Arbitration CAS 2011/A/2506 Yassine Chikhaoui v. Stéphane Canard, award of 21 February 2012

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Football
Contract of exclusive representation between a player and an agent
Notification of a decision according to FIFA rules
Validity of a contract entered into by a minor of limited capacity
Admissibility of a plea of nullity of the contract

1. **The purpose of Art. 63 of the FIFA Statutes, as well as Art. 19 of the FIFA Procedural Rules, is to specify in a uniform manner and on a worldwide scale, when the deadline to appeal a decision will be set in motion. It is irreconcilable with the purpose of those provisions to supplement them with a concept of fictitious notification established under Swiss law and designed for notification within Switzerland which is unknown – at least in part – to other legal systems. The better arguments, in particular reasons of legal certainty and foreseeability, speak in favour of construing said provisions to be exhaustive. It follows from this that the term "notification of the decision" in Art. 63 of the FIFA Statutes and the various ways of notification mentioned in Art. 19 of the FIFA Procedural Rules require the addressee to actually gain control over decision and, thus, cannot be supplemented by notions of fictitious reception / notification according to Swiss Law.**

2. **Art. 12 (11) of the FIFA Players' Agent Regulations which explicitly deals with the conclusion of contracts with minor soccer players must be interpreted as a reference to all rules governing the validity of a contract concluded by a minor. According thereto, the law of the country of domicile governs all of the consequences of entering into a contract and all exceptions thereof. In this respect, the applicable national law may provide that a contract entered into by a person of limited capacity without the consent or approval of his or her legal representative is not – *per se* – null and void. Instead, the law can provide that such nullity only comes into play if the person files an action for rescission of the contract (*"action en rescision"*) which can only be filed within a year of becoming of age or raise a plea of nullity against the person claiming the execution of the contract.**

3. **According to the applicable national law, a plea of nullity may be raised whenever the person would be entitled to lodge an action for rescission of the contract. However, the latter is not tied to the deadline of one year like the action for rescission of the contract. Instead, the law explicitly provides that the plea may also be raised any time thereafter. A person renounces its right to raise the plea of nullity if it confirms or ratifies the contract or if it voluntarily executes it. The fact that a player "breached" an exclusive**

representation agreement concluded with an agent by entering into contractual negotiations with a club without involving the agent cannot be characterized as a "voluntary execution" of the agreement within the meaning the applicable law. Therefore, the player is not precluded to raise a plea of nullity of the contract.

Mr Yassine Chikhaoui ("Mr Chikhaoui"or "the Appellant") is a Tunesian soccer player domiciled in Kilchberg, Switzerland.

Mr Stéphane Canard ("Mr Canard" or "the Respondent") is a French players' agent licensed with the French Football Federation and is domiciled in Tulle, France.

On 6 October 2005, the parties signed an exclusive representation agreement ("Contrat de Mandat"; "the Agreement") valid for a period of two years as of the date of signature. The relevant parts of the agreement read as follows:

Article 1 – Subject of the Agreement – Establishment of Exclusive Representation

1.1 The Player grants the Players' Agent, who accepts, the exclusive authorisation to act for him and in his name to:

- research and negotiate any assignment as a professional football player with any French or foreign sports association in order to realize any transfer or relocation, the creation, signature, renewal or extension of any professional player's contract;

- discuss, and propose all transactions or agreements relating to salary, bonuses, compensation or other benefits which may be due upon signature, the renewal, extension, execution or rescission of any professional player's contract.

(…)

Article 2 – Conditions for the execution of the mandate

2.1 Players' Agent's Obligations

The Players' Agent will submit any employment offer to the Player and will be obliged to seek his opinion before continuing negotiations. He will constantly inform him on the development of the talks and will take into account his comments and remarks.

(…)

2.2. Player's Obligations

In order to ensure the proper execution of the present exclusive representation contract, to avoid any ambiguity or contradiction, and thus to obtain adequate und interesting offers and career prospects, the Player acknowledges that he has to strictly conform to the following obligations:

- he will not undertake any efforts to conclude any agreement covering the same subject as the exclusive agreements with the Players' Agent with any other physical or legal person for the duration of this agreement;

- in the event he is directly contacted with contractual offers by sports associations or companies, he will refrain from entering into any talks and will inform the Players' Agent immediately;

- in case of a dispute or controversy in the execution of agreements with third parties within the framework of Article 1 of this agreement, the Player will not take a stand before having informed the Players' Agent.

- more generally, the Player will inform the Players Agent of any circumstance which may influence the conclusion or the execution of any agreement detailed in Article 1 of this agreement.

Article 3 – Duration of the Agreement

This agreement is concluded for a fixed term of 2 (TWO) YEARS upon signature.

(…)

Article 4 – Representation Fees

4.1 In return for the fulfilment of his obligations, specifically with regard to the negotiation of employment contracts, their conclusion, extension or renewal, the Player's Agent will receive commission equal to 10 (TEN) percent of the total gross annual salary specified for the Player for the entire duration of the agreement. At that time, any transfer premium received by the Player will also be added.

(…)

Article 5 – Breach of Exclusivity – Sanctions

Any breach of the exclusivity granted to the Agent within the frames of the execution of the present agreement and that would be characterized in particular by negotiating, concluding, renewing, prolonging of the employment contract in favour of the Player, would oblige the Player to pay to the Agent compensation equal to the amount of commission provided in art. 4.

Article 6 – Applicable Law – Place of Jurisdiction

This agreement is subject to French law. Any disputes that may arise between the parties (…) will be subject to the courts in Tunis.

(…).

At the time of the conclusion of the Agreement, the Appellant, born on 22 September 1986, was 19 years old.

According to the Tunisian law applicable at the time of the conclusion of the Agreement, full age is attained at the age of twenty. Between 13 and 20 years of age, minors are considered to be of limited capacity. The legal status of minors is governed by the Tunisian Code of Obligations and Contracts (TCO). In this regard Art. 6 - 8 and 330, 331, 335, 337, 338 TCO read as follows:

Art.6

Ont une capacité limitée :

1) les mineurs au-dessus de treize ans et jusqu'à vingt ans révolus, non assistés par leur père ou tuteur;

(…)

Art. 7

Est majeur aux effets de la présente loi, tout individu de sexe masculin ou féminin, âgé de vingt ans révolus.

Art. 8

Le mineur au-dessus de treize ans et l'incapable, qui ont contracté sans l'autorisation de leur père, tuteur ou curateur, ne sont pas obligés à raison des engagements pris par eux et peuvent en demander la rescision dans les conditions établies par le présent code.

Cependant, ces obligations peuvent être validées par l'approbation donnée par le père, tuteur ou curateur à l'acte accompli par le mineur ou l'incapable. Cette approbation doit être donnée en la forme requise par la loi.

Art. 330

L'action en rescision a lieu dans les cas prévus au présent code, articles 8, 43, 58, 60, 61 et dans les autres cas déterminés par la loi. Elle se prescrit par un an dans tous les cas où la loi n'indique pas un délai différent.

Cette prescription n'a lieu qu'entre ceux qui ont été parties à l'acte.

Art. 331

Ce temps ne court, dans le cas de violence, que du jour où elle a cessé ; dans le cas d'erreur ou de dol, du jour où ils ont été découverts ; à l'égard des actes faits par les mineurs, du jour de leur majorité ; à l'égard des actes faits par les interdits et les incapables, du jour où l'interdiction est levée ou du jour de leur décès, en ce qui concerne leurs héritiers, lorsque l'incapable est mort en état d'incapacité ; en cas de lésion, lorsqu'il s'agit de majeurs, du jour de la prise de possession de la chose qui fait l'objet du contrat.

Art. 335

L'exception de nullité peut être opposée par celui qui est assigné en exécution de la convention dans tous les cas où il aurait pu lui-même exercer l'action en rescision.

Cette exception n'est pas soumise à la prescription établie par les articles 330 à 334 ci-dessus.

Art. 337

La confirmation ou ratification d'une obligation contre laquelle la loi admet l'action en rescision n'est valable que lorsqu'elle renferme la substance de cette obligation, la mention du motif qui la rend annulable et la déclaration qu'on entend réparer le vice qui donnerait lieu à la rescision.

Art.338

A défaut de confirmation ou de ratification expresse, il suffit que l'obligation rescindable soit exécutée volontairement, en tout ou en partie, par celui qui en connaît les vices, après l'époque à laquelle l'obligation pouvait être valablement confirmée ou ratifiée.

La confirmation, reconnaissance ou exécution volontaire, dans les formes à l'époque déterminées par la loi, emportent la renonciation aux moyens et exceptions, que l'on pouvait opposer contre l'obligation rescindable. Quant aux droits régulièrement acquis par les tiers de bonne foi, avant la ratification ou exécution, on suivra la règle établie par l'article 336 in fine.

In the months that followed, the Respondent contacted seven European football clubs to inform them about matches played by the Appellant and/or to notify them of his alleged position as the Appellant's agent. One of the said letters had been sent in March 2006, two in November 2006, three in April 2007, one letter is undated.

After the conclusion of the Agreement there was no contact or interaction between the Appellant and the Respondent.

By fax letter dating 3 May 2007, the Respondent contacted the Swiss football club FC Zurich claiming to be the Appellant's players' agent and stated that he had been informed that the club had contacted the Appellant's current club Étoile du Sahel.

On 21 May 2007, the Appellant signed an employment contract ("the Employment Contract") with FC Zurich for a period of five years. In this respect, the Appellant was entitled to receive a yearly basic gross salary of CHF […]. In the negotiations with FC Zurich, the Appellant was represented by the German players' agent Carlos Fleischmann. The Appellant did not inform the Respondent of the negotiations with FC Zurich. Furthermore, the Respondent was not involved in these negotiations.

By fax letter dating 22 May 2007, the Respondent contacted FC Zurich again and objected to being left out of the negotiations between FC Zurich and Étoile du Sahel concerning the transfer of the Appellant.

By correspondence dated 24 May 2007, the Appellant terminated the Agreement with the Respondent in writing.

On 5 October 2007, the Respondent lodged a claim against the Appellant and against FC Zurich before the FIFA Players' Status Committee. In his claim, the Respondent submitted that the Appellant had breached the Agreement as well as Art. 16 of FIFA's Players' Agents Regulations because he had failed to inform him about the employment offer received by FC Zurich and because his name was

not mentioned as the Appellant's player's agent in the Employment Contract. In this respect, the Respondent requested FIFA to establish that he was the Appellant's players' agent at the time the Employment Contract was concluded with FC Zurich. Furthermore, the Respondent requested from the Appellant the payment of 10% of his annual gross salary according to Art. 4 of the Agreement plus 5% interest as from the date he lodged his claim, as well as the payment of the relevant compensation due under Art. 5 of the Agreement plus 5% interest as from the date he lodged his claim. In addition, and in order to be able to quantify the total amount due to him, the Respondent requested from the Appellant, as well as from FC Zurich, a copy of the Employment Contract. Finally, the Respondent asked for sanctions to be imposed on FC Zurich for allegedly having failed to respect Art. 18 of the Players' Agents Regulations.

In his response, the Appellant requested FIFA to reject the Respondent's claims. In this respect, the Appellant admitted having signed the Agreement. The Appellant however stated that after having concluded the Agreement he had no more contact with the Respondent. Furthermore, the Appellant argued that, at the time the Agreement was signed, he had not sought any legal advice and had not understood the meaning of the exclusivity clause and would not have accepted the content of the Agreement had he understood the meaning of such a clause. In the opinion of the Appellant, the Respondent had taken advantage of his inexperience and had not sufficiently explained to him the contents and meaning of the Agreement. Moreover, the Appellant claimed that the Agreement was void and not legally binding and, consequently, the Respondent should not be allowed to derive any rights from it. In fact, the Appellant stated that since the age of majority in Tunisia was 21 years, the Agreement should have been co-signed by his parents or a legal representative in order to be valid.

On 27 October 2010, the Single Judge of the FIFA Players' Status Committee issued his decision ("the Decision") and ruled as follows:

1. *The claim of the Claimant, Stéphane Canard, against the First Respondent, Yassine Chikhaoui, is partially accepted.*
2. *The First Respondent, Yassine Chikhaoui, has to pay to the Claimant, Stéphane Canard, the amount of CHF 45.000, as well as 5% interest per year on the said amount from 5 October 2007 until the date of effective payment,* ***within 30 days*** *as from the date of notification of this decision.*
3. *Any further claims lodged by the Claimant, Stéphane Canard, against the First Respondent, Yassine Chikhaoui, are rejected.*
4. *If the aforementioned sum is not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
5. *The Claimant, Stéphane Canard, is directed to inform the First Respondent, Yassine Chikhaoui, immediately and directly of the account number to which the remittance is to be made and to notify the Players' Status Committee of every payment received.*
6. *The costs of the proceedings in the amount of CHF 10.000 are to be paid in equal shares by the Claimant and the First Respondent. The Claimant, Stéphane Canard, and the First Respondent, Yassine Chikhaoui, shall each pay the amount of CHF 5.000* ***within 30 days*** *as from the notification of the present decision to the following bank account, with reference to case nr. Lza 07-00990:*
7. *(…)*

8. The claim of the Claimant, Stéphane Canard, against the Second Respondent, FC Zurich, is rejected.

The Appellant did not collect the grounds of the Decision which were sent to him by registered mail dated 8 June 2011 at the postal office. By fax dated 22 June 2011, the Head of the FIFA Players' Status Committee sent a copy of the Decision to FC Zurich, delegating to the latter the notification of the Decision to the Appellant. Furthermore, the Head of FIFA Players' Status Committee asked FZ Zurich to ensure that the date of the notification could be traced. In addition, the Head of the FIFA Players' Status Committee informed FC Zurich that in case no reaction should be received in the matter within four days, FIFA would presume that the Decision had been communicated properly to the Appellant within the said timeframe.

On 29 June 2011, the Appellant received a copy of the Decision.

The proceedings before the Court of Arbitration for Sport ("the CAS") can be summarized in their main parts as follows:

On 18 July 2011, the Appellant filed an appeal against the Decision with the CAS.

On 22 July 2011, the CAS Court Office invited the Respondent to inform the CAS within 5 days of receipt of the letter whether he agreed to the appointment of a Sole Arbitrator and further, whether he agreed to the appointment of Prof. Dr. Ulrich Haas to act as Sole Arbitrator, as suggested by the Appellant in his statement of appeal.

On 28 July 2011, the Appellant filed his appeal brief.

By letter dated 2 August 2011, the CAS Court Office invited the Respondent, pursuant to Art. R55 of the Code of Sports-related Arbitration ("the Code"), to submit his answer to the appeal brief within 20 days of receipt of the letter and informed the Respondent that – failing to do so by the given time limit – the Panel could nevertheless proceed with the arbitration and deliver an award. A copy of the appeal brief was enclosed in the letter. According to the DHL delivery document, the appeal brief was delivered to the Respondent's legal representative on 4 August 2011.

On 3 August 2011, the Respondent submitted a written statement and informed the CAS that he agreed on the appointment of Prof Dr Ulrich Haas to act as sole arbitrator. Further, it requested to establish French as the language of the present arbitral proceedings.

Upon proposal by the CAS Court Office, the parties agreed on 4 August 2011 that the proceedings be conducted both in English and in French.

By letter dated 25 August 2011, the Respondent requested an extension of his deadline to file his answer to the appeal brief.

On 25 August 2011, the CAS Court Office informed the parties that the Respondent's answer to the appeal brief would have been due on or before 24 August 2011 and that the deadline had therefore

expired. The Appellant was invited to advise the CAS Court Office whether he agreed to the Respondent's request for an extension of the deadline.

By letter dated 25 August 2011, the Appellant informed the CAS Court Office that he did not agree with such an extension.

On 20 September 2011, the CAS Court Office informed the parties that the Sole Arbitrator had rejected the Respondent's request for an extension of the deadline to file his answer as such deadline had already expired at the time of the request.

On 26 October 2011, a copy of the FIFA file relating to the present arbitration, requested by the Sole Arbitrator, was forwarded to the parties.

A hearing was held at the offices of Bär & Karrer in Zurich on 10 January 2012.

The parties throughout the hearing did not raise any procedural objections and expressly confirmed at the end of the hearing that their right to be heard and to be treated equally had been respected, as they had been given ample opportunity to present their cases, submit their arguments and answer the questions posed by the Sole Arbitrator.

On 18 October 2011, in his statement of appeal, the Appellant requested – *inter alia*:

1. *To fully reverse number 1, 2, 4, 5 and 6 of the Decision of the Single Judge of the FIFA Players' Status Committee, dated 27 October 2010 and to annul the order to pay CHF 45.000 as well as 5% interest per year on the said amount from 5 October 2007 according to number 2 of the aforesaid decision;*
2. *To determine that the Respondent shall bear all costs;*
3. *To grant the Appellant full restitution for its legal fees and other expenses incurred in connection with the proceedings and, in particular, all costs of witnesses and interpreters.*
4. *To immediately stay pending the execution of the Decision of the Single Judge of the FIFA Players' Status Committee, dated 27 October 2010, in particular with regard to number 2, 4, 5 and 6 of the said decision until the final decision of the Court of Arbitration for Sport.*

The Respondend did not formally submit an answer to the appeal brief filed by the Appellant. However, from the correspondence with CAS dated 3 August 2011, as well as from the submissions contained in the FIFA file, the communication of which the Sole Arbitrator has requested according to Art. R57 of the Code, the following requests by the Respondent can be inferred:

1. *De déclarer irrecevable, comme tardif, l'appel formé par Mr Chikhaoui le 18 juillet 2011 de la décision rendue par la Commission du Statut du Joueur de la FIFA le 27 octobre 2010, notifiée le 08 juin 2011;*
2. *de confirmer la décision du 27 octobre 2010 en écartant tous les moyens présents pour la première fois en appel qui sont tant irrecevables que mal fondés.*

LAW

CAS Jurisdiction

1. Art. 27 of the Code provides that the Code applies whenever the parties have agreed to refer a sports-related dispute to the CAS. Such disputes may arise out of a contract containing an arbitration clause, or be the subject of a later arbitration agreement or involve an appeal against a decision rendered by a federation, association or sports-related body where the statutes or regulations of such bodies, or a specific agreement provides for an appeal to the CAS. Art. 63 of the FIFA Statutes states that appeals against final decisions passed by FIFA's legal bodies shall be lodged with CAS. Therefore, the CAS has jurisdiction to hear the appeal. Furthermore, the Sole Arbitrator notes that both parties have signed the order of procedure. In addition, none of the parties have questioned the competence of CAS to decide upon this case.

2. Furthermore, Art R47 of the Code provides two further prerequisites in order for the Sole Arbitrator to decide the matter according to the rules applicable to the appeals arbitration procedure, i.e. that the Appellant has exhausted all (internal) legal remedies available to him prior to the appeal to CAS and that the appeal is directed against a "decision" within the meaning of Art. R47 of the Code. Both prerequisites are fulfilled in the case at hand.

Admissibility of the Appeal

3. As to the time limit of the appeal, Art. R49 of the Code primarily refers to the statutes or regulations of the federation, association or sports- related body whose decision is appealed against. Art. 63 of the FIFA Statutes provides in this respect that appeals against final decisions passed by FIFA's legal bodies shall be lodged with CAS within 21 days of notification of the decision in question.

4. In the case at hand, the Appellant submitted his appeal on Monday, 18 July 2011. Therefore, the appeal would have been filed in due time if the Appellant had been notified of the Decision on or after 26 June 2011.

5. According to Art. 19 (2) and (3) of the FIFA Procedural Rules, a notification is deemed to be completed at the moment the decision is received by the party, at least by fax. Alternatively, decisions may be communicated by registered letter or courier, which shall also be legally binding.

6. It is undisputed that FIFA tried to notify the Appellant of the Decision by registered mail dated 8 June 2011. According to the return receipt, the actual notification attempt was made on 9 June 2011. It is further undisputed that the Appellant was not at home at the time of this notification attempt and that, thus, he did not receive the Decision at that time.

A. Swiss Law on notification of acts of will by registered mail

7. The question therefore arises whether the notification attempt by FIFA is enough to set in motion the 21-days deadline for filing the appeal. According to Swiss jurisprudence, a notification of a declaration or act of will by registered mail may be deemed successful even though it did not reach physically the addressee's sphere of influence (ATF 119 II 147, 149; ATF 107 II 189, 192). In the decision (ATF 107 II 189, 191 et seq.) the Swiss Federal Tribunal stipulated – inter alia:

En principe, une manifestation de volonté écrite déploie ses effets, selon le système dit de la réception (Empfangstheorie), dès qu'elle entre dans la sphère de puissance du destinataire - elle lui est remise, ou est déposée dans sa boîte aux lettres - même si celui-ci n'en prend pas connaissance … Si le destinataire d'un envoi recommandé ne peut être atteint et que le facteur laisse un avis de retrait, la déclaration est considérée comme reçue dès que le destinataire est en mesure d'en prendre possession au bureau de poste, pour autant qu'on puisse attendre de lui qu'il le fasse aussitôt. … Lorsque la loi fait courir un délai depuis la réception d'une déclaration … la jurisprudence tient la déclaration pour notifiée à l'expiration du délai légal fixé pour le retrait du pli recommandé, si ce pli n'est pas retiré (arrêt de la Ire Cour civile du 8 décembre 1969 dans la cause Jordan c. Sarteur, in SJ 1972 p. 60 s.). En cas de retrait du pli recommandé dans le délai légal, on doit donc se fonder sur la réception effective, et non pas sur une réception fictive fixée au jour où le pli pouvait être retiré pour la première fois.

8. The deadline within which the addressee may retrieve the letter sent to him by registered mail at the post office follows from Art. 2.3.7 of the General Terms and Conditions of the Swiss Postal Services (Conditions générales «Prestations du service postal»). This provision reads as follows:

2.3.7 Avis de retrait

a. Principe

La Poste établit un avis de retrait lorsque les envois, en raison de la prestation choisie par l'expéditeur ou de leurs dimensions, doivent être remis personnellement au destinataire ou aux autres ayants droit, mais que ces personnes ne peuvent pas être atteintes.

b. Délais

Le détenteur d'un avis de retrait est habilité à retirer les envois qui y sont mentionnés dans un délai de sept jours. La Poste se réserve le droit de ne délivrer l'envoi qu'au destinataire indiqué sur l'avis de retrait.

c. Réserve d'arrangements contraires

Des instructions contraires données par le destinataire ou l'expéditeur dans le cadre de l'offre de la Poste demeurent réservées.

9. If one applied this jurisprudence on fictitious notification to the case at hand, taking into account that the deadline starts running on the day after the attempted notification, the Decision would have to be considered notified on 16 June 2011. In this case, the appeal would not have been filed in time.

B. Swiss Law on notification of procedural acts by registered mail

10. The concept of a fictitious notification of an act setting in motion a deadline is not only known in Swiss substantive law, but also in Swiss procedural law. Art. 138 of the Swiss Code of Civil Procedure (CCP) reads as follows:

Art. 138 Code de procédure civile

(1) Les citations, les ordonnances et les décisions sont notifiées par envoi recommandé ou d'une autre manière contre accusé de réception.

…

(3) L'acte est en outre réputé notifié:

a. En cas d'envoi recommandé, lorsque celui-ci n'a pas été retiré: à l'expiration d'un délai de sept jours à compter de l'échec de la remise, si le destinataire devait s'attendre à recevoir la notification. (…).

C. Applicability of the above-mentioned principles of Swiss Law to the case at hand

11. The Sole Arbitrator firstly notes that neither the FIFA Statutes nor the FIFA Procedural Rules contain any provisions on fictitious notification by registered mail. Furthermore, the relevant provisions do not make explicit reference to the relevant principles contained in the Swiss Code of Obligations or in the CCP. The FIFA Statutes as well as the FIFA Procedural Rules seem – at least at first sight – to be based on the underlying assumption that the decision in question must be physically received by the addressee in order for the deadline of appeal to be set in motion. This is particularly true for the FIFA Procedural Rules. All three forms of notifications stipulated in Art. 19 of the FIFA Procedural Rules (fax, registered mail or courier) assure that the addressee can actually take notice of the grounds of the decision, which enables him to decide whether or not to take legal actions against the decision in question.

12. Furthermore, the Sole Arbitrator notes that the legal concept that a notification by registered mail may be deemed successful if the relevant (substantive or procedural) act is not collected by the addressee within a certain deadline at the post office is not commonly shared by all legal systems. According to German law, for example, a successful notification – even by registered mail – presupposes that the document in question itself reaches the sphere of influence of the addressee. This is – under normal circumstances – not the case if only a note of an attempted notification is left in the addressee's letter box by the postal services advising the latter that he may collect the document in question at the post office within a certain timeframe (cf. German Federal Tribunal, NJW 1998, 976, 977). The same is true – in principle – for Austrian law (cf. OGH [12.1.1971] Az. 4Ob102/70).

13. The purpose of Art. 63 of the FIFA Statutes, as well as Art. 19 of the FIFA Procedural Rules, is to specify in a uniform manner and on a worldwide scale, i.e. irrespective of where in the world the notification is to take place, when the deadline to appeal a decision will be set in motion. In the Sole Arbitrator's view, it is irreconcilable with this purpose of Art. 63 of the

FIFA Statutes/ Art. 19 of the FIFA Procedural Rules to supplement these provisions with a concept of fictitious notification established under Swiss law and designed for notification within Switzerland which is unknown – at least in part – to other legal systems. The better arguments, in particular reasons of legal certainty and foreseeability, speak in favour of construing the above-mentioned provisions to be exhaustive. It follows from this that the term "notification of the decision" in Art. 63 of the FIFA Statutes and the various ways of notification mentioned in Art. 19 of the FIFA Procedural Rules require the addressee to actually gain control over decision and, thus, cannot to be supplemented by notions of fictitious reception / notification according to Swiss Law.

14. This interpretation of the rules is supported by the specific circumstances of the case. When the registered mail was not retrieved by the Appellant within the deadline prescribed by the General Terms and Conditions of the Swiss Postal Services the latter returned it to FIFA. On 22 June 2011, FIFA tried to notify the Appellant of the Decision via his club (FC Zurich) once more. This procedure would have been unnecessary if the principles of Swiss law pertaining to fictitious reception / notification of registered letters had applied to the FIFA Statutes / FIFA Procedural Rules. It follows from this practice that FIFA itself apparently believed that the previous notification by registered mail had been unsuccessful according to its rules and that, therefore, the notification of the Decision had to be secured by an alternative way.

15. The Sole Arbitrator is aware of the fact that requiring the decision itself to reach the addressee's sphere of influence may be – in a particular case – burdensome for FIFA. In this respect, however, the Sole Arbitrator notes that he would not be prevented to apply common principles of good faith in order to restrain an addressee of a decision to manipulate the starting date of the deadline for appeal. In the case at hand, the Sole Arbitrator is, however, convinced that the facts of the case do not require him to do so. The Appellant had left Zurich – with the consent of his club – for vacation in his home country. The last game of the season had been played and the sporting season was over. It is not uncommon that – especially – foreign players leave their place of domicile at the end of the season to go on vacation. Furthermore, there is no evidence before the Sole Arbitrator that the Appellant was advised or could have expected otherwise that the Decision was meant to be issued and served during the relevant period of time.

16. To sum up, therefore, the Sole Arbitrator finds that the Decision was not notified to the Appellant at the time when the deadline to retrieve the registered mail at the postal office expired.

D. Notification by fax dated 22 June 2011

17. Whether the Decision was (successfully) notified to the Appellant by fax dated 22 June 2012 can be left unanswered here. As mentioned above, the Head of the Players' Status Committee asked FC Zurich to forward the said fax to the Appellant in a traceable way and informed FC Zurich that – in absence of such notification – the notification of the Appellant would be considered complete within four days of the receipt of the fax. It questionable whether such

procedure, which is clearly not covered by the wording of Art. 19 of the FIFA Procedural Rules, is lawful or not. However, even if one assumed that the Appellant was legally notified within four days of the receipt of the fax by FC Zurich, i.e. on 26 June 2011, the deadline for the appeal would have expired on 18 July 2011. Since the appeal in question was lodged on exactly that date, no question of timeliness of the appeal arises in the case at hand.

E. Conclusion

18. The appeal filed by the Appellant on 18 July 2011 is considered admissible.

Applicable Law

18. The present arbitration is an international arbitration within the meaning of chapter 12 of the Swiss Private International Act (PILA). Consequently, the applicable law to the merits is determined according to Art. 187 (1) of the PILA. According thereto, the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected. By agreeing to arbitrate this dispute under the Rules of the Code the parties have agreed on how the law on the merits should be determined and, thus, substituted for Art. 187 (1) of the PILA. Art. R58 of the Code reads as follows:

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. In the latter case the Panel shall give reasons for its decision.

19. In the dispute at hand the applicable regulations to the merits are the statutes and regulations of FIFA, in particular the FIFA Regulations and the FIFA Procedural Rules. Moreover, in case that these rules do not cover all questions arising, the law (validly) chosen by the parties, and, in absence of such a choice, the law of the country in which the federation which has issued the challenged decision is domiciled, i.e. Swiss law.

Mission of the Panel

20. The mission of the Sole Arbitrator follows from Art. R57 of the Code. Thereto the Sole Arbitrator has full power to review the facts and the law. He may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. Since this arbitration constitutes a proceeding de novo, the Sole Arbitrator is not confined to the facts and arguments submitted in the first instance before the FIFA Players' Status Committee.

Merits

21. The starting point whether or not the Agreement was validly concluded between the parties is Art. 12 (11) of the FIFA Regulations which explicitly deals with the conclusion of contracts with soccer players that are minors. The provision reads as follows:

Art. 12 (11)

Minors may not sign a representation contract without the express permission of their legal guardian(s) in compliance with the national law of the country in which the player is domiciled.

22. It follows from this rule (which is in accordance with Art. 35 of the PILA) that the question whether or not a person is to be considered a minor is to be determined according to *"the national law of the country in which the player is domiciled"*. In the case at hand, this refers to Tunisian law, since – at the time of the conclusion of the contract – the Appellant was domiciled in Tunisia. According to Tunisian law, the Appellant was a minor and of limited capacity at the time of the conclusion of the Agreement. It is undisputed between the parties that the Appellant did not act with his legal representative's consent when signing the Agreement. Therefore, the Appellant could not legally commit himself.

23. At first sight, the reference in Art. 12 (11) of the FIFA Regulation seems to relate to two questions only, i.e. whether or not the person concerned is a minor and how to determine the legal representatives with the consent / approval of which the minor is entitled to enter into a contract. However, the Sole Arbitrator understands the reference in Art. 12 (11) of the FIFA Regulations in a broader sense. According thereto, the law of the country of domicile governs all of the consequences of a minor entering into a contract and all exceptions thereof. These exceptions mainly relate to those (rare) circumstances in which a minor does not merit protection. To sum up, therefore, Art. 12 (11) of the FIFA Regulation must be interpreted as a reference to all (Tunisian) rules governing the validity of a contract concluded by a minor.

24. Art. 8 of the TCO provides that a contract entered into by a person of limited capacity (Art. 6 TCO) without the consent or approval of his or her legal representative is not – *per se* – null and void. Instead, the law provides that such nullity only comes into play if the person files an action for rescission of the contract (*"action en rescision"*) according to Art. 330 TCO. In the case at hand, the Appellant did not file such action. In addition, Art. 337 TCO provides that the action for rescission of a contract concluded by a minor of limited capacity can only be filed within a year of becoming of age. However, no such action was lodged by the Appellant within the said timeframe.

25. Irrespective of the deadline to file an action for rescission of the contract, a minor is entitled to raise a plea of nullity against the person claiming the execution of the contract or an obligation arising out of the contract. The plea of nullity may be raised whenever the person would be entitled to lodge an action for rescission of the contract. However, there is one particularity concerning the plea of nullity. The latter is not tied to the deadline of one year like the action for rescission of the contract. Instead, Art. 335 (2) TCO explicitly provides that the plea may also be raised any time thereafter.

26. The Sole Arbitrator finds that in the case at hand the prerequisites of Art. 335 TCO are fulfilled. The Appellant was of limited capacity at the time of the conclusion of the contract according to Art. 6, 8 TCO. It follows from Art. 330 TCO that he could have filed an action for rescission of the contract after coming of age. The Appellant pleaded nullity in the proceedings before the FIFA Players' Status Committee as well as the current proceedings. Since according to Art. 335 (2) TCO, the preclusion deadline provided in Art. 330 TCO does not apply to the plea of nullity, the latter was also raised in time.

27. It is questionable in the case at hand, however, whether the Appellant was precluded to raise the plea of nullity for other reasons than the expiry of the preclusion deadline. Art. 338 (2) TCO provides in that respect that a person renounces its right to raise the plea of nullity if it confirms or ratifies the contract or if it voluntarily executes it. The law provides, however, that a confirmation or ratification of a (voidable) contract cannot be assumed lightly. Instead, Art. 337 TCO requires that a confirmation or ratification of a contract must be directed at the core of the obligation stipulated therein, must mention the reason why the contract is deemed to be voidable and must contain the express declaration that the parties intend to cure the defect giving reason to its contestability. No such (explicit) confirmation or ratification of the contract was expressed by the Appellant in the case at hand at any time.

28. The question to be answered, therefore, is whether the Appellant has voluntarily executed the (voidable) contract and, thus, renounced his plea of nullity. According to Art. 338 (1) TCO, a party renounces the plea of nullity if it executes the (contested) obligation, in parts or as a whole. In the case at hand, the Appellant did not voluntarily execute the contract within the meaning of Art. 338 TCO at any point in time. According to Art. 2.2 of the Agreement, it would have been – *inter alia* – the Appellant's obligation to not conclude any agreement covering the same subject as the exclusive agreement concluded with the Respondent, to refrain from entering into any discussions when contacted with contract proposals, to immediately inform the Respondent of such contact, and to also inform the Respondent of any event which may affect the conclusion or fulfillment of the agreements detailed in Art. 1 of the Agreement.

29. It is undisputed that the Appellant concluded a contract with FC Zurich without including the Respondent in the negotiations or even informing him about the negotiations. Moreover, the Appellant was represented during the negotiations by a different players' agent. No proof could be established that the Appellant fulfilled any of the contested obligations stipulated in the Agreement in part or as a whole. On the contrary, by not abiding to Art. 2.2 of the Agreement, the Appellant expressed the will not to be bound by the contents of said contract. Therefore, the fact that the Appellant "breached" Art. 2.2 of the Agreement by entering into contractual negotiations with FC Zurich without involving the Respondent cannot be characterized as a "voluntary execution" of the Agreement within the meaning of Art. 338 (2) TCO.

30. Furthermore, the Appellant did not (tacitly) confirm the voidable contract by accepting the Respondent's service as his agent. Even assuming that the Respondent contacted European clubs in order to transfer the Appellant to them, there is no evidence before the Sole Arbitrator that the Appellant knew about these actions undertaken by the Respondent, much less

consented to them. On the contrary, the Appellant claims that the Respondent never contacted or informed him after the conclusion of the Agreement.

31. According to Art. 1 of the Agreement, it was in essence the Respondent's obligation to contact various football clubs in order to establish working relations that could culminate in the signing of a transfer agreement in favour of the Appellant. According to Art. 2.1. of the Agreement, the Respondent was also obliged to seek the Appellant's directions before continuing negotiations with interested clubs and to inform him of the development of those talks. Nothing of this has been established in the case at hand. It is uncontested that the Appellant's Employment Contract with FC Zurich had not been negotiated by the Respondent on the Appellant's behalf. It is true that the Respondent contacted FC Zurich with letters dating 3 and 22 May 2007. However, these actions were not causal for the conclusion of the Appellant's contract with the club as claimed by the Respondent, and were not made with the knowledge and consent of the Appellant. The foregoing is confirmed by the testimony of Mr Ancillo Canepa, president of FC Zurich, who testified before the Sole Arbitrator that he himself never had any personal contact with the Respondent and that it had been the German players' agent Carlos Fleischmann (representing the company Agency Creative Talent GmbH) who had recommended the Appellant to his club.

32. Thus, the Sole Arbitrator concludes that the Appellant is not precluded to raise the plea of nullity of the contract. It follows from this that the Respondent has no claim arising out of the Agreement and, thus, the appeal of the Appellant must be upheld.

The Court of Arbitration for Sport rules:

1. The appeal filed by Mr Yassine Chikhaoui against the decision of the Single Judge of the FIFA Players' Status Committee dated 27 October 2010 is upheld.

2. The decision of the FIFA Players' Status Committee dated 27 October 2010 is annulled and, thus, the claim by Mr Stéphane Canard dismissed.

(…).