



**Arbitration CAS 2013/A/3058 FC Rad v. Nebojša Vignjević, award on jurisdiction of 14 June 2013**

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Hans Nater (Switzerland); Prof. Denis Oswald (Switzerland)

*Football*

*Contract of employment between a club and a coach*

*CAS jurisdiction and distinction between contractual cases and doping-related cases*

*Failure of a national association to create a national court of arbitration and jurisdiction of CAS*

1. According to the well-established CAS case law, Article 67 of the FIFA Statutes does not by itself grant jurisdiction to CAS with respect to decisions passed by confederations, members or leagues. It is important to note that the FIFA Statutes clearly distinguish between appeals to CAS in doping-related matters and appeals in all other matters. In doping-related matters, Article 67 Paragraphs 5 and 6 of the FIFA Statutes states that FIFA and WADA, respectively, are entitled to appeal to CAS against any internally final and binding doping-related decision. This difference in language has been recognised as an express reference that confers jurisdiction to CAS in doping-related matters by previous CAS panels. In all non-doping matters, Article 67 of the FIFA Statutes does not by itself confer jurisdiction to CAS.
2. The failure of a national football association to create a national court of arbitration in accordance with the FIFA Regulations on the Status and Transfer of Players does not create a right of appeal to CAS. Said Regulations call for the creation of a court of arbitration at a national level in order to handle contractual disputes among players, coaches and clubs within the national association. Whether such court at national level is operational or not is irrelevant to CAS' analysis regarding its own jurisdiction, if there is an explicit and exclusive provision granting jurisdiction to the Court of Arbitration of the national football association. The pertinent question is whether or not CAS has jurisdiction over the claim, not whether or not the arbitration court provided for in the relevant regulations exists.

**I. FACTUAL BACKGROUND**

**1. Parties**

- 1.1 Football Club Rad (the “Appellant” or the “Club”) is a Serbian football club which is a member of the Football Association of Serbia (“FAS”). It is currently playing in Serbia’s top division, the Jelen SuperLiga.

- 1.2 Nebojša Vignjević (the “Respondent” or “Vignjević”) is a coach who is a member of the Association of Football Coaches of FAS.
- 1.3 Hereinafter, the Appellant and the Respondent are collectively referred to as “the Parties”.

## 2. Facts

- 2.1 In broad terms, in October 2011, Vignjević and the Club executed a contract whereby Vignjević would be the Club’s coach for two seasons in exchange for monthly salary payments, contractual instalment payments, and bonuses. In February 2012, the Respondent left the Club’s training camp in Turkey as a result of what he claims was a wrongful termination of his employment contract by a representative of the Club’s main sponsor. The crux of the dispute is whether Vignjević was in fact terminated on that occasion or was terminated later after his extended absence from the Club.
- 2.2 Below is a summary of the main relevant facts, as established on the basis of the Parties’ written submissions. Additional facts may be set out, where relevant, in connection with the legal discussion which follows.
- 2.3 On 11 October 2011, the Parties concluded a business agreement in which the Club accepted to pay a monthly salary of RSD 25,000, periodic contractual instalments, and potential bonuses to Vignjević to be the Club’s coach (“Club-Coach Contract”).
- 2.4 On 12 October 2011, the Club filed the Club-Coach Contract with the FAS which certified it on the same day.
- 2.5 On 5 February 2012, the Club left for Turkey in order to train for a two week period and play in several friendly matches.
- 2.6 On 13 February 2012, according to the Respondent, Mr. Ranko Stojic, the Appellant’s main financier, announced the dismissal of Respondent to the daily sports magazine, Sports Journal. The next day, reports surfaced throughout the media that Vignjević’s contract had been terminated after a loss to FC Panduri. Further reports surfaced in The Mondo, a sports publication, that the Club’s trainings would be run by Ranko Stojic until the Club returned to Serbia.
- 2.7 On 16 February 2012, Vignjević left the Club’s training camp in Turkey and returned to Serbia.
- 2.8 On 27 February 2012, the Club initiated disciplinary proceedings against Vignjević for various violations due to his *“unjustified absence from work since 16 February 2012”*.
- 2.9 On 5 March 2012, the Club concluded the disciplinary proceedings by determining that the appropriate sanction for these violations was termination. On the same day, the Club initiated proceedings before the Arbitration Commission of the FAS (“First Instance Commission”) for termination at the expense of Vignjević.

- 2.10 On 8 March 2012, Vignjević submitted his response and counter-demanded that the First Instance Commission find that the termination was the fault of the Club.
- 2.11 On 9 November 2012, the First Instance Commission ruled that the Club-Coach Contract was terminated at the fault of the Club. In its decision, the First Instance Commission held that the Club was obligated to pay RSD 75,000 for monthly salary owed and EUR 35,250 for contractual instalments owed.
- 2.12 Subsequently, the Club appealed the decision to the Appeals Commission of the Assembly of the FAS (“Appeals Commission”).
- 2.13 On 18 December 2012, the Appeals Commission upheld the decision of the First Instance Commission in part agreeing that the termination was the fault of the Club. In its decision, the Appeals Commission concluded that the Club was obligated to pay RSD 75,000 for monthly salaries owed and, after a re-calculation of the amount of instalments owed, determined that EUR 43,850 were owed for contractual instalments.
- 2.14 On 25 December 2012, the Club received the Appeals Commission’s decision.

### **3. Proceedings before CAS**

- 3.1 By letter dated 14 January 2013, the Appellant filed its Statement of Appeal against the Respondent with the Court of Arbitration for Sport (“CAS”). The Appellant submitted the following prayers for relief in its Statement of Appeal:

- “1. ... [T]o modify the Decision by which the Agreement between the Appellant and the Respondent, shall be terminated at the expense of the coach – the Respondent and
  - the Respondent commits itself to pay the amount of 30.000 EUR to the Appellant in the name of the compensation
  - all of the Respondent’s requests is [sic] to be rejected as groundless or
2. CAS shall cancel the Decision and send the dispute back to the FAS bodies for retrial and decisions.
3. The Respondent shall pay for all the expenses of the present CAS procedure and compensate the Appellant’s legal costs”.

- 3.2 On 16 January 2013, the CAS Court Office acknowledged receipt of the Statement of Appeal and informed the Parties that the matter had been submitted to the Appeals Arbitration Division. The CAS Court Office also noted that the Court Office fee had been paid and that the language of the arbitration would be English.
- 3.3 On 28 January 2013, the CAS Court Office acknowledged receipt of the Appeal Brief dated 25 January 2013 and noted the Appellant’s preference that a hearing be held.
- 3.4 On 15 February 2013, the CAS Court Office issued a notice to the Parties that the Panel was constituted in the following composition: Dr. Dirk-Reiner Martens as President, Dr. Hans Nater as Arbitrator appointed by the Appellant and Dr. Denis Oswald as Arbitrator appointed by the Respondent.

- 3.5 On 20 February 2013, the Respondent filed his Answer by courier. In his Answer, the Respondent objected to the CAS jurisdiction.
- 3.6 By letter dated 22 February 2013, the CAS Court Office acknowledged receipt of the Respondent's Answer and invited the Parties to state their preference as to whether or not a hearing should be held.
- 3.7 By facsimile dated 28 February 2013, the Appellant informed the CAS Office of its preference that a hearing be held. On the same day, the CAS Court Office acknowledged the Appellant's preference.
- 3.8 By facsimile dated 1 March 2013, the Respondent informed the CAS Court Office of his preference that the Panel issue an award based on the Parties' written submissions.
- 3.9 By facsimile dated 14 March 2013, the CAS Court Office informed the Parties of the Panel's decision to grant an opportunity to the Appellant to file, on or before 25 March 2013, an answer as to the issue of the jurisdiction of CAS.
- 3.10 By facsimile dated 20 March 2013, the Appellant requested an extension of time in order to obtain the opinion of the FAS Commission for Legal Matters on the interpretation of the FAS Statute and Regulations regarding the question of CAS jurisdiction. On the same date, the CAS Court Office acknowledged receipt of this request and invited the Respondent to inform the CAS Court Office if he agreed to this request.
- 3.11 By letter dated 25 March 2013, the Respondent objected to the Appellant's request for an extension of time to file its answer on CAS jurisdiction. On the same date, the CAS Court Office acknowledged receipt of the Respondent's objection and informed the Parties that the Panel would render a decision on the request.
- 3.12 By facsimile dated 25 March 2013, the CAS Court Office informed the Parties that the Panel had granted the Appellant an extension of time to file its answer on jurisdiction.
- 3.13 By facsimile dated 1 April 2013, the Appellant filed its answer regarding CAS jurisdiction.
- 3.14 By facsimile dated 2 April 2013, the CAS Court Office acknowledged receipt of the Appellant's submission on jurisdiction dated 1 April 2013.
- 3.15 By facsimile dated 22 April 2013, the CAS Court Office informed the Parties that the Panel would rule on jurisdiction in an interlocutory decision.
- 3.16 By facsimile dated 23 April 2013, the CAS Court Office supplemented its facsimile from the previous day by inviting the Parties to state their preference as to whether to hold a hearing on the issue of jurisdiction by 30 April 2013.
- 3.17 By facsimiles dated 29 and 30 April 2013 respectively, both Parties informed the CAS Court Office of their preference that a hearing not be held on the issue of jurisdiction.

3.18 In accordance with Article R57 of the Code of Sports-related Arbitration (the “Code”), the Panel determined that there was no need to hold a hearing to adjudicate the issue of jurisdiction.

#### **4. The Parties’ Submissions**

4.1 The following outline of the Parties’ positions as it relates to the jurisdiction of CAS is illustrative only and does not necessarily comprise every contention put forward by them. The Panel, indeed, has carefully considered all written submissions made by the Parties regarding the jurisdiction of CAS, even if there is no specific reference to those submissions in the following summary.

##### **4.2 The Appellant’s Submissions**

The Appellant submits:

4.2.1 The Respondent correctly cites Article R47 of the Code but incorrectly asserts that CAS does not have jurisdiction due to the failure of the Statutes and Regulations of the FAS to provide for such jurisdiction.

4.2.2 Specifically, Article 3 of the Statutes of the FAS requires the FAS to be committed to “*recognize the jurisdiction of the CAS and respect its decisions as set out in the relevant provisions of the statutes of FIFA and UEFA*” and states that “*any dispute of national dimension arising from or related to the application of the Statutes or Regulations of the FA of Serbia [is referred] to an independent and impartial court of arbitration [...]*”.

4.2.3 Article 3 creates a legal gap and does not provide for a specific solution on this issue but provides that this gap can be bridged by looking at the suitable rules of FIFA and UEFA.

4.2.4 Article 67 of the FIFA Statutes provides that any decisions from FIFA’s or any of its members’ (i.e. the FAS) legal bodies can be appealed to CAS. Therefore, CAS has jurisdiction because the Statutes of the FAS provide that it will recognise CAS or, alternatively, that it will respect the Statutes of FIFA which provide for the right to appeal decisions to CAS in Article 67.

4.2.5 On 27 March 2013, the FAS Commission for Legal Matters delivered an opinion which stated that CAS has jurisdiction over this appeal:

*“Decision of the FA of Serbia Appeal Commission No. 24-2940/1 of 18 December 2012 is final and there is no possibility of filing any extraordinary legal remedies with the organs of FA of Serbia according to Article 102 section 5 of the Rules of Registration, Status and Transfer of the FA of Serbia Players.*

*Art. 67 Section 1 of the FIFA Statute allows referring to CAS upon exhaustion of all legal possibilities before the organs of the FA of Serbia”.*

4.2.6 The Appellant admits that the independent and impartial arbitration court referred to in Article 3 of the Statutes of the FAS has not yet been created. Thus, the argument made by the

Respondent claiming that the jurisdiction of this dispute lies with this non-existent court is legally unacceptable.

4.2.7 The Appellant submits the following prayer for relief:

*“The Respondent’s objections in relation to CAS jurisdiction are groundless and have no legal basis”.*

### **4.3 The Respondent’s Submissions**

The Respondent submits:

4.3.1 The Parties did not conclude a specific arbitration agreement granting CAS jurisdiction over the claim.

4.3.2 Therefore, CAS can only have jurisdiction over the claim if the statutes or regulations of the FAS *“undoubtedly provide that an appeal against the decision of the association may be filed with the CAS”*.

4.3.3 The following statutes and regulations of FAS clearly demonstrate that CAS does not have jurisdiction:

- (a) Article 3 of the Statutes of FAS as stated above requires that a national dispute is referred *“to an independent and impartial court of arbitration”*.
- (b) Article 80 of the Statutes of FAS which goes into further detail and states in relevant part that *“all disputes of national dimension arising from or related to the implementation of the Statutes of the FA of Serbia or its Regulations shall be resolved by an impartial Court of Arbitration in the territory of Serbia, to the exclusion of any ordinary court [emphasis added by Respondent]”*.
- (c) Articles 43 and 44 of the Regulations on License and Status of Coaches (“Coaches Regulations”) provide that disputes in the first instance are submitted to the First Instance Commission and, thereafter, any appeals to the Appeals Commission. Article 44 specifically provides that *“[t]he Decision of the Appeal Commission of the FAS is final and cannot be disputed [emphasis added by Respondent]”*.
- (d) The Regulations for the Registration, Status and Transfer of Players of FAS (“RSTP Regulations”) govern more than the relation between players and clubs. Specifically, Article 96 of the RSTP Regulations provides that *“[d]isputes among professional players, coaches and clubs in relation to status related issues and maintenance of contractual stability, that may arise at national level...shall be resolved by the Court of Arbitration of the FA of Serbia ... Award rendered by the Court of Arbitration of the FA of Serbia shall be final [emphasis added by Respondent]”*.
- (e) The court of arbitration of the FA of Serbia has not been established yet. However, Articles 101 and 102 of the RSTP Regulations provide that disputes in the first instance are submitted to the First Instance Commission until the Court of

Arbitration of the FA of Serbia is established and, thereafter, any appeals to the Appeals Commission. Article 102 specifically provides that “[t]he decisions taken by the appeals bodies are final and absolute [emphasis added by Respondent]”.

4.3.4 The Respondent submits the following prayer for relief:

*“The result of the overall analyses will lead the Panel in the favour of the Respondent’s standpoint that the CAS HAS NO JURISDICTION to decide this appeal [emphasis added by Respondent]”.*

## II. LAW

### 1. Jurisdiction

- 1.1 The only issue to be addressed in this award is whether CAS has jurisdiction to hear the appeal lodged by the Appellant.
- 1.2 Because Switzerland is the seat of the arbitration and all parties involved are non-Swiss entities or persons, the provisions of the Swiss Private International Law Act (hereinafter referred to as the “PILA”) apply pursuant to its Article 176, Paragraph 1. According to Article 186 of the PILA, CAS has the power to decide on its own jurisdiction.
- 1.3 Furthermore, 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].
- 1.4 “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 Law*, Zurich et al. 2004, p. 115-116].
- 1.5 Article 186 has been held to be applicable in CAS proceedings as well [RIGOZZI A., *L’arbitrage international en matière de sport*, thesis Geneva, Basel 2005, p. 524].
- 1.6 Furthermore, neither party has denied that CAS has the competence to rule on its own jurisdiction in the present case. Thus, under principles of Swiss law the Panel has competence to rule on its own jurisdiction.

**A. *The Substantive Analysis of CAS Jurisdiction***

1.7 Both Parties correctly assert that Article R47 of the Code is the relevant provision regarding jurisdiction of CAS. Article R47 states 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 [emphasis added]”.*

1.8 Generally speaking, this Article requires three separate criteria in order for CAS to have jurisdiction over a claim:

- (a) A decision of a federation, association or sports-related body;
- (b) An express grant of jurisdiction either through:
  - (i) The statutes or regulations of that sports-related body; OR
  - (ii) A specific arbitration agreement concluded by the Parties; and
- (c) The Appellant has exhausted all legal remedies available to him prior to the appeal.

1.9 It is undisputed among the Parties that this Appeal is directed against the decision of the Appeals Commission dated 18 December 2012.

1.10 Neither party claims that the Parties entered into a specific arbitration agreement. Therefore, the Parties merely disagree over whether or not the statutes or regulations of FAS provide for an arbitration clause in favour of CAS.

1.11 Based on the analysis below, the Panel finds that the statutes and regulations of FAS do not expressly provide for CAS jurisdiction.

**B. *The Statutes and Regulations of the FAS do not specifically provide for CAS jurisdiction by reference to the FIFA Statutes***

1.12 In paragraph 2 of its Answer relating to CAS jurisdiction, the Appellant submits that the FAS Statutes and Regulations do not provide for *“any specific solution of this issue, but provide that it can be solved by applying the suitable legal rule from another source (FIFA Statute) or by analogy”*. The Appellant contends that there is a *“legal gap”* which ought to be filled by reference to *“the legal principles and global goals which the FIFA Statutes set”*.

1.13 In the present case neither the Statutes of FAS nor the FIFA Statutes contain any reference to a right of appeal to CAS. The provisions that have been invoked by the Parties are the following:



In relevant part, Article 3 of the Statutes of FAS states:

*“As a member of FIFA and UEFA, FAS is committed to:*

- Recognize the jurisdiction of the CAS and respect its decisions, as set out in the relevant statutes of FIFA and UEFA;*
- Refer to the last instance any disputes within national dimensions arising out of or relating to the implementation of the Statutes or Rules of FAS to the independent and impartial court of arbitration, which shall resolve disputes outside the civil courts, unless it is clearly prohibited under the laws of Serbia”.*

Article 67 of the FIFA Statutes provides that:

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

- 1.14 The Appellant does not submit that the *“independent and impartial court of arbitration”* referred to in Article 3 of the Statutes of FAS is the CAS. The Panel is satisfied that there is no specific grant of jurisdiction provided in Article 3 of the Statutes of FAS.
- 1.15 The Panel has to examine whether Article 67 of the FIFA Statutes itself or in combination with Article 3 of the Statutes of FAS confirm jurisdiction to CAS in the present matter. The Panel finds that it does not confirm jurisdiction.
- 1.16 Previous CAS jurisprudence requires that the statutes or regulations expressly provide CAS with jurisdiction over the claim (*see e.g.* CAS 2005/A/952 and CAS 2002/O/422). The Appellant’s argument fails to take into account consistent CAS jurisprudence regarding Article 67 of the FIFA Statutes. Previous CAS Panels have determined that the language found in Article 67 of the FIFA Statutes does not by itself grant jurisdiction to CAS with respect to decisions passed by confederations, members or leagues (*see e.g.* CAS 2011/A/2472, CAS 2009/A/1910, CAS 2008/A/1656, CAS 2005/A/952, CAS 2004/A/676, CAS 2002/O/422).
- 1.17 It is important to note that the FIFA Statutes clearly distinguish between appeals to CAS in doping-related matters and appeals in all other matters. In doping-related matters, Article 67 Paragraphs 5 and 6 of the FIFA Statutes states that FIFA and WADA, respectively, are *“entitled to appeal to CAS against any internally final and binding doping-related decision”*. This difference in language has been recognised as an express reference that confers jurisdiction to CAS in doping-related matters by previous CAS Panels (*see e.g.* CAS 2009/A/1910, CAS 2007/A/1370 & 1376) and by the Swiss Federal Tribunal (*see* 4A\_460/2008 (confirming the jurisdiction of CAS in CAS 2007/A/1370)). In all non-doping matters, Article 67 of the FIFA Statutes does not by itself confer jurisdiction to CAS.
- 1.18 The Appellant further argues that the opinion delivered by the FAS Commission for Legal Matters on 27 March 2013 also supports its claim that CAS has jurisdiction over this matter. The FAS Commission for Legal Matters opined that Article 67 of the FIFA Statutes granted CAS jurisdiction because there was no possible legal remedy available with FAS and that thus the Appellant had exercised all of its available remedies with FAS.

1.19 The FAS Commission for Legal Matters' opinion can only be submitted for persuasive value because Swiss law grants the CAS the competence to rule on its own jurisdiction. For the reasons discussed above, the FAS Commission for Legal Matters incorrectly asserts that Article 67 of the FIFA Statutes grants CAS jurisdiction over this claim. Their opinion did not take into account CAS jurisprudence and is of no persuasive use to the Panel.

**C. *The FAS' failure to create the court of arbitration of the FAS does not create a right of appeal to CAS***

1.20 The RSTP Regulations call for the creation of a court of arbitration of FAS to handle contractual disputes among players, coaches and clubs within FAS. The decision of the Court of Arbitration of FAS would be final and binding pursuant to Article 96 of the RSTP Regulations. According to both parties, this court of arbitration has not yet been created.

1.21 The Appellant argues that it would be legally absurd to say that a court of arbitration that has not yet been created would have jurisdiction over this claim. Essentially, the Appellant argues that CAS should fill the void created by the lack of a functional court of arbitration of the FAS.

1.22 A previous CAS Panel addressed this issue in CAS 2012/A/2688. That case involved football clubs and committee members bringing a claim against the national football federation over governance issues. Specifically, there was a question as to whether a dispute resolution court, known as the BAKI, was operational in order to handle the dispute. In that case, the Panel found that had there been a provision that referred the dispute "*explicitly and exclusively*" to the BAKI then CAS would be excluded from hearing the dispute. The Panel held that if CAS did not have jurisdiction over the claim then it was "*irrelevant which sport's entity or state court [had] jurisdiction in the matter*". Thus, whether the BAKI was functional was irrelevant to CAS' analysis regarding its own jurisdiction.

1.23 Here, the Panel finds that there is an explicit and exclusive provision granting jurisdiction to the Court of Arbitration of FAS. Article 96 of the RSTP Regulations clearly provides that "[d]isputes among professional players, coaches and clubs in relation to status related issues and maintenance of contractual stability, that may arise at national level...shall be resolved by the Court of Arbitration of the FA of Serbia" and that the decision of the Court of Arbitration of the FAS is final. The present dispute is between a Serbian club and Serbian coach over which party terminated the Club-Coach Contract. Therefore, it clearly falls within the parameters of this provision making it subject to a final decision by the Court of Arbitration of FAS.

1.24 Alternatively, even if there was no such provision in the RSTP Regulations, the Panel finds that whether the Court of Arbitration of the FAS exists is irrelevant to the query at hand. The pertinent question is whether or not CAS has jurisdiction over the claim, not whether or not the arbitration court provided for in the relevant regulations exists.

1.25 In light of the foregoing, the Panel concludes that the appeal filed by the Appellant on 14 January 2013 must be dismissed due to a lack of jurisdiction of CAS.

## **ON THESE GROUNDS**

### **The Court of Arbitration for Sport rules:**

1. CAS has no jurisdiction to adjudicate the present dispute between Football Club Rad and Nebojša Vignjević.
2. The appeal filed by Football Club Rad on 14 January 2013 against the decision of the Appeals Commission of the Assembly of the FAS dated 18 December 2012 is dismissed.
3. (...).
4. (...).
5. All other motions or prayers for relief are dismissed.