Arbitration CAS 2014/A/3482 FC Union Berlin v. Changchun Yatai Footbal Club, award of 17 September 2014

Panel: Mr Patrick Lafranchi (Switzerland), Sole Arbitrator

Football
Withdrawal of a statement of appeal due to non-respect of Article R51 CAS Code
Article R51 CAS Code and prohibition of excessive formalism
Requirement of an explicit declaration that the statement of appeal shall be considered as appeal brief
Foreseeability of the consequences of a missed deadline stated in Article R51 CAS Code

1. **The wording of Art. R51 para. 1 of the CAS Code on the time limit to file the appeal brief is very clear. The Appellant must submit an appeal brief no later than 10 days following the expiry of the time limit or, in the same time limit, must declare that his statement of appeal shall be also considered as appeal brief. Art. R51 para. 1 of the Code is formulated in a very clear manner and its enforcement serves the protection of the legal interests of the predictability of legal decisions and the equality of the parties. The enforcement of the rule therefore does not violate the prohibition of excessive formalism but is by all means justified. An implementation of Art. R51 of the Code could only be considered as excessively formalistic if the Respondent would have agreed to expand the 10 day delay because in such a case the protection of the interest of the equality of the parties would be granted and there would thus be no point of holding on to the fiction of withdrawal as formulated in Art. R51 of the Code.**

2. **The CAS Code explicitly requires an additional appeal brief or an explicit declaration that the statement of appeal shall be considered as appeal brief in order to avoid any confusion. The fact that the first submission of an Appellant would at the same time meet the substantive requirements of a statement of appeal and of an appeal brief cannot replace the obligation for the Appellant to express in writing its decision to consider the statement of appeal as the appeal brief.**

3. **While the statement of appeal and the appeal brief clearly deviate in their content (cf. Art. R48 and Art. R51), the Code gives the Appellant the opportunity to declare a statement of appeal (that usually does not meet the requirements of an appeal brief) as appeal brief. The Code therefore, as long as an appeal brief is concerned (concerning the substantive requirements of a statement of appeal cf. Art. R48 Para. 3 of the Code), does not care about its content but rather about the declaration of the parties that a submission shall be considered as appeal brief. Furthermore, the consequences of a missed deadline stated in Art. R51 of the Code are highly predictable for the Appellant, all the more so in the event that the Appellant is represented by a professional legal advisor.**

1. BACKGROUND

1.1 The Parties

1. FC Union Berlin ("Appellant") is a German football club with seat in Berlin, Germany, affiliated to the German Football Federation, which is again a member of the FIFA. The Appellant is playing in the "2. Bundesliga".

2. Changchun Yatai Footbal Club (the "Respondent") is a Chinese football club with seat in Changchun, affiliated to the Chinese Football Federation, which again is a member of the FIFA. The Respondent is playing in the Chinese Super League.

1.2 Context of the Dispute

3. On 31 January 2014 the Appellant filed a statement of appeal (however designated as "request for arbitration") against the FIFA decision No. Iza 12-01624. On 14 February 2014 the Appellant informed the CAS Court Office that the statement of appeal is to be considered as the appeal brief.

2. SUMMARY OF THE ARBITRAL PROCEEDINGS BEFORE THE CAS

4. On 31 January 2014 the Appellant did file its statement of appeal (entitled with "Request for Arbitration") against the decision of the FIFA's Players Status Committee (Case No. Iza 12-01624), issued on 19 March 2013 and submitted by FIFA on 13 January 2014 (sic!) to the Appellant.

5. On 7 February 2014, with letters to the parties, the CAS Court Office acknowledged receipt of the statement of appeal of the Appellant. In cipher 2 of the letter the CAS Court Office explicitly informed the Appellant (with words in bold) about the wording of Article R51 of the Code of Sports-related Arbitration ("the Code"),

   a) that is that the Appellant shall file with CAS, within 10 days following the expiry of the time limit for the appeal, a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits, failing which the appeal shall be deemed withdrawn;

   b) that, alternatively, the Appellant shall inform the CAS Court Office within the same deadline if the statement of appeal is to be considered as the appeal brief, failing which the appeal shall be deemed withdrawn.

6. On 14 February 2014 the Appellant informed the CAS that its statement of appeal shall be considered as the appeal brief.

7. On the same day the CAS Court Office acknowledged receipt of the Appellant's letter issued on 14 February 2014. It informed the Appellant that the deadline for such a declaration has expired on 13 February 2014. Further it called the attention to the fact that unless the

Respondent would agree by 21 February 2014 to the admissibility of the declaration submitted on 14 February 2014, the procedure shall be deemed withdrawn and a Termination Order shall be notified to the parties.

8. On 18 February 2014 the Appellant submitted a letter in order to appeal against the letter issued on 14 February 2014 by the CAS Court Office. In this submission the Appellant asked the CAS to perform with the procedure and to decide that the appeal shall not be deemed withdrawn. The submission was sent to the Respondent's attention and was then forwarded for decision to the Deputy President of the CAS Appeals Arbitration Division (hereafter the Deputy President).

9. On 7 May 2014 the CAS Court Office informed the parties amongst others that the Deputy President has decided:

   a) that the Appellant's submission issued on 31 January 2014 is provisionally considered as a combined statement of appeal and appeal brief;

   b) that the Respondent shall submit to the CAS an answer including possible remarks to a termination of the case in application of Article R51 of the Code within 20 days;

   c) that the Respondent should inform the CAS Court Office within a week whether it agrees to the appointment of a Sole Arbitrator;

   d) that the Panel, once constituted, would decide whether the appeal should, or not, be terminated in application of Article R51 of the Code.

10. On 23 May 2014 the CAS Court Office informed the parties that the Respondent did not provide his comments regarding the appointment of a Sole Arbitrator. The Parties were also informed that, in view of the CAS file and of the absence of any objection from the Respondent to the Appellant's request for the appointment of a sole arbitrator, the Deputy President had decided that the Panel would be composed of a Sole Arbitrator.

11. On 6 June 2014 the CAS Court Office informed the parties that the Deputy President of the CAS Appeals Arbitration Division has nominated Patrick Lafranchi, attorney at law in Bern, Switzerland, as the Sole Arbitrator for the present case.

12. The Respondent, even though duly summoned, did at not produce any submission.

13. After having duly consulted the Parties, the Sole Arbitrator decided, on 18 August 2014, to issue the award on the admissibility of the appeal and, if needed, on the merits of the case, on the basis of the CAS file since he deemed that he was sufficiently well informed to do so.

14. An Order of Procedure was issued on the same day. This Order of Procedure was countersigned by the Appellant on 27 August 2014 and on 8 September 2014 by the Respondent.

3. POSITION OF THE PARTIES

15. The following outline of the Appellant's position (the Respondent is at completely at default) is illustrative only and does not necessarily comprise every contention put forward by the Appellant. The Sole Arbitrator, however, has carefully considered all the submissions put forward by the Appellant.

a. The Position of the Appellant

16. In its statement of appeal issued on 31 January 2014 the Appellant requests the following:

    a) The decision of FIFA's Players Status Committee (Case No. Iza 12-01624) is suspended. The Respondent is required to pay to the Claimant EUR 121,500,00 plus interest dating from 16.03.2012 onwards;

    b) The Respondent is required to pay to the Claimant all costs of the proceedings in the case No. Iza 12-01624 – FIFA Players Status Committee and the current CAS Appeal Arbitration.

17. In its submission issued on 18 February 2014 the Appellant further requests that the Appeal Arbitration Procedure has to be performed.

18. In support of its request to proceed with the arbitration the Appellant holds the point of view (cf. submission issued on 18 February 2014, especially page 4 ff.) that […]

    a) *the letter of 31.01.2014 contains all content necessary for a statement of appeal in accordance with Rule 48;*

    b) *that the letter of 31.01.2014 fulfils all requirements of an appeal brief in the sense of Rule 51;*

    c) *that the letter of 31.01.2014 therefore shall be considered as combined statement of appeal and appeal brief ;*

    d) *That the Code does not require that the Statement of Appeal and the Appeal Brief are labelled as such but arise out of their content;*

    e) *that the Rule 51 Par. 1 S. 2 is not (be) applicable as the Appellant has submitted all content of an Appeal Brief and therewith the Appeal Brief itself to the CAS;*

    f) *that according to Rule 51, in the case that an Appellant has only filed a statement of appeal without an appeal brief, the statement of appeal shall be treated as appeal brief.*

b. The Position of the Respondent

19. The Respondent failed to take position in the present matter.

4. JURISDICTION

20. CAS jurisdiction in this matter arises out of article 67(1) of the FIFA Statutes, which establishes the following:

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

21. In addition, neither of the parties disputes the jurisdiction of the CAS and both of them signed the Order of Procedure.

22. Therefore, the CAS has jurisdiction to rule on the present appeal.

5. ADMISSIBILITY

5.1. Applicability of the CPIL

23. According to Art. 176 Para. 1 of Switzerland's Federal Code on Private International Law ("CPIL") the provisions of the articles 176 ff. CPIL apply if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland. The seat of the present arbitration is situated in Lausanne, Switzerland (R28 of the Code). None of the parties are domiciled or habitually resident in Switzerland. In consequence the articles 176 ff. CPIL are applicable in the present case.

5.2. Facts

5.2.1. Issuance Dates of the submissions of the Appellant: Undisputed facts

24. In a first step it has to be examined if evidence is required for known and undisputed facts. Neither the Code nor an agreement of the parties do answer this question. Therefore and based on Art. 182 Para. 2 CPIL the Sole Arbitrator deems the applicability of the Swiss Civil Procedure Code (hereafter referred to "CPC") as appropriate to answer this question.

25. According to Art. 150 CPC evidence is only required for disputed, but not for undisputed facts.

26. The question, if a factual circumstance not contested can be qualified as not disputed in the sense of Art. 150 Para. 1 CPC has to be decided in due consideration of the specific circumstances of the case, especially of the parties' procedural behaviour and their submissions. In regard of the principle of production of evidence (so called "Verhandlungsmaxime", cf. Art. R44.1 of the Code) evidence of not contested circumstances should only be demanded in exceptional cases (cf. Berner Kommentar zum ZGB, HAUSHEER/WALTER, 2012, N 58 to Art. 8 ZGB).

27. Presently it can be considered as undisputed

a) that the appealed decision was notified to the Parties on 13 January 2014,

b) that the Appellant issued its letter titled "Request for Arbitration" (hereafter referred to as "statement of appeal") on 31 January 2014 and

c) that the Appellant issued its written statement that the statement of appeal shall be considered as appeal brief on 14 February 2014.

28. This conclusion results out of the fact that the above mentioned issues on the one hand are not disputed by the Appellant but rather confirmed by it. On the other hand the Respondent – even though at default - would not have any interest to dispute the above referenced fact because they could result in an inadmissibility of the claim (cf. below).

29. In consequence, the Sole Arbitrator considers the above enumerated facts as undisputed and consequently as formally true. The Sole Arbitrator will therefore emanate from those facts in his subsequent legal considerations.

5.2.2. Agreement between the parties: undisputed fact

30. According to the Appellant the parties concluded on 29 February 2012 a transfer agreement with amongst others the following content:

"[…]

Article 1: The player John Mosquera will be permanently transferred from "FC Union Berlin" to "Changchun YATAI Football Club" starting with 1st of March 2012.

[…]

Article 7: This Agreement shall be subject to all applicable rules and regulations of FIFA and CAS and shall be governed and construed in accordance with these regulations".

31. The Respondent did not challenge the authenticity and validity of this agreement. According to the Sole Arbitrator there are no exceptional circumstances at hand that would require the production of additional evidence concerning this question. In consequence the agreement is considered as authentic, that is as concluded between the parties of the present proceeding.

5.3 Legal Analysis

32. In the consecutive considerations it has to be examined if the Appellant respected the deadline stipulated in Art. R51 of the Code or if his appeal shall be deemed withdrawn.

5.3.1 Applicability of the Code

33. The parties, in article 7 of their agreement issued on 29 February 2012, did declare the applicable rules of the CAS and therefore the Code explicitly as applicable for an eventual CAS procedure.

In application of Art. 182 Para. 1 CPIL the present proceeding shall therefore be ruled by the Code.

5.3.2 Art. R51 of the Code

34. Art. R51 Para. 1 of the Code stipulates the following

> *"Within ten days following the expiry of the time limit for the appeal, the Appellant shall file with the CAS Court Office a brief stating the facts and legal arguments giving rise to the appeal, together with all exhibits and specification of other evidence upon which he intends to rely. Alternatively, the Appellant shall inform the CAS Court Office in writing within the same time limit that the statement of appeal shall be considered as the appeal brief. The appeal shall be deemed to have been withdrawn if the Appellant fails to meet such time limit".*

5.3.3 Interpretation of Art. R51 of the Code

35. The wording of Art. R51 of the Code is very clear. The Appellant, no later than 10 days following the expiry of the time limit, has to submit an appeal brief or, alternatively, in the same time limit, declare that his statement of appeal shall be also considered as appeal brief.

36. Art. R51 Para. 1 of the Code does not contain any vague legal concept or award the Sole Arbitrator with discretionary authority. Rather it is formulated in a very clear manner. An interpretation *"contra verba legis",* as demanded by the Appellant, would require legitimate reasons because it would endanger highly protected interests of a procedural order, that is the predictability of legal decisions and the equality of the parties (cf. amongst others the decision of the Federal Tribunal BGer 4A_600/2008, issued on 20 February 2009, consideration 4.2.1.3).

37. As seen, the enforcement of Art. R51 of the Code serves the protection of the legal interests of the predictability of legal decisions and the equality of the parties. The enforcement of the rule therefore does not violate the prohibition of excessive formalism but is by all means justified (cf. also the decision of the Federal Tribunal BGer 4A_600/2008, issued on 20 February 2009, consideration 5.2.2, where the Federal Tribunal had to assess Art. R64.2 of the Code, a norm similar to Art. R51 of the Code). An implementation of Art. R51 of the Code could only be considered as excessively formalistic if the Respondent would have agreed to expand the 10 day delay because in such a case the protection of the interest of the equality of the parties would be granted and there would thus be no point of holding on to the fiction of withdrawal as formulated in Art. R51 of the Code.

38. Further, the Appellant holds the point of view that an additional appeal brief or an explicit declaration that the statement of appeal shall be considered as appeal brief is not required as long as the statement of appeal meets the material requirements of an appeal brief (cf. letter of 18 February 2014, page 4 ff.).

39. There is no basis in the Code for such an approach, that is that the appeal brief would be optional or that a statement of appeal - if the Appellant fails to hand in an appeal brief or fails to declare that its statement of appeal should be considered as appeal brief - would have to be interpreted or considered as the appeal brief as long as it meets the substantive requirements of

an appeal brief. Such criterion, if applied, would open the door to various possible interpretations by the CAS Court Office. In order avoid any confusion, the Code requires a clear statement of the Appellant, either in the form of an appeal brief or in the form of a simple declaration that the statement of appeal shall also be considered as the appeal brief. The fact that the first submission of an Appellant would at the same time meet the substantive requirements of a statement of appeal and of an appeal brief cannot replace the obligation for the Appellant to express in writing its decision to consider the statement of appeal as the appeal brief.

40. This is further confirmed by a systematic interpretation of the Code. While the statement of appeal and the appeal brief clearly deviate in their content (cf. Art. R48 and Art. R51), the Code gives the Appellant the opportunity to declare a statement of appeal (that usually does not meet the requirements of an appeal brief) as appeal brief. The Code therefore, as long as an appeal brief is concerned (concerning the substantive requirements of a statement of appeal cf. Art. R48 Para. 3 of the Code), does not care about its content but rather about the declaration of the parties that a submission shall be considered as appeal brief.

41. Hence, there is no basis for an interpretation of Art. R51 of the Code as presented by the Appellant. The arguments of the Appellant therefore have to be rejected.

42. Last but not least, the consequences of a missed deadline stated in Art. R51 of the Code were highly predictable for the Appellant. This results not only out of the very clear wording of Art. R51 of the Code and the fact that the Appellant was represented by a professional legal advisor. These consequences were also predictable because the CAS Court Office, with its letter issued on 7 February 2014, explicitly pointed out to the Appellant that it would have to observe the 10-day time limit, otherwise the appeal would be deemed withdrawn. The fact that the Appellant was aware of those consequences is further demonstrated clearly by its letter submitted on 14 February 2014, wherein it declared that the statement of appeal should be considered also as the appeal brief. The argumentation of the Appellant is therefore contradictory because it knew that it would have to make a declaration, made on 14 February 2014, or submit an appeal brief during the 10 day deadline.

43. Summing up, the arguments of the Appellant have to be entirely rejected. According to the *ratio legis* of Art. R51 of the Code, in order that an appeal is not considered as withdrawn, the Appellant, during the 10-day time limit stated in Art. R51 of the Code, either has to hand in an appeal brief or declare that its statement of appeal shall be considered as appeal brief.

5.3.4 No adherence of the deadline

44. Next, it has to be examined if the Appellant, with its letter issued on 14 February 2014, met the 10-day time limit stated at Art. R51 of the Code.

45. According to Art. 67 Para. 1 of the FIFA Statutes, appeals against decisions passed by FIFA bodies have to be lodged with CAS within 21 days of notification of the decision in question. Pursuant to Art. R32 of the Code the time limits fixed under the Code shall begin from the day after that on which notification by the CAS is received. The relevant time limits are respected

if the communications by the parties are sent before midnight, on the last day on which such time limits expire.

46. Presently, the FIFA-decision was communicated to the Appellant by fax on 13 January 2014. The 21 day deadline therefore began on 14 January and ended 21 days later, that is on 3 February 2014. The first day of the 10 day delay thus and in accordance with Art. R51 of the Code started on 4 February 2014 and ended on 13 February 2014.

47. However, as noted above, the Appellant declared on 14 February 2014 that its statement of appeal should also be considered as appeal brief. The Appellant therefore did not respect the time limit provided by Art. R51 of the Code. The appeal of the Appellant in consequence shall be considered as withdrawn.

48. Hence the appeal submitted by FC Union Berlin against the decision of the FIFA's Players Status Committee (Case No. Iza 12-01624), issued on 19 March 2013 cannot be entertained.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by FC Union Berlin against Changchun Yatai Footbal Club Co. Ltd. is considered as withdrawn and shall not be entertained.

(…).