Arbitration CAS 2013/A/3249 Zbynek Pospech v. Football Association of the Czech Republic (FACR), award on jurisdiction of 31 March 2014

Panel: Mr Efraim Barak (Israel), President; Mr Michele Bernasconi (Switzerland); Mr Gerhardt Bubník (Czech Republic)

Football
Disciplinary and financial sanctions against a player issued by various bodies of a national association
Payment of a security for costs and CAS Code
Order of the payment of a security for costs as a provisional or conservatory measure
Conditions for granting provisional and conservatory measures
Burden to prove that the responding party would be incapable of paying a potential cost award
Kompetenz-Kompetenz doctrine
Meaning of an appealable decision under Article R47 CAS Code

1. **The payment of a security for costs, the *cautio iudicatum solvi*, is regulated in several national procedural statutes, while procedural set of rules of arbitral institutions often do not contain specific norms for a security to be ordered. This is also the case for the CAS Code. Whilst it is ruled explicitly that the CAS panel has to decide on the costs of the procedure and on any contribution that a party may be ordered to pay to the other party (cf. Article R64 of the CAS Code), there are no rules addressing the issue of a request for security of costs. No specific provisions can be found either in the Swiss Private International Law Act.**

2. **It is generally admitted in international arbitration, that the order of the payment of a security for costs is a kind of provisional or conservatory measure. Accordingly, the general requirement is that a security for costs may be granted if the party that requested the security can prove that the relief is necessary to protect it from irreparable harm. According to Article R37 of the CAS Code, next to the risk of an irreparable harm, the CAS panel, when deciding on the issue of the grant of a provisional measure, has to consider also the likelihood of success on the merits of the claim, and whether the interests of the party requesting the measure outweigh those of the counter-party.**

3. **According to the CAS jurisprudence, as a general rule, when deciding whether to issue provisional and conservatory measures, it is necessary to consider whether the measure is useful to protect the applicant from irreparable harm, the likelihood of success on the merits of the applicant's claim and whether his interests outweigh those of the opposite party. Under Swiss law, a party is entitled to request three kinds of provisory measures. Protective measures which aim at leaving the issue in the same state during the procedure (for example the prohibition to destruct evidence); statutory measures, which aim at regulating the situation while waiting for the final decision (for example the obligation to pay a pension); and the anticipated execution of an obligation though not**

definitive.

4. **An applicant seeking security for costs bears a high onus to prove that the responding party would be incapable of paying a potential cost award. It is necessary for the applicant to file the reasons which make it likely that the future settlement of its claim will be threatened if the security is not paid immediately.**

5. **A CAS panel has the so-called *Kompetenz-Kompetenz*, i.e. the authority to determine whether it has jurisdiction to adjudicate the merits of the case.**

6. **Under certain circumstances, "negative decisions" or "refusals to decide" can be considered as appealable decisions. Simple information or the communication of a mere intention cannot be considered as a decision, and are not appealable. However, the heading of a letter does not necessarily rule out that the letter is to be regarded as a "decision". The essence is whether the correspondence is based on an *animus decidendi*, i.e. an intention of a body of the association to decide on a matter, being also only the mere decision on its competence (or non-competence).**

I. PARTIES

1. Mr Zbyněk Pospěch (the "Appellant" or the "Player") is a professional football player of Czech nationality.

2. The Football Association of the Czech Republic (*Fotbalová Asociace České Republiky* – the "Respondent" or the "FACR") is the national governing body of football in the Czech Republic with its registered office in Prague, Czech Republic. The FACR is affiliated to the Fédération Internationale de Football Association ("FIFA") and to the Union of European Football Associations ("UEFA").

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the written submissions of the parties and the evidence provided by the parties together with the submissions. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be set out, where relevant, in connection with the legal discussion.

4. On 1 April 2006, the Player concluded a "contract of mandate" (the "Mandate") with Mr Ondrej Chovanec, a licensed players' agent of Czech nationality (the "Agent") for a duration of two years, *i.e.* until 31 March 2008.

5. The Mandate contains, *inter alia*, the following relevant terms:

> *"III. Duties of the Contracting Parties*
>
> *(…)*
>
> *4. The* [Player] *assigns all his rights in deciding on his transfers and hosting, lengthening current contracts or fixing of a new contract, amendments to contracts with sport clubs or other subjects, to the* [Agent]. *The* [Player] *explicitly undertakes not to enter into contracts or their amendments that may come into conflict with this contract without a written consent of the* [Agent]. *The Contracting Parties agree that all transfer rights were assigned to the* [Agent]. *(…)*
>
> *IX. Penalty Clause*
>
> *(…)*
>
> *2. In the case, that the* [Player] *breaches the conditions of this Contract, especially a breach of the Articles IV., V., VI., IX of this Contract, the* [Player] *is obliged to pay a penalty in amount of EUR 100.000,-. Penalty is due and payable to the bank account of the* [Agent] *within 3 days of its written notice delivery to the* [Player].
>
> *X. Final provisions*
>
> *(…)*
>
> *3. Legal acts in contravention of FIFA or the National Football Associations are void and not binding on any Contracting Party or third people, who act in contravention of these regulations, do not bind the interested parties".*

6. On 1 February 2008, when the Player was registered with Odd Grenland, a professional football club from Skien, Norway, currently named Odds BK, the Player himself, without the assistance of the Agent, negotiated an employment contract with FC Petržalka 1898, a professional football club from Bratislava, Slovakia, because the Agent allegedly only offered him worse contracts with FC Viktoria Plzen and FC Viktoria Zizkov, two professional football clubs from the Czech Republic.

7. On 4 June 2008, the Agent informed the Player that the conclusion of the employment contract with FC Petržalka 1898 *"all in effect of our mandatory contract without informing me, without my prior consent, this action is considered a gross breach of the terms and conditions signed in the mandatory contract from the 1st April 2006. With respect to the above stated fact I appeal you for paying a contractual fee, with reference to the mandatory contract, in the amount of EUR 100.000,- (…)".*

8. On 29 September 2008, in the absence of payment by the Player, the Agent lodged a claim with the Arbitration Commission of the FACR (the "AC FACR"), requesting to be awarded EUR 100,000.

9. On 4 May 2009, the AC FACR decided that *"[t]he* [Player] *shall pay the* [Agent] *a fine in the amount of 2 442 500,- CZK* [equivalent to EUR 100,000] *at the latest 31st May 2009"*.

10. On 3 June 2009, the Player filed an action with the Prague 1 District Court, requesting the court to declare the above-mentioned decision of the AC FACR of 4 May 2009 null and void.

11. On 19 July 2009, the Prague 1 District Court delivered its decision, holding that it did not have the necessary competence and referred the matter to the Prague 6 District Court. However, before the Prague 6 District Court held a hearing, the Player withdrew his action and the court terminated the proceedings by decision of 14 April 2011.

12. On 25 September 2009, as the Player apparently failed to comply with the decision of the AC FACR dated 4 May 2009, a secretary of the AC FACR requested the Disciplinary Committee of the FACR to instigate disciplinary proceedings against the Player.

13. On 12 November 2009, the Disciplinary Committee of the FACR decided to sanction the Player *"in accordance with the Amendment 1, Art. 15 Penalty Tariff with effort from 13th November 20009* [sic] *in term of terminating his professional career. In case the* [Player] *is capable to prove to the* [AC FACR] *that he met his obligations, the Disciplinary Committee will reinstate his professional career"*.

14. On 18 November 2009, the Player filed an appeal with the Appeal and Review Commission of the FACR (the "ARC FACR") against the decision of the Disciplinary Committee of the FACR dated 12 November 2009.

15. On 27 January 2010, the ARC FACR issued its decision and decided to dismiss the appeal as, *inter alia*, the *"*[Disciplinary Committee of the FACR] *is not allowed to reverse of the* [sic] *Decision by the* [AC FACR]. *The Disciplinary Committee did not make any mistake"*. However, the ARC FACR *"initiates that the Executive Committee will apply the "Special cases procedure" under Article 14 of the Statute and Rules of Proceeding of* [FACR] *in case of the* [Player]*"*.

16. The Player alleges that, as from 1 January 2010, his club FC Zbrojovka Brno, a professional football club from Czech Republic, stopped paying him his salaries as the Player was no longer eligible to play.

17. On 23 March 2010, the Executive Committee of the FACR determined the following: *"[t]he Executive Committee approves and calls (in accordance with Article 14 of the Statute and the Rules of Procedure of the* [AC FACR]*) the* [AC FACR] *for the Special cases procedure in the matter of* [the Agent] *versus* [the Player] *in front of the whole collegium of the* [AC FACR]*"*.

18. On 23 March 2010, the Player sent previously unknown documentary evidence to the AC FACR with the request to open new proceedings on the basis of article 14 of the Statute and Rules of Procedure of the AC FACR.

19. On 7 May 2010, the Player reiterated his request to the Chairman of the AC FACR.

20. On 18 June 2010, the Player filed a complaint with the AC FACR against FC Zbrojovka Brno for unfair dismissal and requested to be reimbursed as from 1 January 2010.

21. On 1 September 2010, following his requests of 23 March and 7 May 2010 and in the absence of an answer from the AC FACR, the Player requested the ARC FACR to review the decisions issued by the AC FACR dated 4 May 2009, the Disciplinary Committee of the FACR dated 12 November 2009 and the decision of the ARC FACR dated 27 January 2010.

22. On 1 October 2010, the AC FACR issued an interlocutory decision denying the Player's request to declare the termination of the Player's employment contract by FC Zbrojovka Brno invalid.

23. On 11 October 2010, the Player filed a proposal for a new trial with the AC FACR.

24. On 13 October 2010, the ARC FACR issued a decision with the following operative part:

> *"I. The proceeding about the review of the resolution issued by the Arbitration Committee case ref. 38/10* [*i.e.* the decision of the AC FACR dated 4 May 2009] *is discontinued and the case is transferred to the* [AC FACR] *to another proceeding.*
>
> *II. The proceeding about the review of the resolution issued by the Disciplinary Committee of* [the FACR]*, case ref. 156/2009* [*i.e.* the decision of the DC FACR dated 12 November 2009] *is discontinued and the case is transferred to the Disciplinary Committee to another proceeding.*
>
> *III. The proceeding about the review of the resolution issued by the* [ARC FACR] *case ref. 55/2009* [*i.e.* the decision of the ARC FACR dated 27 January 2010] *and to issue a verdict in favour of protecting player's professional active career is rejected.*
>
> *IV. The decision of the Disciplinary Committee of* [the FACR] *about discontinuing activities of the* [Player] *is discontinued, coming into effort on 13th October 2010, until the* [AC FACR] *decides (see the aforemention* [sic] *point I.)".*

25. As such, as from 13 October 2010, the Player was again eligible to play in the competitions organised by the FACR, UEFA and FIFA and to be registered by any club.

26. On 18 November 2010, the Player requested FC Zbrojovka Brno to perform in accordance with the employment contract and sent an invoice to the club. The Player maintains that FC Zbrojovka Brno did not provide him any refund.

27. On 11 March 2011, further to an appeal having been filed by the Player against the decision of the AC FACR dated 1 October 2010, the AC FACR decided to dismiss the appeal and to uphold the decision[1].

28. On 8 April 2011, the Player started an action before the Prague 6 District Court, seeking a declaration that the decision of the AC FACR of 1 October 2010, was contradictory to the law or statutes of the FACR. The court dismissed the action by its decision dated 3 December

[1] It appears that the AC FACR decided in appeal to confirm its own decision of 1 October 2010.

2012. According to the submissions, this decision of the ordinary court was subsequently appealed, but until today no decision has been rendered in the appeal proceedings.

29. On 13 February 2012, the Player was declared bankrupt and was assigned a bankruptcy trustee.

30. On 26 October 2012, the Appellant's insolvency trustee sent a letter to the chairman of the FACR maintaining that the rules of the FACR were not followed.

31. On 9 November 2012, the Appellant was invited to a hearing before the AC FACR in relation to the matter 38/10, *i.e.* the dispute concerning the decision of the AC FACR dated 4 May 2009. However, because the panel had not been convened, no hearing took place.

32. On 9 May 2013, the Player's insolvency trustee issued a letter to the chairman of the ARC FACR. With this letter the insolvency trustee requested, *inter alia*, the following:

> *"As the chairman of the* [ARC FACR] *I request you to state an opinion on the herein mentioned petitions and cases.*
>
> *(…)*
>
> *6) On 26th October 2012 I sent voluminous information about the undermentioned current proceedings of* [the Player] *in FACR that were to be delivered to the chairman of FACR Mr Miroslava Pelta. Unfortunately, to date, I have not received any answer.*
>
> *With reference to the provisions laid down by law, I hereby state that the decision and inactivity of FACR, as the incorporated association, gained such intensity and extent, in terms of restraining rights of the debtor, a member of the incorporated association FACR that is in gross inconsistency with Act No. 83/1990 Coll. On Citizens' Association § 3 par. 2 and 3 and 4b).*
>
> *Due to this fact I recurrently consider to file a motion to the Ministry of the Interior of the Czech Republic, since the abovementioned action might fulfil § 12 para. 3 of the aforementioned Act and might be a reason to dismiss the association. However, I still see this procedure as the upmost solution that should not be in the interest of FACR, a significant sports element in our country.*
>
> *Due to the seriousness of the aforementioned case and the obligations as an insolvency administrator resulting from Act No. 182/2006 Coll. Bankruptcy and Settlement (Insolvency Act), and Act. No. 311/2007 Collection on Insolvency Rules and Procedures, to prevent* [the Player] *and his property from another legal injury I expect FACR bodies to redress the mischiefs and to act in compliance with its Statutes".*

33. On 24 May 2013, the Chairman of the ARC FACR issued an *"Opinion of the* [ARC FACR]*"* (the "Appealed Decision")[2].

[2] Due to the various decisions of different tribunals and committees referred to in the parties' submissions, and for the sake of convenience and better understanding of this award, the Panel will refer to this "decision" as the "Appealed Decision" without this name being considered or understood as a conclusive opinion of the Panel in respect of the nature

34. In the Appealed Decision, the ARC FACR stated in the first place that it had no jurisdiction to reopen the case and to rule again on the various decisions of other FACR bodies. Subsequently, the Appealed Decision reads, *inter alia*, as follows:

> *"Based on its findings, completed grounds and the state of the discussed matters resulting from the resolution issued by* [ARC FACR] *from 13th October 2010 and due to the expired terms and terminating mandate of the all mentioned authorities of FACR,* [ARC FACR] *and FACR have decided as follows:*
>
> *(…)*
>
> *In the aforementioned case,* [ARC FACR] *found recurrent breach of the principles of an equal proceeding within unincorporated associations, fair play, and* [FACR Statutes]*".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

35. On 3 July 2013, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS"). In this submission the Appellant nominated Mr Michele A.R. Bernasconi, attorney-at-law in Zurich, Switzerland, as arbitrator.

36. On 15 July 2013, the Appellant filed its Appeal Brief. This document contained a statement of the facts and legal arguments. The Appellant challenged the Appealed Decision, submitting the following requests for relief:

> *"A] According to above facts this is appeal against above described decisions, resp. requests for new decisions by CAS according to R57 of CAS Code because this is appeal "for denial of justice when authority refuses without reason to make ruling or to delay ruling beyond reasonable period" (see para 11 of CAS/A/659 of March 17th 2005 referring to Bovay B., Procédure administrative, Bern 2000, p. 170 and 253). Moreover organs which were supposed to decide do not exist anymore after new Statutes of* [FACR] *were passed. This unstable situation must be resolved because there is no final decision regarding the status of player (at disciplinary level and arbitration at* [AC FACR] *and also the resolution of legality of sanction in Mandate contract in the light of art. 19/7 of Players' agents regulations).*
>
> *B] This is also request for damages. According to causation between ban, resp. inactivity of competent organs of* [FACR] *the player has been in insolvency proceedings since 7th July 2011. The insolvency was imposed on the player since due to ban on football activity he could not make any living. The sanction to pay for alleged breach of Mandate Contract with agent Chovanec ignored FIFA Players' agents regulations since the provisions of this Regulation are without prejudice to the client's right (the player) to conclude an employment contract or a transfer agreement without the assistance of a representative (the agent). Moreover sanction infringed players's* [sic] *personal freedom since he could*

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of this "decision". The nature of this "decision" will be further elaborated and dealt with by the Panel in the legal discussion of this award.

not repay financial sanction anyway when banned to work (see similar destiny of Matuzalem which was corrected in the light of Swiss Federal Tribunal of March 27, 2012).

The damage to the player arises nearly to twenty million CZK in following way:

1) *In insolvency proceedings creditors claim against the player 8.261 023,00 CZK (Exhibit no. 38 concerning decisions of courts in this matter including the debts).*

2) *The home – house player bought for 7 million CZK was sold by Insolvency trustee for 3 million CZK.*

3) *Due to dismissal by FC Zbrojovka Brno football club player lost 1.440.000,- CZK which is the damage for money he would have received according to contract with Brno during one year.*

4) *CAS is then also asked to make evaluation of player's value according to FIFA regulations – the player at age of 28 – what amount of money he lost during the ban of football activity".*

37. On 25 July 2013, the Respondent nominated Mr Gerhardt Bubník, attorney-at-law in Prague, Czech Republic, as arbitrator.

38. On 28 August 2013, pursuant to Article R54 of the Code of Sports-related Arbitration (the "CAS Code"), and on behalf of the Deputy President of the CAS Appeals Arbitration Division, the parties were informed that the Panel appointed to decide the present matter was constituted by:

- Mr Efraim Barak, attorney-at-law in Tel Aviv, Israel, as President;
- Mr Michele A.R. Bernasconi, attorney-at-law in Zurich, Switzerland; and
- Dr Gerhardt Bubník, attorney-at-law in Prague, Czech Republic.

39. On 17 September 2013, the Respondent filed its Answer, whereby it requested CAS to decide the following:

"The Respondent claims that the CAS Panel has no jurisdiction to rule in this case and that the Appellant's appeal is inadmissible. Furthermore, the Respondent claims that the Appellant is not entitled to submit appeal with CAS and that the Appellant failed to support his claims for damages with any evidence. On these grounds, the Respondent asks the CAS Panel to decide to the effect that the Appellant's appeal be dismissed".

40. On 19 September 2013, the Respondent requested the Panel to order the Appellant to provide the Respondent with a security for costs in relation to the present procedure in the amount of CHF 10,000.

41. On 23 October 2013, the Appellant, further to an invitation thereto from the Panel, filed his observations with respect to the Respondent's allegations that 1) the Appellant lacks legal capacity to submit the appeal due to his status as a bankrupt; 2) the Appellant has filed an appeal directed against an "opinion" of a judicial body that cannot be considered as a "decision" with respect to the CAS Code; and 3) the appeal was filed with CAS by the Appellant is manifestly late and therefore inadmissible.

42. On 4 November 2013, the Respondent filed its comments on the observations of the Appellant.

43. On 3 February 2014, the CAS Court Office, on behalf of the Panel informed the parties as follows:

> *"a. The request for security of costs filed by the Respondent on 19 September 2013 is dismissed. The grounds of such decision will be provided within the framework of the final award. This decision shall neither be understood nor interpreted as if the Panel has already decided the question of the jurisdiction of CAS.*
>
> *b. Pursuant to article R55 para. 5 of the Code of Sports-related Arbitration ("the Code"), the Panel will first issue a preliminary award on jurisdiction.*
>
> *c. Pursuant to article R57 para. 2 of the Code, the Panel deems to be sufficiently informed in the present matter and will render its decision on jurisdiction solely based on the parties' written submissions. Therefore, no hearing will be held in the present case in respect of the decision on jurisdiction.*
>
> *d. Further instructions with respect to the current proceedings will be communicated to the parties by the Panel in due course and as a consequence of the decision on jurisdiction".*

IV. SUBMISSIONS OF THE PARTIES

44. The submissions of the Player, in essence, may be summarised as follows:

- The Player principally submits that *"in light of the permanent inactivity in the case, the* [ARC FACR] *made final statement in the case on May 24th 2013. It again despite the above cited CAS case 2008/A/1468* [ARC FACR] *repeated it is not appeal body from* [AC FACR]. *Appellant does not agree. This statement was delivered to Appellant on 14th of June 2013 and as last and hopeless resort of Appellant is this submission to CAS to make new decision in the case. At the same time* [ARC FACR] *made clear reasoning that this is not satisfactory state of affairs and declared that fair trial principles were breached in also in this case concerning art.14 of the Statute and the Rules of Procedure of the* [AC FACR] *and motion for new trial".*

- *"According to above facts this is appeal against above described decisions, resp. request for new decisions by CAS according to R57 of CAS Code because this is appeal "for denial of justice when authority refuses without reason to make ruling or to delay ruling beyond reasonable period" (see para 11 of CAS/A/659 of March 17th 2005 referring to Bovay B., Procédure administrative, Bern 2000, p. 170 and 253). Moreover organs which were supposed to decide do not exist anymore after new Statutes of* [FACR] *were passed. This unstable situation must be resolved because there is no final decision regarding the status of player (at disciplinary level and arbitration at* [AC FACR] *and also the resolution of legality of sanction in Mandate contract in the light of art. 19/7 of Players' agents regulation)".*

- *"This is also request for damages. According to causation between ban, resp. inactivity of competent organs of* [FACR] *the player has been in insolvency proceedings since 7th July 2011. The insolvency*

was imposed on the player since due to ban on football activity he could not make any living. The sanction to pay for alleged breach of Mandate Contract with agent Chovanec ignored FIFA Players' agents regulations since the provisions of this Regulation are without prejudice to the client's right (the player) to conclude an employment contract or a transfer agreement without the assistance of a representative (the agent). Moreover sanction infringed players' personal freedom since he could not repay financial sanction anyway when banned to work (see similar destiny of Matuzalem which was corrected in the light of Swiss Federal Tribunal of March 27, 2012)".

45. The submissions of the FACR, in essence, may be summarised as follows:

- The FACR principally maintains that the appeal filed by the Player is inadmissible and that CAS does not have jurisdiction.

- The FACR argues that the first issue is the Appellant's legal capacity to file the appeal according to Czech domestic law due to the insolvency proceedings initiated against the Player.

- The second issue is the Player's failure to exhaust all legal remedies available to him prior to the appeal, as required by the FACR Statutes, the FIFA Statutes and Article R47 of the CAS Code.

- In addition, the FACR finds that the appeal, which is also directed against the decisions in respect of the proceedings deriving from the AC FACR's decision dated 4 May 2009, the proceedings deriving from the decision of the Disciplinary Committee of the FACR dated 12 November 2009 and the proceedings following the decision of the AC FACR dated 1 October 2010, was filed late, *i.e.* after the expiry of the time limit set out in Article R49 of the CAS Code.

- Finally, the FACR submits that the "opinion" of the ARC FACR dated 24 May 2013, which the Player is appealing, cannot be considered as a "decision" pursuant to Article R47 of the CAS Code.

V. REQUEST FOR SECURITY FOR COSTS

46. On 19 September 2013, the FACR filed a request for security for costs in the amount of CHF 10,000. Based on Article R65.3 of the CAS Code and Swiss law, the FACR maintained that it is generally accepted that arbitral tribunals have the authority to order a party to provide a security for costs under article 183(1) of the Private International Law Act (the "PILA"). With reference to the fact that the Player was declared insolvent and bankrupt and that the court appointed an insolvency trustee to the Player, the FACR purported that there is a clearly documented risk that the assets of the Player would not cover future award of costs in the case of the FACR's success in the current proceedings. The FACR further expressed the opinion that because of the *"evidently vexatious character of the Appellant's claims, and with reference to the insolvency proceedings of the Appellant, the Respondent's interest in obtaining security for costs is well-founded and just".*

47. On 24 September 2013, the Player stated that he hoped that by paying both his own share of the advance of costs to the CAS Court Office, as well as the FACR's share, he assured the FACR that he *"could cover the costs of the FACR in case he would not win the case"*.

48. On 23 October 2013, following an invitation thereto from the Panel, the Player requested to dismiss the FACR's request for a security for costs of CHF 10,000. The Player maintained that he paid for all the proceedings before the FACR. Furthermore, the Player purported that because CAS decisions are enforceable in the football sector by disciplinary proceedings, a security for costs is not necessary. Finally, the Player averred that disputes before CAS are to be resolved in short time and at relatively low costs, this objective would be threatened if he would have to pay an additional amount of CHF 10,000.

49. The Panel observes that article 183(1) of the PILA determines the following:

> *"Unless the parties have agreed otherwise, the arbitral tribunal may enter provisional or protective measures at the request of one party".*

50. Article R37 of the CAS Code reads as follows:

> *"The President of the relevant Division, prior to the transfer of the file to the Panel, or thereafter the Panel may, upon application by one of the parties, make an order for provisional or conservatory measures. (…)"*

51. In the case CAS 2011/O/2545, a CAS Panel dealt with a similar issue, *i.e.* with a request to issue a freezing order to secure the "debt" in dispute. In the parts of that decision which are relevant to the issue at stake (par. 31 *et seq.*) the Panel decided the following:

> "*According to the CAS jurisprudence, as a general rule, when deciding whether to issue provisional and conservatory measures, it is necessary to consider whether the measure is useful to protect the applicant from irreparable harm, the likelihood of success on the merits of the applicant's claim and whether his interests outweigh those of the opposite party (CAS 2004/A/578; CAS 2000/A/274, published in the Digest of CAS awards II, p. 757; CAS 98/200 pp. 38-41; CAS 2003/A/523, par. 7.4; CAS 2004/A/691).*
>
> *Under Swiss law, a party is entitled to request three kinds of provisory measures (Fabienne Hohl, L'exécution anticipée "provisoire" des droits privés, PJA/AJP 1992, p. 576 ss, 577):*
>
> - *Protective measures which aim at leaving the issue in the same state during the procedure (for example the prohibition to destruct evidence);*
> - *Statutory measures, which aim at regulating the situation while waiting for the final decision (for example the obligation to pay a pension); and*
> - *The anticipated execution of an obligation though not definitive".*

52. In the present case, the Respondent asks the CAS to order the Appellant to deposit an amount of CHF 10,000 in order to secure not an amount in dispute, but the collection of an amount that hypothetically could be granted to the Respondent and would have to be paid by the Appellant as contribution to the expenses incurred by the Respondent, namely in case that the appeal will be dismissed. Therefore, the question at stake falls under the first category of measures, *i.e.* it is a protective measure, in other words a measure aiming at securing the allegedly jeopardized claim of the Respondent to be granted a contribution to its legal expenses and is not an anticipated execution of an obligation, like for instance would be the case for an anticipated payment of an amount in dispute.

53. The payment of a security for costs, the *cautio iudicatum solvi*, is regulated in several national procedural statutes (e.g. Article 99 of the Swiss Federal Civil Code of Procedure), while procedural set of rules of arbitral institutions often do not contain specific norms for a security to be ordered.

54. This is also the case for the CAS Code. Whilst it is ruled explicitly that the Panel has to decide on the costs of the procedure and on any contribution that a party may be ordered to pay to the other party (cf. Article R64 of the CAS Code), there are no rules addressing the issue of a request for security of costs. No specific provisions can be found either in the PILA.

55. It is generally admitted in international arbitration, that the order of the payment of a security for costs is a kind of provisional or conservatory measure. Accordingly, the general requirement is that a security for costs may be granted if the party that requested the security can prove that the relief is necessary to protect it from irreparable harm. In the present case, the Panel notes that according to Article R37 of the CAS Code, next to the risk of an irreparable harm, the Panel, when deciding on the issue of the grant of a provisional measure, has to consider also the likelihood of success on the merits of the claim, and whether the interests of the party requesting the measure outweigh those of the counter-party.

56. On this basis, the Panel is satisfied that it indeed has the authority and discretion to order one party to pay a security for costs. Moreover, it remained undisputed between the parties that the Panel has the power to order security for costs.

57. The Panel finds that an applicant seeking security for costs bears a high onus to prove that the responding party would be incapable of paying a potential cost award (CAS 2011/A/2360, §2.5). Or, *"[a]s stressed several times and in very general terms, in order to obtain the order of a security or a conservatory measure it is necessary for the applicant to submit the reasons which make it plausible that the future settlement of its claim will be seriously endangered if the security is not paid immediately"* (BERGER, Prozesskostensicherheit (*caution indicatum solvi*) im Schiedsverfahren, 22 ASA Bulletin 1/2004, p. 4 *et seq.*, at p. 15).

58. Although the Player is asserted to have been declared bankrupt, he showed to have the financial means to pay both the CAS Court Office fee, his share of the advance of costs of these appeal arbitration proceedings, as well as to substitute for the FACR's share of the advance of costs.

59. It is also worth noting that the bankruptcy situation in which the Appellant is at present was a result, either partially or solely, of the sanction imposed on him by the competent bodies of the Respondent preventing him from playing football and thus preventing him the possibility to continue his professional career and the possibility to earn salaries performing his usual occupation. As opposed to a situation in which the dispute is between two different parties while the appealed decision is rendered by an adjudicating authority, here the Respondent, which is the party asking the securities, is actually the same party that imposed the sanction and thus contributed (independently on whether or not such sanction was imposed legitimately and within its legal capacity) to the bankruptcy status of the Appellant.

60. Further, when considering the request for securities and the fact that the request was made by the Respondent that, through its internal tribunals, sanctioned the Appellant, the Panel also took due note of the fact that indeed, in reply to the question of the Player's bankruptcy trustee, the chairman of the ARC FACR stated in the Appealed Decision that the *"*[ARC FACR] *found recurrent breach of principles of an equal proceedings within unincorporated associations, fair play, and* [FACR Statutes]*"*. The Panel is of the opinion that all these facts, as well as the possible amount of costs that may be imposed on the Appellant in case he will lose the case, should be taken into consideration when assessing whether the Respondent met the burden to justify its request.

61. Finally, it cannot be disregarded that Appellant is not acting individually in the present proceedings: indeed, it was the Player's insolvency trustee that wrote a letter to the Chairman of the ARC FACR that led to the Appealed Decision.

62. Taking into account all the above, the Panel is not satisfied that the security requested by the Respondent is necessary to protect it from irreparable harm. Furthermore, the Panel finds that the Respondent's interest in obtaining a security for costs does not outweigh the Appellant's interest in continuing this procedure without paying such a security. In particular when the Appellant has already paid the CAS Court Office fee and both his own and the Respondent's share of the advance of costs.

63. Consequently, the Panel finds that the request to order the depositing of a security for costs must be dismissed.

VI. JURISDICTION

64. Further to the communication of the CAS Court Office dated 3 February 2014, this award solely concerns the issue of jurisdiction of CAS.

65. The Panel observes that the present case involves an athlete of Czech nationality and a sport governing body domiciled in Czech Republic. As the seat of the arbitral tribunal is in Switzerland and because neither of the parties are domiciled or habitually resident in Switzerland, the present dispute is subject to the provisions of Chapter 12 of the PILA.

66. Article 186(1) of the PILA determines as follows:

"1. The arbitral tribunal shall rule on its own jurisdiction.

2. The objection of lack of jurisdiction must be raised prior to any defense on the merits.

3. In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision".

67. The Panel therefore has the so-called *Kompetenz-Kompetenz, i.e.* the authority to determine whether it has jurisdiction to adjudicate the merits of the case (CAS 2010/A/2091).

68. The Panel observes that the Player, in his Appeal Brief, clarified that *"this is appeal against above described decisions, resp. request for new decisions by CAS according to R57 of CAS Code because this is appeal "for denial of justice when authority refuses without reason to make ruling or to delay ruling beyond reasonable period".*

69. The Panel observes that Article R57 of the CAS Code determines, *inter alia*, the following:

> *"The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged (…)".*

70. In light of this provision, the Panel finds that the Player clearly intended to submit an appeal with CAS, requesting it to replace the Appealed Decision with a new decision. Further, the Appellant bases all his claims on the allegedly wrong and illicit Appealed Decision and on the allegedly abusive denial of justice, respectively. The Appellant, in fact, makes reference to Article R57 of the CAS Code, without relying on any other legal basis.

71. Accordingly, and as communicated to the parties by correspondence of the CAS Court Office dated 12 July 2013, the Panel finds that the present matter is correctly assigned to the Appeals Arbitration Division of CAS and shall be dealt with according to Article R47 *et seq.* of the CAS Code.

72. Nevertheless, the Panel notes that in request for relief (B) in the Appeal Brief, the Appellant also added the following relief:

> *"This is also request for damages. According to causation between ban, resp. inactivity of competent organs of [FACR] the player has been in insolvency proceedings since 7th July 2011. The insolvency was imposed on the player since due to ban on football activity he could not make any living (…)".*

73. This paragraph is followed by a list of damages allegedly incurred by the Appellant, however, these alleged damages were not claimed in front of the competent tribunals of the FACR and no decision of any such tribunal rejecting the claim for damages was provided to CAS. Therefore, the Panel is confronted with the question whether CAS has jurisdiction to deal with such a claim submitted in the framework of an appeals arbitration proceeding.

74. The Panel notes that Article R47 of the CAS Code reads as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration*

agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body.

An appeal may be filed with CAS against an award rendered by CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules of the federation or sports-body concerned".

75. The Panel observes that article 29 of the FACR Statutes determines the following:

> *"1. FACR members – both individuals as well as legal entities – are obliged to resolve any disputes ensuing from the Articles of Association and FACR rules and regulations through FACR organs. They can turn to other authorities only in the event that all resources provided by the FACR regulations have been exhausted. A breach of this provision is subject to sanctions.*
>
> *2. Apart from the statutory right of a Member of Czech FA to refer a case to the court according to the ACT no. 83/1990 Coll. On Association of Citizens as amended, member of Czech FA may apply for a decision to the Court of Arbitration for sport (CAS) with its seat in Lausanne, as is stipulated in applicable regulations of FIFA and UEFA and such decision of CAS shall not be subject to appellate review by Czech Courts".*

76. The Panel notes that it is not disputed between the parties that the Player is a member of the FACR and that members of the FACR have the right to lodge an appeal with CAS against a decision of a federation, association or sports-related body if all national legal remedies have been exhausted.

77. The Appellant did not claim (yet) the alleged damages in front of the FACR organs and no final decision of any FACR tribunal in this respect was submitted with the Appeal Brief. Therefore, and in lack of any other jurisdictional basis asserted by the Appellant, this request should be dismissed for lack of jurisdiction independently of the discussion that will follow and will deal with the jurisdiction of the CAS in respect of the "Appealed Decision".

78. Pursuant to article 29(2) of the FACR Statutes, the Panel is prepared to accept that, in principle, the Player has the right to lodge an appeal against a final and binding decision of a decision-making body of the FACR.

79. The FACR however maintains, with reference to jurisprudence of the Swiss Federal Tribunal, that CAS has no jurisdiction to decide the present dispute as the decision appealed against (*i.e.* the letter of the ARC FACR dated 24 May 2013) is not a *"decision of a federation, association or sports-related body"* as is required by Article R47 of the CAS Code.

80. In this respect, the FACR purports that although the ARC FACR *"briefly discussed the merits of the Appellant's case, it did not review any of the Appellant's cases neither did it come to any binding decision. (…) Furthermore, as defined by the Statutes and other internal regulations of the FACR, the* [ARC FACR] *did not have any authority whatsoever to review decisions of the AC FACR or to change final and conclusive decisions of the* [Disciplinary Committee of the FACR]*".*

81. In addition, the FACR argues that the ARC FACR did not and could not produce any legal effects in relation to the cases of the Player. This is allegedly corroborated by the reference to

"opinion" in the challenged document itself and references to an "opinion" on the official website of the FACR. Also, the content of the letter does not correspond to the form and structure required by Czech law and observed by the FACR in its decision-making practise to decisions issued by the ARC FACR and other bodies of the FACR.

82. Contrarily, the Player refers to CAS jurisprudence in maintaining that CAS can accept jurisdiction in cases where a sports association refuses to issue a decision within a reasonable period of time. In other words, no matter the form, there is a decision if the act of a sports association materially affects the legal position of a party.

83. Although the ARC FACR determined that it was not competent to take a decision, the Player submits that this is a denial of justice and breach of due process since the ARC FACR's position is not backed by regulations of the FACR.

84. The Panel finds that under certain circumstances, "negative decisions" or "refusals to decide" can be considered as appealable decisions (BERNASCONI M., When is a "decision" an appealable decision?, in: RIGOZZI/BERNASCONI (Ed.), The proceedings before the Court of Arbitration for Sport, Bern 2007, p. 273), however, and as determined by the Swiss Federal Tribunal, *"simple information or the communication of a mere intention cannot be considered as a decision, and are not appealable"* (Decision of the Swiss Federal Tribunal of 27 June 2002, Case No. 5C.328/2001).

85. It is in this perspective that the Panel analyses the content of the ARC FACR's letter dated 24 May 2013.

86. The Panel observes that the heading of the ARC FACR's letter reads: *"Opinion of the* [ARC FACR]*"*. Although this supports the proposition that the letter was indeed only an "opinion" and not a "decision", the Panel finds that the heading of a letter does not necessarily rule out that the letter is to be regarded as a "decision". The essence is whether the correspondence of the FACR is based on an *animus decidendi*, *i.e.* an intention of a body of the association to decide on a matter, being also only the mere decision on its competence (or non-competence) (BERNASCONI M., When is a "decision" an appealable decision?, in: RIGOZZI/BERNASCONI (Ed.), The proceedings before the Court of Arbitration for Sport, Bern 2007, p. 273). Or, as put by the Swiss Federal Tribunal, it is relevant to note that the Appealed Decision does not have any impact on any membership right of the Appellant (*cf.* ATF 118 II 12), or, with the words of another CAS Panel, it is not intended *"to affect the legal situation of the addressee"* (CAS 2005/A/899).

87. The Panel observes that the Player's bankruptcy trustee requested the following in his letter to the chairman of the ARC FACR of 9 May 2013:

> *"As the chairman of the* [ARC FACR] *I request you to state an opinion on the herein mentioned petitions and cases (…)"* and *"Due to the seriousness of the aforementioned case and the obligations as an insolvency administrator resulting from* [the Insolvency Act]*, and Act. No. 311/2007 Collection on Insolvency Rules and Procedures, to prevent* [the Player] *and his property from another legal injury*

I expect FACR bodies to redress the mischiefs and to act in compliance with its Statutes. I am awaiting your reply".

88. The Panel finds it important that the chairman of the ARC FACR was requested to *"state an opinion"* on the way the FACR bodies acted regarding the various petitions of the Player, but was not asked for any specific ruling. As such, the Player's bankruptcy trustee appears to have been aware of the fact that he did not have any legal basis to file an official request and thus only asked for an *"opinion"*.

89. Indeed, in reply to the question of the Player's bankruptcy trustee, the chairman of the ARC FACR stated that the ARC FACR did not have jurisdiction to reopen the case and rule on the various issues, while determining that the *"*[ARC FACR] *found recurrent breach of principles of an equal proceedings within unincorporated associations, fair play, and* [FACR Statutes]*"*.

90. The Panel observes that no proceedings were pending before the ARC FACR at the time the Player's insolvency trustee issued his letter to the chairman of the ARC FACR. The reply of the ARC FACR dated 24 May 2013 was only an answer to this question and therefore did not have any impact on the legal situation of the Player, at least not in an obligatory and constraining manner.

91. Consequently, the Panel finds that the letter of the ARC FACR dated 24 May 2013 is not a decision susceptible to an appeal arbitration procedure before CAS and that CAS therefore does not have jurisdiction to adjudicate this matter.

92. In light of this decision, the Panel finds (i) that there is no need to assess the other objections raised by the Respondent and rules that it has no jurisdiction to decide on the merits of the present Appeal; and (ii) that it is therefore not for this Panel to comment on the validity of the previous decisions of the different bodies of the FACR nor on their compliance with any FIFA rule. Accordingly, these, without any doubt important questions, shall remain unanswered by the present decision on jurisdiction.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has no jurisdiction to decide the present dispute between Mr Zbyněk Pospěch as Appellant and the Fotbalová Asociace České Republiky as Respondent.

2. The arbitration procedure with the reference CAS 2013/A/3249 Zbyněk Pospěch v. Fotbalová Asociace České Republiky is terminated and shall be removed from the CAS roll.

3. (…).

4. (…).

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