Arbitration CAS 2012/A/2877 Gostareshe Foulad Tabriz Cultural-Sports Institution v. Basghah Farhangi Varzeshi Nassaji Mazandaran (Nassaji Mazandaran FC), award of 18 January 2016

Panel: Judge Borhan Amrallah (Egypt), Sole Arbitrator

Football
Eligibility of a player
Lack of CAS jurisdiction

The current version of article 67 of the FIFA Statutes providing for CAS jurisdiction is not directly applicable as far as decisions passed by a confederation, member or league is concerned. In order that such a decision can be appealed with the CAS, the statutes or regulations of the concerned member of FIFA need to contain a clause transcribing article 67 para. 1 of the FIFA Statutes into a "national" regulation. In this respect, where the proof of the existence of a valid and directly applicable arbitration clause has not been met i.e. where no "national" regulations have been produced, nor any directly applicable FIFA Regulations or any bilateral arbitration agreement that would confer jurisdiction to the CAS, the CAS has no jurisdiction to rule on an appeal.

I. THE PARTIES

1. Gostareshe Foulad Tabriz Cultural-Sports Institution (the "Appellant") is a professional football club with registered offices in Tabriz, Iran, and is currently competing in the Iran Persian League.

2. Basghah Farhangi Varzeshi Nassaji Mazandaran Nassaji Mazandaran FC (Nassaji Mazandaran FC – the "Respondent") is a professional football club with registered offices in Mazandaran, Iran, and in currently competing in the Azadegan League.

II. FACTUAL BACKGROUNDS

A. Background Facts

3. Below is a summary of the relevant facts and allegations based on parties' written submissions and evidences adduced. Additional Facts and allegations found in the parties' written submissions, pleadings and evidences may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations,

legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidences he considers necessary to explain his reasoning.

4. On 13 February 2011, the Appellant and the Respondent played a match which ended up by a 1-1 draw.

5. During this match, the Respondent fielded the Player David Wilkrom (the "Player") in its starting line-up.

6. However, the Player was not supposed to play for the Respondent since his employment contract was signed and registered by the Football Federation of Iran after the end of the transfer window [emphasis added].

7. The Appellant lodged a complaint with the Disciplinary Committee of the Iranian Football Federation with respect to the fact that the Respondent's fielded an ineligible player during the aforementioned match.

8. By decision no. 111 dated 20 April 2011, the said Disciplinary Committee rejected the Appellant's complaint.

B. Proceedings before the Appeal Committee of Iran Football Federation

9. The Appellant filed an appeal against the aforementioned decision no. 111 with the Appeals Committee of the Iranian Football Federation. The latter Committee, by its decision no. 86 of 8 May 2011 dismissed the Appellant's appeal.

10. At an unspecified date, the Appellant requested the Appeals Committee of the Iranian Football Federation to reconsider its decision. It relied upon the report of the Security Department Director of the Iranian Football Federation indicating that the Respondent had contracted with Mr David Wilkorm on 5 January 2011 (after the official registration period) and on the report of the Police Administration Inspection General Department to the General Manager of Security Dept. of Sport & Youth Ministry. The Appellant claimed for the reversal of the Disciplinary Committee's decision and declaring the result as 3-0 in its favour.

11. On 19 June 2012, the Appeals Committee of the Iranian Football Federation dismissed the Appellant's request for reconsideration and declared the rendered Verdict final (verdict no. 27 of 19 June 2012). It grounded its verdict on the lack of any clear evidence denoting the registration of the Mr David Wilkorm's contract by the Respondent after the legal period (the "challenged decision").

C. Proceedings before the Court of Arbitration for Sport

12. In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (the "Code"), on 15 July 2012, the Appellant filed its statement of appeal against the Respondent

and with respect the challenged decision. Together with its statement of appeal, the Appellant filed three exhibits.

13. In accordance with Article R51 of the Code, on 25 July 2012, the Appellant filed its appeal brief together with six exhibits.

14. Despite being invited to do so, the Respondent failed to submit its answer within the time limit prescribed in Article R55 of the Code. However, it submitted an answer by its letter dated 25 February 2013.

15. By letter dated 15 March 2013, the CAS informed the Appellant and the Respondent that the Panel appointed to hear this appeal was constituted as follows: Sole Arbitrator: Dr. Borhan Amrallah Former President of Cairo High Court of Appeal in Giza, Egypt. The Parties did not raise any objection on the appointment of the Sole Arbitrator.

16. By letter dated 18 April 2013, according to the Sole Arbitrator's instructions, the CAS requested the Parties to advise the CAS Court Office whether their preference was for a hearing to be held in this matter or for the Sole Arbitrator to issue an award based on the Parties' written submissions.

17. By its letter dated 27 April 2013, The Appellant preferred that the present matter be decided solely on the basis of the Parties' written Submissions.

18. The Respondent failed to file its position regarding holding a hearing within the deadline fixed by the CAS.

19. The Sole Arbitrator, pursuant to Article R57 of the Code, advised the Parties, on 13 January 2014 that the present matter will be decided on the written submissions only, and that a hearing will therefore not be held.

20. In 2014 and 2015, the CAS Court Office, despite many attempts, was not able to get into contact neither with the Appellant, nor with the Respondent.

21. On 16 October 2015, the CAS Court Office sent a letter to the Iranian Football Federation, requesting a valid and complete address of both Parties. In parallel of such letter, the CAS Court Office also tried to contact again the Parties, requesting (i) them to provide with information about the status of this procedure and (ii) the Appellant to produce a complete and valid address of the Respondent in accordance with Article R48 para. 1 of the Code.

22. While the Respondent and the Iranian Football Federation failed to reply within the time limit set forth by the CAS Court Office, the Appellant, by letter of 25 October 2015, provided it with new contact details of the Respondent and invited the CAS Court Office to render an arbitral award.

23. On 28 October 2015, the CAS Court Office invited both Parties to sign and return the Order of Procedure within five (5) days upon receipt of the CAS Court Office's letter, by courier.

24. On 4 November 2015, the Appellant signed and returned its Order of Procedure. The Respondent failed to reply with the aforementioned time limit.

25. By signing the Order of Procedure, at the least the Appellant confirmed its agreement that the Sole Arbitrator may decide this matter based on the Parties' respective written submissions and that its right to be heard had been respected.

III. SUBMISSIONS OF THE PARTIES

26. The Appellant's submissions, in essence, may be summarized as follows:

- The Appellant stated that the Respondent used an ineligible player (Player David Wilkorm) in the whole match between both Parties to the Appeal played on 13 February 2011 which ended up to 1-1 draw. Due to this result it (the Appellant) lost its chances to be promoted to the pro League while another club (Messe Sarcheshme Club), being the third club, went to pro League instead of the Appellant.
- The aforementioned Player was ineligible due to the fact that his employment contract with the Respondent was concluded and registered after the termination of the legal duration of the last registering window. Accordingly, the date of the said contract and the date of its registration in the Registration Books of the Iran's Mazandaran Provincial Football Board were all forged.
- The Appellant relies, *inter alia*, upon the testimony of both Mr Mehdi Malek Abady (Director of Security and supervision Dpt. Of Football Federation) and Mr Behdad Bayat (the official Agent of the player David Wilkorm) who witnessed that the said player's contract was registered on 4 February 2011, *i.e.* after the expiry of the legal period.
- The Appellant requested for relief the following:

  "Annulling the Decision appealed against, issue a new decision, which replaces the decision challenged and declaring the match result as 3-0 for the Appellant playing against Respondent, the return round of State First League (Azadegan) on February 13, 2011. Finally, declaring that the Appellant has merit to go to the Iran First National Football League, which is named league Bartar".

27. The Respondent failed to submit its answer within the time limit prescribed by Article R55 para. 1 of the Code. It restrained its submission in a letter dated 25 February 2013 addressed to the CAS Court Office. In this letter, the Managing Director of the Respondent admitted the receipt of the deeds & document which were sent from the CAS to the Respondent and declared that all said documents had been discharged from the club by its previous employees.

28. The Respondent's Managing Director declared in the above-mentioned letter that *"Having investigated by the new management of club, it should be necessary to acknowledge that the events related to contract of player, David Wilkorm, which was first concluded on 1 February 2011, were due to one of the former*

employee's violation of this sport club; and senior expert of club was not informed of those events. Therefore, the actual date of contract of this club with Mr. David Wilkorm was on 4 February 2011 after completion of legal due date announced by Football Federation of IRI for employing new players in season 2010/2011. The cases are being announced to that respected court for information".

IV. JURIDICTION

29. It is generally accepted that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Private International Law Act ("PILA") is the relevant arbitration law (DUTOIT B., Droit international privé Suisse, commentaire de la loi fédérale du 18 décembre 1987, Bâle 2005, N. 1 on article 176 PILA; TSCHANZ P-Y., in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, n° 1, p. 1627, ad art. 186 LDIP). Article 176 par. 1 PILA provides that the provisions of Chapter 12 of PILA regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

30. The CAS is recognized as a true court of arbitration (ATF 119 II 271). It has its seat in Lausanne, Switzerland. Chapter 12 of the PILA shall therefore apply, the parties in the present dispute having neither their domicile nor their usual residence in Switzerland.

31. Pursuant to article 176 para. 2 PILA, the provisions of Chapter 12 do not apply where the parties have excluded its application in writing and agreed to the exclusive application of the procedural provisions of cantonal law regarding arbitration. There is no such agreement in this case. Therefore, articles 176 et seq. PILA are applicable.

32. According to Swiss legal scholars, this provision *"is the embodiment of the widely recognized principle in international arbitration of 'Kompetenz-Kompetenz'. This principle is also regarded as corollary to the principle of the autonomy of the arbitration agreement"* (ABDULLA Z., The Arbitration Agreement, in: KAUFMANN-KOHLER/STUCKI (eds.), International Arbitration in Switzerland – A Handbook for Practitioners, The Hague 2004, p. 29). *"Swiss law gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it (…). It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement"* (MÜLLER C., International Arbitration – A Guide to the Complete Swiss Case Law, Zurich et al. 2004, pp. 115-116). *"It is the arbitral tribunal itself, and not the state court, which decides on its jurisdiction in the first place (...). The arbitral tribunal thus has priority, the so-called own competence"* (WENGER W., n. 2 ad Article 186, in: BERTI S. V., (ed.), International Arbitration in Switzerland – An Introduction to and a Commentary on Articles 176-194 of the Swiss Private International Law Statute, Basel et al. 2000). The provisions of Article 186 are applicable to CAS arbitration (RIGOZZI A, L'arbitrage international en matière de sport, thesis Geneva, Basel 2005, p. 524; CAS 2005/A/952; CAS 2006/A/1187).

33. According to article R27 par. 1 of the CAS Code, the CAS has jurisdiction whenever the parties agreed to refer a dispute to the CAS:

- by means of an arbitration clause inserted in a contract or regulations or of a later arbitration agreement (ordinary arbitration proceedings), or
- by means of 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 (appeal arbitration proceedings).

34. In the present case, according to the Appellant, the jurisdiction of the CAS arises out of Article 65 para. 1 of the Statutes of the Football Federation of the Islamic Republic of Iran (2011 edition) (the "FFIRI Statutes") provides as follows:

"In accordance with articles 59 and 60 of the FIFA Statutes (sic), any appeal against a final FIFA decision shall be referred to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. CAS shall not, however, deal with appeals on violations of the laws of the Game, suspensions up to four matches or up to three months".

35. As stated in the previous paragraph, the Appellant based the jurisdiction of the CAS on article 65 para. 1 of the FFIRI Statutes.

36. The arbitral tribunal has the power to decide on its own jurisdiction, it has the *"Kompetenz-Kompetenz"* (Article R55 para. 4 of the Code). This exercise is especially important when the Respondent is in default, that is, if it has not taken standing on the jurisdiction of the tribunal or with respect to the merits of the case. In similar cases, the arbitral court is obliged to examine its jurisdiction *ex officio* (BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, second ed., N 629 ff.).

37. This is the case in the present dispute. A clarification regarding the ambit of this examination is warranted. The Sole Arbitrator does not have to search for reasons that cause lack of jurisdiction and he may accept his jurisdiction, as long as he is *prima facie* satisfied that the Appellant provides a valid arbitration clause and there is no indication that such clause should be declared null and void, inoperative or incapable of being performed (BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, second ed., N 629).

38. In the present case, the Sole Arbitrator notes that the Appellant argues that article 65 para. 1 of the FFIRI Statutes confers jurisdiction to the CAS. Such clause refers to articles 59 and 60 of the FIFA Statues which are now articles 66 and 67 according to the 2012 edition of such Statutes.

39. Article 67 para. 1 of the FIFA Statutes provides as follows:

"Appeals against final decision passed by FIFA's legal bodies and against decision passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".

40. After having referred to article 67 para. 1 of the FIFA Statutes, the Sole Arbitrator has to determine whether the arbitration clause contained in such legal provision – as far as a decision

of a member or league is concerned – is a directly applicable, *i.e.* a self-executing norm, or if it needs to be transcribed into an implementation rule of a FIFA-section in order to be applied.

41. As it can be seen subsequently, this question has been widely discussed in the jurisprudence of the CAS.

42. The landmark CAS decision in this topic area was the arbitral award issued in the procedure CAS 2005/A/952. In such award, the Panel concluded the following:

"It is only with the implementation by the individual confederations of the […] FIFA statutes into their individual statutes, that the CAS can be held to have jurisdiction. The FIFA rules […] do not constitute per se a basis for arbitration. Instead, they constitute an instruction to introduce a regulation providing for CAS arbitration".

43. In the procedure CAS 2009/A/1910, for instance, the Panel underlined that:

"In accordance with the consistent jurisprudence of the CAS on this issue, in the Panel's view article 63 para. 1 of the current FIFA Statutes does not by itself grant jurisdiction to the CAS with respect to decisions passed by confederations, members or leagues (see e.g., CAS 2008/A/1656, CAS 2005/A/952, CAS 2005/A/676, CAS 2002/O/422)".

44. The Sole Arbitrator emphasises that the above-mentioned CAS decisions were confirmed in the cases CAS 2011/A/2472 and CAS 2012/A/2688.

45. In a nutshell, with respect to the consistent jurisprudence of the CAS, the current version of article 67 of the FIFA Statutes is not directly applicable as far as decisions passed by a confederation, member or league is concerned. In order that such a decision can be appealed with the CAS, the Statutes or Regulations of the concerned member of FIFA need to contain a clause transcribing article 67 para. 1 of the FIFA Statutes into a "national" Regulations.

46. In light of the above, the Sole Arbitrator finds that article 67 para. 1 of the FIFA Statutes on its own does not confer jurisdiction to rule over the present matter. Rather, a jurisdiction's clause contained in the FFIRI Statutes is necessary to confer jurisdiction to the CAS.

47. The Sole Arbitrator thus has to examine if the applicable FFIRI Statutes contains a clause conferring jurisdiction to the CAS.

48. As mentioned in paragraph 34, the Appellant based the jurisdiction of the CAS on article 65 para. 1 of the FFIRI Statutes which reads as follows:

"In accordance with articles 59 and 60 of the FIFA Statutes (sic), any appeal against a final FIFA decision shall be referred to the Court of Arbitration for Sport (CAS) in Lausanne, Switzerland. CAS shall not, however, deal with appeals on violations of the laws of the Game, suspensions up to four matches or up to three months" [emphasis added].

49. In the present case, article 65 para. 1 of the FFIRI Statutes does not grant jurisdiction to the CAS because there is presently no FIFA decision under appeal.

50. As a conclusion, the Sole Arbitrator finds that the Appellant failed to produce any FFIRI Regulations, any directly applicable FIFA Regulations or any bilateral arbitration agreement that would confer jurisdiction to the CAS. The proof of the existence of a valid and directly applicable arbitration clause has not been met. As a consequence, the CAS has no jurisdiction to rule over the present matter.

V. CONCLUSION

51. As the FFIRI Statutes does not contain any valid arbitration clause granting jurisdiction to the CAS, the Sole Arbitrator has consequently no jurisdiction to decide the present matter.

ON THESE GROUNDS

The Court Of Arbitration For Sport rules that:

1. The Court of Arbitration for Sport has no jurisdiction to rule on the appeal filed by Gostareshe Foulad Tabriz Cultural-Sports Institution on 15 July 2012 against the decision issued by the Appeals Committee of the Iranian Football Federation on 19 June 2012.

2. (…).

3. (…).

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