be credible. However, if one uses these factual submissions as a basis for making the decision, the only conclusion that can be drawn is that the parties never intended that the Appellants also be employed as professional players in the highest and most competitive Romanian football league.

31. A number of other circumstances also support the above interpretation of the contracts. The Appellants received a work permit from the Ministry of Labour, Social Solidarity and Family on 4 August 2006. This shows the First Appellant to be “head coach” the Second Appellant to be a “football coach” and the Third Appellant to be a “physical trainer”. However, the said documents do not make any reference to any activity as professional football players. This is noteworthy in that the Appellants’ work as “coaches” is specified with clear distinction in the work permit. All this indicates that the Appellants were never intended to be signed as players. The circumstances after conclusion of the contracts also indicate this. Thus, the Respondent paid the Appellants the salaries for July and August unconditionally although the Appellants were never employed as players in the period from July to the beginning of October. Further the Respondent did not submit that it had requested the Appellants to make themselves available for the Respondent as players, to apply for a licence as players or even to train accordingly.
32. Finally, a look at other clauses in the contracts between the Respondent and the Appellants also support the above interpretation of the contracts. Although throughout they describe the Appellants as “Coach/Sportsman”, i.e. acting in a double function, there are also important exceptions. Thus, for example, Article 8 of the contracts stipulates:

“8.1 This hereby Convention is ceasing within the following situations:

...

d) the Convention is unilaterally terminated by 31st January 2007 as a result of a unilateral, unjustified and severe initiative of the coach. Should this be the case, the coach shall pay the Club damages amounting to EUR 40,000 ...”.
33. According to the working of this clause a contract penalty is only incurred if the Appellants grossly breach their obligations as coaches and this gives rise to termination of the contract prior to 31 January 2007. The contract has no comparable clause for the breach of any obligations as a player. This also shows that it was never intended that the Appellants be signed as players and that therefore the condition in Article 2.1 (b) was only incorporated as a sham in order to achieve a purpose that was alien to the contract (for example tax benefits).

34. To sum up, the contracts between the Appellants and the Respondent came about validly. The Appellants therefore have a contractual claim against the Respondent for payment of their monthly remuneration until the contract is terminated.

D. *Termination of the contracts?*

35. The Respondent terminated the Appellants by letter of 5 October 2006. The wording of the letter to the Appellants reads as follows:

“The object of this communication is the notice that we inform you that in accordance with the work contract ... started with 5.10.2006 in accordance with the work code we give you 20 days of notice, after 20 days the work contract will finish in accordance with art. 61, lit D) of the Work Code”.

36. Whether and the extent to which the termination is “lawful” depends, in the Panel's opinion, first and foremost on the RSTP. Although the latter - according to their wording - only regulate the status and the transfer of football players, but not of coaches, the case law of the CAS treats coaches and players equally when contract disputes with the clubs are concerned. (cf. CAS 2005/A893, no. 7.5; TAS 2007/A/1267, no. 64 *et seq.*; CAS 2007/A/1235 & 1243, no. 46 *et seq.*; CAS 2006/O/1055, no. 73 *et seq.*). Furthermore, the parties in the present case particularly also agreed that the RSTP be the applicable legal standard. Finally, the Panel is of the opinion that the provisions in the RSTP on contract stability (Article 13 *et seq.*) contain general legal principles, which require the RSTP to be applied analogously to coaches in view of the identical interest that players and coaches have.

37. According to the RSTP unilateral termination of the contract before expiry of the term for which the contract was concluded is in principle only possible if the terminating party can invoke “just cause”. The parties are basically free to specify “just causes” in the contract or to extend the possibilities for early termination of the contract (CAS 2006/A/1024, no. 7.15, see also CAS 2007/A/1267, no. 68). This follows, not least from Article 17(1) of the RSTP. The provision provides that the parties can determine the consequences of unlawful termination. However, the same must then apply, in principle, to the stipulation whether there is “just cause” in the first place (CAS 2006/A/1180, no. 8.3).

38. In the present case the Respondent is invoking the ground for termination regulated in the contracts in Article 8.1 (c), pursuant to which the Respondent can terminate the contract if the Appellants either do not have a coaching licence or do not obtain a professional player licence. As explained above, the Appellants had a coaching licence, so no termination by the Respondent can be based on this. Furthermore, as explained above, the parties never intended that the Appellants would also work as professional players. Hence, the Respondent cannot use this as a ground for termination. Rather, in this regard the Respondent is bound by what the parties unanimously intended at the time the contract was concluded. To sum up, the Respondent cannot invoke a contractual ground for termination.

39. If the Respondent cannot invoke a contractual ground for termination, the termination is only lawful if the Respondent has other “just causes” pursuant to Article 14 RSTP. In its written

pleadings, the Respondent points out that the sporting performance of the Respondent's team were very weak in the period between the beginning of the season and 5 December 2006. The team won only one out of 10 matches and lost all of the other matches. After the 10th matchday the team was in last position in the table of the first league. However, such sporting grounds do not give rise to “just cause”. A coach does not owe a particular outcome, rather only the rendering of services. The Appellants are therefore not guilty of any breach of duty. It is then not apparent wherein any “just cause” is supposed to lie for the premature termination of the contracts.

E. *Consequences of the Unlawful Termination by the Respondent*

40. If the Respondent terminated the contracts with the Appellants unlawfully, the consequences of Article 17(1) RSTP ensue. The provision provides as follows:

“The following provisions apply if a contract is terminated without just cause:

(1) in all cases the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period”.

41. It follows from Article 17(1) RSTP that the amount of the compensation claim depends on, *inter alia*, the remaining term of the contract. This makes it clear that the obligation to pay compensation is in any event intended to replace the prime obligation of occupying the athlete and the rendering of the sporting performance owed (CAS 2006/A/1062, no. 8.4). If, therefore, as in the present case, the Respondent has terminated the contract without “just cause”, then according to Article 17(1) RSTP the contract is deemed to have terminated at that moment (CAS 2006/A/1062, no. 8.4). In lieu of a claim for remuneration the Appellants have a claim to compensation from that moment onwards. Whether and why the Appellants did not return to their place of work is therefore irrelevant in the present case. Notwithstanding the claim for compensation, the claims to remuneration that are attributable to the period prior to termination of the contracts remain (CAS 2007/A/1210, no. 61).

F. *Calculation of the Claim for Compensation*

42. The CAS had in previous decisions consistently calculated a player's/coach's claim for damages where Article 17(1) RSTP applies as follows: The party in breach has to pay compensation for the remuneration lost due to the lost contractual term (CAS 2005/A/906, no. 7.3.14 *et seq.*; CAS 2006/A/1180, no. 8.8.4; CAS 2006/A/1061, no. 39). The Appellants therefore have a claim to compensation for that which they would have earned had the employment been terminated by expiry of the term stipulated in the contract. The Appellants must therefore be placed in the

position they would be in at the end of the contractual term. The Appellants therefore have a claim to the (full) contractually agreed remuneration.

43. As the CAS has consistently held, when compensation is paid under Article 17(1) RSTP so that the Appellants are not enriched or over-compensated, a deduction is made for that which the Appellants save or would have earned or could have earned elsewhere had they made reasonable efforts as a result of the (early) termination of the employment (CAS 2006/A/1180, no. 8.8.4 ; CAS 2005/A/866, no. 58, 60; CAS 2006/A/1061, no. 40 *et seq.*). According to the submissions by Counsel for the Appellants, which remained undisputed, following their departure from Romania the Appellants tried to find new employment, but were unsuccessful - at least until 1 July 2007. Therefore, no deduction of other earnings or earning possibilities can be made from the Appellants' claim for compensation.

G. *Amount of the Payment Claim*

44. In summary, the Appellants have a claim against the Respondent for payment of the remuneration agreed in the contract either arising out of contract or on the basis of Article 17(1) RSTP.

45. Since, however, it is undisputed that the Respondent did not make any more payments as of September, the Respondent owes the Appellants the agreed monthly remuneration (Article 3 a of the contract) for 10 months. This amounts to the following:

for the First Appellant	EUR 86,670;
for the Second Appellant	EUR 25,000 and
for the Third Respondent also	EUR 25,000.

46. Basically, other financial benefits agreed in the contract in connection with the rendering of services, such as for example, the provision of accommodation, a vehicle and the reimbursement of trips home, count as remuneration. However, since the Appellants have not made any substantiated submissions in this regard, these elements of remuneration cannot be calculated with the consequence that any claim in such regard is to be dismissed because of the absence of adequate certainty of the particulars.

47. Since the Appellants are no longer residents of Romania, the Respondent must contrary to the wording of Article 3 of the contract pay the remuneration owed in full without deduction. The Appellants are personally responsible for fulfilling their tax obligations.

H. *Reimbursement of the Intangible Loss*

48. Apart from the financial loss, the Appellants are also claiming an intangible loss because the market value of the Appellants as coaches has diminished due to the early termination of the contract. As a general rule, the CAS is reserved about such intangible loss. (CAS 2007/A/1267,

no. 113 *et seq.*). In the present case the question need not be answered because the Appellants' submissions are unsubstantiated, thus the request has to be dismissed for this reason. Counsel for the Appellants has not demonstrated from which provision in the FIFA, UEFA or RFF regulations any such claim is to be derived. Particulars about the specific adverse effect on the Appellants in the present case and what connection there is between the early termination of the contracts by the Respondent and the Appellants' further professional career are also missing.

I. *Claim for Interest*

49. This interpretation is also supported by the fact that the Statutes of the RFF – for example in Article 56(1) or Article 56(3) – describes all of the judicial organs (including the CAF) with the term “*commissions*”. Another reason not to agree with the Respondent is that in Article 56(1)(c) of the Statutes of the RFF, although the CAF is designated as the highest judicial organ, this is only the case “*in cases of national character*”. However, in the present case the matter in dispute has an international character because of the nationality of the Appellants. Furthermore, another argument against the Respondent's opinion is that, in the decisions of the CA, the Appellants were only advised of the possibility of an appeal to the CAF but not of an appeal to the CAS, for the notice on the right to appeal in the decision of the CA merely states:
50. Finally, the Appellants are also demanding “*a minimum of 10% interest in accordance with the EC rules about payments of debts between employer and workers*”. This request has not been adequately specified. It is not clear with effect from when interest is being claimed. The same applies in relation to the amount of the claim for interest. Counsel for the Appellants has also not demonstrated on what ground the claim for interest is based. The request is therefore dismissed because of these deficiencies.

The Court of Arbitration for Sport rules:

1. The appeal filed on 5 July 2007 by Messrs Giuseppe Giannini, Corrado Giannini and Pasquale Cardinale against the decisions nos. 71, 72 and 73 issued by the Romanian Court of Arbitration for Football dated 14 June 2007 is allowed.
2. The decisions nos. 71, 72 and 73 issued by the Romanian Court of Arbitration for Football dated 14 June 2007 are set aside.
3. The Club S.C. Fotbal Club 2005 S.A. Piteste is ordered to pay EUR 86,670 to Mr Giuseppe Giannini and EUR 25,000 to each of Messrs Corrado Giannini and Pasquale Cardinale.
4. In all other respects the appeal is dismissed.
5. (...).