



Arbitration CAS 2009/A/1968 FC Politehnica Timisoara v. Romanian Football Federation (RFF) & SC FC Timisoara, award of 5 July 2010

Panel: Mr Martin Schimke (Germany), President; Mr Michele Bernasconi (Switzerland); Mr Olivier Carrard (Switzerland)

Football

CAS Jurisdiction

Decision passed by the Secretary to one of FIFA's legal bodies

Counterclaim

Res judicata

1. A decision signed by the Secretary to the Disciplinary Committee satisfies the requirement that the decision be passed by one of FIFA's legal bodies in order to be appealable before the CAS. Despite the fact that art. 73 of the FIFA Disciplinary Code only lists the Disciplinary Committee, the Appeal Committee and the Ethics Committee as FIFA's judicial bodies, it would be excessively formalistic to find that a decision signed by the Secretary of one of these bodies was not passed by one of FIFA's legal bodies. Moreover, communications from the Secretary to the Disciplinary Committee may be deemed to express the opinion of the Disciplinary Committee.
2. Pursuant to general principles applicable to international arbitration, as well as art. 186 of the Swiss Private International Law Statutes, any counterclaim requires to be within the scope of the arbitration agreement. Therefore, if the submissions contained in the counterclaim have never been the subject of the proceedings which were closed by FIFA's decision which is the object of the appeal with the CAS, they are not caught by the scope of the arbitration clause on which the jurisdiction of CAS is based.
3. The question of the binding effect of previous awards, which can also be described as the *res judicata* effect, is to be examined according to the law of the seat of the arbitration. When the same claim between the same parties, which has already been validly decided upon by a Swiss Court, is submitted to an arbitral tribunal having its seat in Switzerland (in domestic or international arbitration proceedings) the *res judicata* effect prevails without exception. The same principle applies when the first decision was rendered by an arbitral tribunal having its seat in Switzerland.

The Appellant, FC Politehnica Timisoara (the "Appellant" or "FC Politehnica"), is a football club registered with the Romanian Football Federation (RFF; the "1st Respondent").

The RFF is the national football federation in Romania. It has been affiliated with the Fédération Internationale de Football Association (FIFA) since 1923.

S.C. Fotbal Club Timisoara S.A. (the “2nd Respondent” or “SC Timisoara”) is a football club registered with the RFF.

Asociata Sportiva Fotbal Club Politehnica Timisoara (the “third Party” or “ASFC”) is a sportive non-profit association according to the laws of Romania.

On 5 December 2006, the Court of Arbitration for Sport (CAS) issued an award (the “1st CAS Award”) in proceedings (CAS 2006/A/1109) raised by the Appellant against the 2nd Respondent which was at that time acting under its previous name, i.e. CS FCU Politehnica Timisoara. These proceedings centred on the claim made by the Appellant that the 2nd Respondent’s club name, colours and logo created a risk of confusion between the two clubs and consequently violated the Appellant’s personality rights.

The operative part of the 1st CAS Award reads as follows:

- “1. *The appealed decision of 12 June 2006 of the Federal Appellate Commission of the Romanian Football Federation is set aside.*
2. *FCU Politehnica Timisoara is ordered to continue to use its earlier name CS FC Politehnica AEK Timisoara or to adopt another name, approved by the Romanian Football Federation, that does not include the risk of confusion with the name of SC FC Politehnica Timisoara SA. FCU Politehnica Timisoara is ordered to pay the amount of Euros 5.000,- as compensation to SC FC Politehnica Timisoara SA for each official match played from 5 December 2006, until it effects a name change in accordance with the present award.*
3. *FCU Politehnica Timisoara is interdicted to imitate the colours, or use the track record, history and logo of SC FC Politehnica Timisoara SA.*
4. *FCU Politehnica Timisoara is ordered to pay the amount of Euros 90.000,- as compensation for violation with regard to the use of the name, colours, track record, history and logo of SC FC Politehnica Timisoara SA between 13 June 2006 and 4 December 2006 inclusive. This amount is to be paid within 1 month from the receipt of this award. In case the sum has not been paid to SC FC Politehnica Timisoara SA by this deadline, FCU Politehnica Timisoara is ordered to pay 5% interest p.a.*
5. *The Federal Appellate Commission of the Romanian Football Federation shall render a decision, within a reasonable timeframe, deciding the amount of compensation to be paid to SC FC Politehnica Timisoara SA by FCU Politehnica Timisoara for each usage of SC FC Politehnica Timisoara SA’s name, track record, history and logo and colours between 31 January 2005 and 12 June 2006 inclusive, and shall multiply this amount by the amount of official games played by FCU Politehnica Timisoara during that period to calculate the entire amount of compensation to be paid by FCU Politehnica Timisoara to SC FC Politehnica Timisoara SA for violation of SC FC Politehnica Timisoara SA’s personality rights during that period.*
6. *The costs of the present arbitration, which shall be determined and notified to the parties by the Secretary General of the Court of Arbitration for Sport, shall be borne by FCU Politehnica Timisoara.*

7. *FCU Politehnica Timisoara shall reimburse SC FC Politehnica Timisoara SA's costs to the amount of CHF 500,-. FCU Politehnica Timisoara shall bear its own costs".*

As it alleged that the 2nd Respondent had failed to comply with the 1st CAS Award, the Appellant initiated proceedings against the 2nd Respondent before FIFA. After various exchanges between FIFA, the 1st and 2nd Respondents and the Appellant (during which time the 2nd Respondent changed its name from FCU Politehnica Timisoara & Invest SA to SC FC Politehnica 1921 Stiinta Timisoara & Invest SA and paid monies to the Appellant, pursuant to the 1st CAS Award, in the amount of EUR 288,367 and CHF 500) FIFA issued a letter, dated 26 July 2007, indicating that it had "closed the case". The Appellant challenged FIFA's decision that the case was closed in front of the CAS. On 25 April 2008, CAS issued another award (the "2nd CAS Award"), in proceedings (CAS 2007/A/1355) between the Appellant, on one side, and FIFA, the 1st Respondent and the 2nd Respondent, on the other.

In the 2nd CAS Award, CAS ruled, pursuant to Art. 71 paragraph 1 of the FIFA Disciplinary Code (the "FDC") adopted on 15 September 2006:

1. *The decision of FIFA contained in its letter of 26 July 2007 is set aside.*

Ruling de novo, the Court of Arbitration for Sport renders the following decision:

2. *SC Politehnica 1921 Stiinta Timisoara Invest SA shall no later than 30 June 2008 change its name to a name which does not include the risk of confusion with the name of FC Politehnica Timisoara SA. Such new name shall not include the words "1921" or "Stiinta" and if such new name includes both the words "Politehnica" and "Timisoara" there shall be at least one substantive word not associated with FC Politehnica Timisoara SA or its history between those words.*
3. *SC Politehnica 1921 Stiinta Timisoara Invest SA shall change its club colours so that they no longer include violet.*
4. *SC Politehnica 1921 Stiinta Timisoara Invest SA shall no later than 30 June 2008 pay a fine of CHF 5.000,- to FIFA.*
5. *If SC Politehnica 1921 Stiinta Timisoara Invest SA fails to comply with the paragraphs 1 to 3 above or any of them by 30 June 2008 6 points will be deducted.*
6. *FIFA, FRF and Politehnica 1921 Stiinta Timisoara Invest SA shall each pay one third of the arbitrations costs, the amount of such costs to be determined by the CAS Secretary General and notified to the parties at the conclusion of the proceedings.*
7. *SC Politehnica 1921 Stiinta Timisoara Invest SA shall reimburse FC Politehnica Timisoara SA's costs to the amount of CHF 7.500,-.*
8. *Romanian Football Federation shall reimburse FC Politehnica Timisoara SA's costs to the amount of CHF 2.500,-.*
9. *The remaining parties shall all bear their own costs.*
10. *All further claims are rejected".*

On 5 July 2008, the 1st Respondent's Executive Committee took a decision acknowledging that the 2nd Respondent had changed its name from SC Politehnica 1921 Stiinta Timisoara & Invest SA to SC Fotbal Club Timisoara, as well as the fact that it had changed its colours to mauve-white-black. In the

same decision, the 1st Respondent indicated that FIFA and UEFA were to be informed “*about the application of the CAS decision from 25 April 2008*”.

On 3 September 2008, FIFA wrote a letter to the 1st Respondent and the Appellant in which it considered that the name change ordered by the CAS award had been implemented on 5 July 2008 and requesting that the Appellant inform FIFA of the number of official matches played by the 2nd Respondent in the period between 5 December 2006 and 5 July 2008 (i.e. between the handing down of the 1st CAS Award and the name change). In the same letter FIFA noted that “*after a thorough analysis of the uniforms used by FC Timisoara in the season 2008/2009*” it deemed the dominant colour of the club to still be violet and that point 3 of the 2nd CAS Award had not been complied with. FIFA consequently asked the 1st Respondent to immediately implement points 3 & 5 of the 2nd CAS Award, namely to deduct six points from the 2nd Respondent’s first team.

On 4 September 2008, following the letter from FIFA dated 3 September 2008, the 1st Respondent decided to deduct six points from the points earned by 2nd Respondent in the 2008/2009 season pursuant to points 3 & 5 of the operative part of the 2nd CAS Award. Furthermore, the 1st Respondent requested that the 2nd Respondent comply with point 3 of the operative part of the 2nd CAS Award within ten days.

On 10 September 2008 the 2nd Respondent filed an appeal with FIFA’s Appeal Committee against the decision contained within FIFA’s letter dated 3 September 2008.

By letter dated 7 October 2008, FIFA ordered the 2nd Respondent to pay the Appellant Euros 178,961.-, pursuant to point 2 of the operative part of the 1st CAS Award (which point ordered the 2nd Respondent to pay the Appellant Euros 5,000.- as compensation for each official match played between 5 December 2006 until the 2nd Respondent effected a name change).

The FIFA Appeal Committee rendered its decision on 9 February 2009. After having declared itself competent to deal with the 2nd Respondent’s appeal lodged on 10 September 2008, the Appeal Committee rejected the appeal on the grounds that it had been filed outside the time limit provided by the FDC and taking into account the fact that the appeal fee had not been paid.

The decision of 9 February 2009 was appealed by the 2nd Respondent before the CAS (the respondents in this case being FIFA and the 1st Respondent). CAS issued an award in these proceedings, CAS 2008/A/1658 (the “3rd CAS Award”), the operative part of which reads as follows:

- “1. *The appeal filed by FC Fotbal Club Timisoara SA is partially upheld.*
2. *The FIFA Disciplinary Committee’s decision dated September 3, 2008 is set aside.*
3. *The decision of the Executive Committee of the Romanian Football Federation dated September, 2008, is set aside.*
4. *The deduction of six points from SC Fotbal Club Timisoara SA’s first team ordered by the FIFA Disciplinary Committee on September 3, 2008 and implemented by the RFF by decision of September 4, 2008 is cancelled.*

5. *FIFA may still enforce item 2 of the operative part of CAS 2006/A/1109 according to Art. 71 para 1 of the FIFA Disciplinary Code.*
6. *All other motions or prayers for relief are dismissed”.*

On 20 July 2009, FIFA sent a fax letter to the 1st Respondent, copied to the 2nd Respondent and the Appellant, which reads, in pertinent part:

“(…)

Ref. no. 090250 plo

Club SC Fotbal Club Timisoara SA, Romania

Dear Sir,

We refer to the above mentioned matter, as we have learned that the Club, SC Fotbal Club Timisoara SA, has not acted in accordance with item 2 of the operative part of CAS 2006/A/1109 that was confirmed by item 5 of the operative part of CAS 2008/A/1158 and has not paid the outstanding amount notified in the letter of 7 October 2008. This would appear to be a violation of art. 64 of the FIFA Disciplinary Code (FDC), and as such, it would be the subject of an investigation by the FIFA Disciplinary Committee.

We are therefore opening disciplinary proceedings against the Club, SC Fotbal Club Timisoara SA, in respect of a violation of art. 64 of the FDC.

“(…)

With this in mind, we hereby urge the Club, SC Fotbal Club Timisoara SA, to pay the outstanding amount immediately, and to send us a copy of proof of payment.

Should the Club pay the outstanding amount immediately and send us a copy of the proof of payment, these disciplinary proceedings will be closed.

“(…)”.

On 3 September 2009, the 2nd Respondent paid an amount of RON 529,050.- into the Appellant’s bank account.

In view of the above mentioned payment, FIFA sent a fax dated 24 September 2009 to the Appellant, the 1st Respondent and the 2nd Respondent in which it declared that “*We would like to inform you that the above referenced case is closed, since all financial duties have been fulfilled*”.

On 5 October 2009, the Appellant filed its statement of appeal with CAS which it directed against the 1st and 2nd Respondents. The appeal challenged what it considered to be “*The new decision*”, namely, FIFA’s letter dated 24 September 2009. The appeal set out the following requests for relief:

- “1. *Respondents are grated (sic) to comply with all the orders contained in the arbitral award rendered on April 25, 2008.*

Ruling de novo, the following award is issued:

Principally:

2. *FC Timisoara is granted (sic) a final deadline of ten days from the notification of the CAS award to comply with all the orders containing the arbitral award rendered on December 5, 2006 and on 25 April 2008 by the Court of Arbitration for Sport, among other to refrain from imitating the colours, or using the track record and history of FC Politehnica Timisoara.*
3. *FC Timisoara is granted (sic) a final deadline of ten days from the notification of the CAS award to pay FC Politehnica Timisoara at least EUR 5,000.- (five thousands Euros) as compensation for each official match played by FC Timisoara in the 2008-2009 and 2009-2010 seasons. CAS will establish the compensation according to the amounts gained from TV rights and visibility of football European competitions.*
4. *The Romanian Football Federation is ordered to pay all the above mentioned amounts and threats in case of failure by FC Timisoara to pay the amounts by the CAS award of 5 December 2006 and 25 April 2008 and by the above orders within the stipulated time-limit.*

Subsidiarily:

5. *The Romanian Football Federation is ordered to issue a decision directed at FC Timisoara, containing all the orders and threats mentioned in items 1 to 3.*
6. *Respondents are sanctioned according to FIFA and UEFA Statutes.*

At any rate:

7. *FC Timisoara and/or RFR (sic) shall bear all the costs, if any, of this arbitration and shall reimburse FC Timisoara the minimum court of his fee of CHF 500.-”.*

On 19 October 2009, the Appellant filed its Appeal Brief (the “Appeal”) together with four exhibits. In the Appeal the Appellant submitted the following request for relief:

- “1. *The CAS-Panel will reconfirm the previous Awards 2006/A/1109 and 2007/A/1355 and will order the Respondents to comply with all the threats contained in these two awards.*

Ruling de novo, the following award is issued:

Principally:

2. *FC Timisoara is granted (sic) a final deadline to pay to FC Politehnica Timisoara an amount as compensation for each official match played by FC Timisoara in the 2008/2009 and 2009/2010 seasons. CAS will establish the compensation, considering the fact that the amounts from TV rights for internal competition had this evolution:*
 - *in season 2004/2005 the Respondent club gained about EUR 400.000,- and the compensation per official match of EUR 5.000,- was established by Appeal Court of RFF and approved by TAS;*
 - *in season 2007/2008 the Respondent club gained about EUR 2 millions;*
 - *in season 2008/2009 the Respondent club gained about EUR 2.5 millions.*

The compensation should be updated according to the evolution of the amounts gained from national TV rights. Also the CAS-Panel will take in consideration the other amounts gained from European TV

rights and UEFA compensation. The Respondent club played 2 matches in UEFA Cup in season 2008/2009, 4 matches in UEFA Champions League preliminaries and at least 6 matches in UEFA Europa League, season 2009/2010. These matches offered an European visibility, based on the Appellant's history and record due the confusion created by usage of the Appellant's colours.

3. *FC Timisoara is grated (sic) to comply with all the orders contained in the arbitral awards 2006/A/1109 and 2007/A/1355 rendered by CAS, among other to refrain from imitating the colours and using the track record and history of SC FC Politehnica Timisoara SA.*
4. *The Romanian Football Federation is ordered to pay all the above mentioned amounts and threats in case of failure by FC Timisoara to pay the amounts by the new CAS award.*

Subsidiarily:

5. *FIFA is ordered to issue a decision of punishment against Respondents, according to its Statute.*
6. *To condemn the Respondents to the payment of the proceedings costs before the CAS, including Law House's fees and other expenses made during the case.*
7. *To condemn the Respondents to the payment of the proceedings costs before the CAS".*

On 16 November 2009, the 1st Respondent filed its Answer together with four exhibits, requesting that *"the claim introduced by SC FC Politehnica Timisoara SA against the RFF be rejected as unfounded and unsubstantiated based on all the above mentioned grounds"*.

On 16 November 2006, the 2nd Respondent filed its Answer, together with thirty-six exhibits, requesting CAS:

"Principally,

- *to declare the appeal lodged by FC Politehnica Timisoara SA against the letter of the FIFA Disciplinary Committee dated September 2009 as inadmissible;*
- *to condemn the Appellant to the payment in the favour of the 1st Respondent of the legal expenses incurred;*
- *to establish that all the costs of the arbitration procedure shall be borne by the Appellant.*

Subsidiarily, in the event the above is not accepted:

- *to dismiss the appeal lodged by FC Politehnica Timisoara SA against the letter of the FIFA Disciplinary Committee;*
- *to establish that the 1st Respondent has complied with all requirements of the CAS awards CAS 2006/A/1109, CAS 2007/A/1355, CAS 2008/A/1658;*
- *to condemn the Appellant to the payment in the favour of the 1st Respondent of the legal expenses incurred;*
- *to establish that all costs of the arbitration procedure shall be borne by the Appellant"*.

Also on 16 November 2009, the 2nd Respondent filed a document entitled counterclaim and joinder, in which document the 2nd Respondent requested that the Panel accept its joinder and counterclaim and:

- “ To take note of the fact that Asociata Sportiva “Fotbal Club Politehnica Timisoara” is an existing legal person, therefore the Appellant had never been able to take over its patrimony;
- consequently, to establish that all the rights concerning its identity, history, track record, colour violet legally belong to Asociata Sportiva “Fotbal Club Politehnica Timisoara” and have never been transferred to the Appellant;
- to establish that the circumstances surrounding the initial CAS award CAS 2006/A/1109 have significantly changed in the extent that the 1st Respondent has gained the right to use the personality rights of Asociata Sportiva “Fotbal Club Politehnica Timisoara” directly from Asociata Sportiva “Fotbal Club Politehnica Timisoara”;
- to establish that the 1st Respondent has refrained from using its legal right to use the personality rights of Asociata Sportiva “Fotbal Club Politehnica Timisoara” in compliance with CAS awards CAS 2006/A/1109, CAS 2007/A/1355;
- to authorize the 1st Respondent to use the personality rights of Asociata Sportiva “Fotbal Club Politehnica Timisoara”, respectively its identity, history, track record and colour violet for the future;
- to condemn the Appellant to the payment in the favour of the 1st Respondent of the legal expenses incurred;
- to establish that all costs of the arbitration procedure shall be borne by the Appellant”.

By letter dated 19 November 2009, the Panel set the Appellant a deadline to express its position on the participation of ASFC. By letter dated 20 November 2009, the Panel set ASFC a deadline of twenty days to state its position on its participation and to submit a Response pursuant to art. R39 of the CAS Code of Sports-Related Arbitration, 2004 Edition (the “Code (2004)”).

By letter dated 25 November 2009, the Appellant requested that the CAS rejects the counterclaim and request for joinder.

On 23 December 2009, ASFC submitted a document entitled “Contestation” in which it requested CAS:

- “1. to admit the joinder of Asociata Sportiva “Fotbal Club Politehnica Timisoara” lodged by SC Fotbal Club Timisoara SA;
2. to declare the appeal lodged by FC Politehnica Timisoara SA against the letter of the FIFA Disciplinary Committee dated September 2009 as inadmissible;
3. to take note of the fact that Asociata Sportiva “Fotbal Club Politehnica Timisoara” is an existing legal person, therefore the Appellant had never been able to take over its patrimony;
4. consequently, to establish that all the rights concerning its identity, history, track record, colour violet legally belong to Asociata Sportiva “Fotbal Club Politehnica Timisoara” and have never been transferred to the Appellant;
5. to establish that the circumstances surrounding the initial CAS award CAS 2006/A/1109 have significantly changed in the extent that the 1st Respondent has gained the right to use the personality rights of Asociata Sportiva “Fotbal Club Politehnica Timisoara” directly from Asociata Sportiva “Fotbal Club Politehnica Timisoara”;

6. *to authorize FC Fotbal Club Timisoara SA to use the personality rights of Asociata Sportiva "Fotbal Club Politehnica Timisoara", respectively its identity, history, track record and colour violet for the future;*
7. *to condemn the Appellant to the payment of the legal expenses incurred by SC Fotbal Club Timisoara SA also in the favour of the undersigned;*
8. *to establish that all costs of the arbitration procedure shall be borne by the Appellant".*

By letter dated 28 December 2009, the CAS Court Office informed the parties that it would be for the Panel to decide whether to allow the intervention of ASFC.

By letter dated 5 February 2010, the CAS set the 2nd Respondent and ASFC a deadline of twenty days to file a statement explaining the basis on which they alleged CAS has jurisdiction over the counterclaim in the following two scenarios:

- a. the appeal is considered admissible (as argued by the Appellant);*
- b. the appeal is considered inadmissible (as argued by the Respondents)".*

By letter dated 25 February 2010, the 2nd Respondent filed a statement requesting that the CAS establish that it has full jurisdiction over the counterclaim.

By letter dated 3 March 2010 the Panel set the Appellant a deadline of twenty days to file its comments on the 2nd Respondent's statement dated 25 February 2010.

The AFSC did not file any statement in response to the CAS letter dated 5 February 2010.

By letter dated 23 March 2010, the Appellant filed comments on the 2nd Respondent's statement of 25 February 2010, which comments requested the enforcement of the final and irrevocable CAS awards (i.e. the 1st and 2nd CAS Awards) which the Respondents allegedly had not complied with.

On 28 April 2010, the CAS Court Office issued an Order of Procedure on behalf of the President of the Panel which confirmed, among others things, that the applicable law would be determined in accordance with art. R58 of the Code (2004) and that the parties waived their right to have a hearing as regards the jurisdiction of CAS. This order stipulated that, by signing and returning it, the parties confirmed that their right to be heard as regards CAS Jurisdiction had been respected within the framework of the present procedure and that, accordingly, they were satisfied with the Panel drafting the award on jurisdiction on the basis of what has been written and said until now, without any further exchange of submissions. The parties signed and returned such Order of Procedure to the CAS Court Office.

On 4 May and 10 June 2010, once the order of procedure had been signed by the parties, the Appellant submitted two additional statements that the Panel has decided to reject since the requirements set under article R56 of the Code (2004) were not met. As a consequence, the additional letters and attachments sent by the Appellant will be disregarded and not taken into consideration by the Panel.

On 22 June 2010 the CAS Court Office wrote to the parties in order to advise them that, upon study of the parties' written submissions, the Panel considered itself to be sufficiently well informed to take

a final decision without the need to hold a hearing. In accordance with article R57 of the Code (2004), the parties were invited to advise CAS whether or not they considered a hearing to be necessary and their reasons therefor. On 23 June 2010 the Appellant confirmed via letter that it did not deem a hearing to be necessary. On 24 and 25 June 2010 respectively, ASFC and the 2nd Respondent confirmed via letter that they did believe a hearing to be necessary. After taking all of the relevant information into account, and taking into consideration the paramount importance of the parties' right to be heard, the Panel decided, pursuant to art. R57 of the Code (2004), that it was not necessary to hold a hearing as it was sufficiently well informed to issue a decision on the basis of the parties' written submissions. Crucial to this decision was the fact that, after detailed review of the parties' written submissions, the Panel believed that any factual evidence to be presented at a hearing would not impact on the formal/procedural/jurisdictional problems surrounding the appeal/counterclaim/request for joinder (see below for detail) and that, accordingly, such evidence would not affect the outcome of the case.

LAW

CAS Jurisdiction

1. Art. R47 of the Code (2004) provides that:

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

2. The Appellant filed its Appeal against FIFA's letter dated 24 September 2009 before CAS. The Appellant submits that this letter is an appealable decision according to art. 63 of the FIFA Statutes.
3. Furthermore, the 2nd Respondent filed a counterclaim, submitting that the subject of the counterclaim is connected to the subject of the Appeal in terms of the facts and the parties.
4. Accordingly, consideration requires to be given to whether CAS has jurisdiction to rule on the Appeal and, then, if it has jurisdiction to rule on the counterclaim.

A. CAS jurisdiction regarding the appeal against FIFA's letter dated 24 September 2009.

5. As submitted by the parties, the relevant provision is art. 63 of the FIFA Statutes, which reads, in its pertinent part, as follows:

“1. Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, members or leagues shall be lodged with CAS within 21 days of notification of the decision in question.

2. Recourse may only be made to CAS after all other internal channels have been exhausted.

(...)”.

6. It follows from the above that CAS has jurisdiction if FIFA’s letter dated 24 September 2009 meets the following requirements:

- it is a “decision”;
- passed by one of FIFA’s legal bodies (art. 63 par 1 of the FIFA Statutes); and
- all internal channels for review have been exhausted (in other words, the decision is final in that there are no other options for appeal within FIFA) (art. 63 par 2 of the FIFA Statutes).

7. At first glance the Panel were concerned that FIFA’s letter dated 24 September 2009 might not be a decision. In considering this matter, the Panel referred to CAS award 2005/A/899 in which it was decided:

“(...)

The form of communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal.

(...)

What is decisive is whether there is a ruling, or, in case of denial of justice, an absence of ruling where should have been a ruling in the communication”.

8. With reference to this case law, the Panel in the 2nd CAS Award decided that in relation to the Appellant’s Appeal against FIFA’s decision, contained within a letter informing the parties that the “*case is closed*”, was an appealable decision.

9. In the present case, the consequence of FIFA’s letter of 24 September 2009 is that enforcement proceedings instigated thus far against the 2nd Respondent pursuant to the 1st, 2nd and 3rd CAS Awards will cease as FIFA considers that these Awards have been complied with. It is obvious that this decision impacts on the Appellant’s right to have these Awards enforced. Accordingly, the Panel takes the view that FIFA’s letter dated 24 September 2009 is a decision against which an appeal can be filed.

10. The Panel also considers that FIFA’s letter dated 24 September 2009 satisfies the requirement that it be passed by one of FIFA’s legal bodies even though it is signed by Mr Paolo Lombardi, “*Secretary to the Disciplinary Committee*”. Despite the fact that art. 73 of the FDC only lists the Disciplinary Committee, the Appeal Committee and the Ethics Committee as FIFA’s judicial bodies, it would be excessively formalistic to find that a decision signed by the Secretary of one of these bodies was not passed by one of FIFA’s legal bodies. Moreover, communications from the Secretary to the Disciplinary Committee may be deemed to express the opinion of the Disciplinary Committee.

11. Having decided that FIFA's letter dated 24 September 2009 is a decision issued by one of FIFA's legal bodies, the Panel required to determine whether the decision is final. In other words, have all internal means of recourse been exhausted pursuant to art. 63 of the FIFA Statutes?
12. FIFA's letter of 24 September 2009 was issued as a result of proceedings initiated by a letter from the Secretary of the Disciplinary Committee to the 2nd Respondent dated 20 July 2009. In this letter, the Disciplinary Committee explained that the 2nd Respondent's failure to pay the outstanding amount it was notified that it owed in a letter of 7 October 2008 appeared to be a violation of art. 64 of the FDC, and, as such, would be the subject of an investigation by the FIFA Disciplinary Committee. Art. 64 of the FDC provides that sanctions may be taken against anyone who fails to pay another person a sum of money when instructed to do so by CAS. Moreover, art. 64 par 5 of the FDC provides that "*Any appeal against a decision passed in accordance with this article shall immediately be lodged with CAS*". It is therefore clear to the Panel that any decision of the FIFA Disciplinary Committee taken on the basis of art. 64 FDC is indeed final within FIFA and can be directly appealed before CAS.
13. In conclusion, the Panel considers that it has jurisdiction to rule on the Appeal filed by the Appellant.

B. *CAS jurisdiction regarding the counterclaim*

14. The 2nd Respondent is of the opinion that if CAS has jurisdiction to hear the Appeal and render a decision on the merits of the case, it also has jurisdiction over its counterclaim, as the counterclaim is directly and substantially related to the Appeal and allegedly forms part of the same case.
15. Art. R55 of the Code (2004) provides that the respondent's answer may contain any counterclaim. There is no express limitation of the CAS's jurisdiction to hear a counterclaim in the Code (2004). However, pursuant to general principles applicable to international arbitration, as well as art. 186 of the Swiss Private International Law Statutes (as construed by scholars) any counterclaim requires to be within the scope of the arbitration agreement (see POUURET/BESSON, *Droit comparé de l'arbitrage international*, Zurich 2002, No. 574; WENGER W., *International Arbitration in Switzerland, an introduction to and a commentary on art. 176-194 of the Swiss Private International Law Statutes*, No. 21 ad art. 186).
16. Consequently, consideration requires to be given to whether the 2nd Respondent's counterclaim is within the scope of the arbitration clause on which the CAS's jurisdiction is founded in the present case.
17. As outlined above, the jurisdiction of CAS is, in the present case, founded on art. 63 of the FIFA Statutes. This provision provides, *inter alia*, that appeals against decisions passed by FIFA's legal bodies lie to the CAS. The counterclaim made by the 2nd Respondent concerns: the existence of a third party (a legal person existing under the laws of Romania); the

determination of the rights of this third party; and the alleged transmission of these rights to the 2nd Respondent. These claims have never been the subject of any proceedings in front of FIFA. It is doubtful that such claims are within the scope of FIFA's jurisdiction; however, in any event, it is clear that these questions were not a part of the FIFA Disciplinary Committee's proceedings which were closed by FIFA's decision dated 24 September 2009. Even if the Panel broadly accepts that it is, at least to a limited extent, possible to link the proceedings that have occurred in front of CAS and FIFA with the alleged existence of the ASFC, there is not a close enough connection for it to be the case that every single potential claim flowing from each party involved in the dispute can be considered to be caught by the scope of the arbitration clause on which the CAS's jurisdiction is founded in the present case.

18. In conclusion, the admissibility of a counterclaim in an appeal proceeding is limited by the scope of the appealed decision founding the CAS's jurisdiction. In appeal proceedings under the Code (2004), the jurisdiction of CAS is limited to the claims decided upon in the appealed decision.
19. In conclusion, the Panel considers that it has jurisdiction to hear the Appeal but not the 2nd Respondent's counterclaim.

Admissibility of the Joinder

20. The 2nd Respondent has submitted a request for joinder of a third party (ASFC) to the arbitration.
21. According to art. R 41.4 of the Code (2004), a third party may only participate in the arbitration if it is bound by the arbitration agreement or with the written consent of all parties.
22. In the present case, the claims involving ASFC, namely the counterclaim raised by the 2nd Respondent, do not fall under the scope of the arbitration clause, as outlined above. Furthermore, ASFC was not a party to the proceedings closed by the challenged decision. Moreover, ASFC has not been a party to any of the proceedings in front of FIFA involving the Appellant and the 2nd Respondent.
23. In light of the above, the Panel concludes that ASFC is not bound by the arbitration agreement. Furthermore, as the Appellant did not consent to the participation of ASFC in these proceedings, the 2nd Respondent's request for joinder is rejected.

Applicable Law

24. Art. R58 of the Code (2004) 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 has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.

25. Art. 62 par. 2 of the FIFA Statutes 2008 provides that FIFA Rules and Regulations and, additionally, Swiss law, apply. In the present matter, the parties have not elected for any particular law to apply. Therefore, the Rules and Regulations of FIFA apply primarily and Swiss law applies subsidiarily.

As to the Merits

26. In its Appeal, the Appellant's main position is that the 2nd Respondent has not complied with its obligations pursuant to the 1st and 2nd CAS awards and that the 1st Respondent has breached its Statutes by failing to enforce the above mentioned obligations.
27. As pointed out by the 2nd Respondent, these submissions raise the question of the binding nature of the 1st and 2nd CAS Awards on the claims made by the Appellant.
28. The question of the binding effect of previous awards, which can also be described as the *res judicata* effect, is to be examined according to the law of the seat of the arbitration which, in the present case, is Swiss law. Art. 190 par 1 of the Private International Law Statutes states simply that "*The award is final once notified*". According to scholars, this means that the award is both *res judicata* and enforceable (see POUDRET/BESSON, Comparative Law of International Arbitration, 2nd edition, Zurich 2007, No. 475).
29. When the same claim between the same parties, which has already been validly decided upon by a Swiss Court, is submitted to an arbitral tribunal having its seat in Switzerland (in domestic or international arbitration proceedings) the *res judicata* effect prevails without exception. The same principle applies when the first decision was rendered by an arbitral tribunal having its seat in Switzerland (see BERGER/KELLERHALS, Internationale und Interne Schiedsgerichtbarkeit in der Schweiz, Berne 2006, p. 531, ch. 1512).
30. The 2nd Respondent submits that the three previous CAS Awards, which have been rendered in the same dispute, preclude the current claim as a result of the *res judicata*. The Panel accepts the 2nd Respondent's position in this regard in terms of the 1st and 2nd CAS Awards. However, the 3rd CAS Award cannot be binding on the Appellant, as it was not a party to the proceedings leading to that award.
31. Nevertheless, the Panel has no reason to doubt the findings of the 3rd CAS Award. As pointed out by the 2nd Respondent, this Award confirmed that the 2nd Respondent has fully complied with the 1st and 2nd CAS Awards in terms of the change of its colours and name. In the present proceedings, the Appellant has not submitted any evidence which would lead the Panel to doubt the findings of the 3rd CAS Award.
32. Furthermore, the appealed decision was rendered in the course of proceedings relating only to the payment by the 2nd Respondent of compensation to the Appellant pursuant to the 1st CAS Award. In this regard, the Panel again stresses that claims made in appeal proceedings in front

of CAS cannot cover matters which are outside the scope of the challenged decision. Accordingly, the Panel is of the view that it cannot consider the Appellant's claims in connection with: the colours used by the 2nd Respondent; or the allegation that the 2nd Respondent used the Appellant's track record and history for its own benefit.

33. In light of the above, the Panel takes the view that the Appeal requires to be limited to claims in relation to the payment by the 2nd Respondent of compensation to the Appellant pursuant to item 2 of the operative part of the 1st CAS Award. The documents submitted during the current proceedings appear to illustrate that the 2nd Respondent has paid the above noted compensation to the Appellant. The Panel emphasises that the burden of proof in this regard is borne by the Appellant who has not demonstrated (or even alleged) that these monies have not in fact been paid. As the payment has been made, the Panel sees no reason to modify FIFA's decision to close the case.
34. As the only matter the appealed decision decided was that the 2nd Respondent has made the payment required pursuant to the 1st CAS Award to the Appellant, all of the claims made by the Appellant in its Appeal in these proceedings are not only inadmissible in terms of the scope of these proceedings, but also do not challenge the appealed decision. Accordingly, it is irrelevant whether the numerous allegations made by the Appellant in relation to the 2nd Respondent's current behaviour are true (and the Panel notes that it has not considered these matters). To confirm, this is as a result of the fact that these matters cannot comprise a part of the present proceedings.
35. Accordingly, the Panel is of the view that the Appellant is in fact seeking enforcement measures as opposed to the resolution of an appeal. This is particularly obvious in light of the Appellant's submissions dated 23 March 2010, in which it is noted that "*We still maintain our initial application in which we have shown that we simply ask the enforcement of two CAS final and irrevocable awards not respected by Respondents*".
36. Finally, the Panel notes that throughout its Appeal the Appellant complains about the 1st Respondent's attitude. However, the Appeal is raised against FIFA's decision of 24 September 2009. In light of this, the Panel takes the view that the Appeal has been raised against the wrong party. If FIFA's Disciplinary Committee's decision is being challenged, FIFA should have been called as a respondent (see SIMON G., *La partie intimée dans la procédure d'appel des litiges du football*, in BERNASCONI/RIGOZZI (eds), *Sport Governance, Football Disputes, Doping and CAS Arbitration*, 2nd CAS & SAV/FSA Conference Lausanne 2008, Bern 2009, p. 156).
37. In light of all of the above, the Panel confirms that the admissible part of the Appeal (namely the Appeal against FIFA's decision of 24 September 2009) is dismissed.

Conclusion

38. In conclusion, after consideration of all of the parties' evidence and arguments, the Panel dismisses the Appeal against FIFA's decision dated 24 September 2009. All other claims or

requests for relief made by the Appellant are inadmissible. The 2nd Respondent's counterclaim is inadmissible and its request for Joinder of ASFC is rejected.

The Court of Arbitration for Sport rules:

1. The Appeal filed by FC Politehnica Timisoara is dismissed.
 2. The decision of FIFA's Disciplinary Committee dated 24 September 2009 is confirmed.
 3. The counterclaim and request for joinder filed by SC Fotbal Club Timisoara SA are inadmissible and rejected, respectively.
 4. All other motions or prayers for relief are dismissed.
- (...).