



**Arbitration CAS 2016/A/4581 Apollon Football Ltd. v. Partizan FC & Fédération Internationale de Football Association (FIFA), award of 28 February 2017**

Panel: The Hon Michael Beloff QC (United Kingdom), President; Mr Efraim Barak (Israel); Prof. Luigi Fumagalli (Italy)

*Football*

*Compensation due to another club in case of a subsequent transfer*

*Jurisdiction of the FIFA Single Judge*

*CAS jurisdiction to rule as a first instance*

*Competence of FIFA to impose the sanctions contemplated by Art. 12bis RSTP in case of overdue payables*

- 1. On the clear language of Article 22f) of the FIFA Regulations on the Status and Transfer of Players (RSTP) a dispute between clubs belonging to different jurisdictions which do not fall within the expressly excluded categories, i.e those in a) d) and e), falls within the jurisdiction of FIFA and by reason of Article 23.1 within that of its Players' Status Committee. The wording of article 22f) does not include limits, restrictions or precisions on the kind of disputes "between clubs belonging to different Associations that do not fall within the cases foreseen in a) d) and e)" comprised therein.**
- 2. If FIFA has never addressed the merits of a case because it decided that it did not have jurisdiction over the dispute, the CAS, overturning this decision, is *de facto* the first instance tribunal to review them. However, public policy does not require that a case be heard at two levels. Therefore, if none of the parties requests that the case be referred back to FIFA and in view of the full power of review conferred to CAS panels by Article R57 of the CAS Code, the CAS can rule directly on the merits of the case.**
- 3. It is for FIFA, where a FIFA decision or CAS decision finds that a payment was delayed for more than 30 days (Art. 12bis (2) RSTP), to decide in the first instance whether or not to impose the sanction contemplated by Article 12bis RSTP. The distinction between monetary claims and disciplinary proceedings should be preserved in the sense that FIFA will be the first instance body to deal with disciplinary sanctions under Article 12bis and the CAS should deal with such questions only as an appellate body and once FIFA has addressed it on the merits. Therefore, where FIFA decided not to enter into the merits for what it perceived to be reasons of lack of jurisdiction, the proper course is for a CAS panel to refer the issue of sanctions under Article 12bis to be dealt with by FIFA, if FIFA decides to do so as a consequence of the findings of this panel.**

## I. PARTIES

1. Appellant, Apollon Football (Public) Ltd. (“Apollon”) is a sports association organized under the laws of Cyprus with its registered office in Limassol, Cyprus. Apollon is the legal entity acting as Apollon Limassol FC, a football club, participating in the Cypriot “First Division”, the top division of the Cyprus Football Association (“CFA”).
2. First Respondent, Partizan Football Club (“Partizan”), is a football club, participating in the Serbian “SuperLiga”, the top division of the Football Association of Serbia (“FSS”).
3. Second Respondent, the Fédération Internationale de Football Association (“FIFA”), is the governing body of football at worldwide level, constituted as an association under Swiss law and domiciled in Zurich, Switzerland.

## II. FACTUAL BACKGROUND

### A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties’ written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.
5. On 18 August 2014, Apollon and Partizan concluded an agreement (the “Agreement”) concerning the player A. (the “Player”).
6. The Agreement provided, so far as material, as follows

*“WHEREAS: Partizan declares that it is the exclusive holder of 100% federative rights and 75% of the Economic rights (“Partizan Rights”) over the player A., born [in] 1996 holding Serbian passport no. [...] (“Player”) and the Rights are free from any lien, pledge, encumbrances or any kind of third party’s rights.*

*WHEREAS: The reminding 25% of the economic rights over the Player belongs to the Player’s father (15%) and his agent (10%).*

*WHEREAS: The Player has a valid employment agreement with Partizan until 30.6.2016 (“Employment Agreement”).*

*WHEREAS: Apollon desires to Purchase from Partizan Rights 50% of the economic rights over the Player all under the terms and conditions as specified in this Agreement.*

*Therefore it is declared, agreed and stipulated between the parties as follows:*

...

**2. Representations and undertakings of the parties:**

**Partizan declares and undertakes as follows.**

2.1 Partizan is the sole and exclusive owner of 100% federative rights and 75% of the Economic rights over the Players...

...

2.6 Partizan has the ability to fulfil its undertakings under this Agreement...

...

2.9 Subject to an offer presented to the Partizan to purchase the Player rights and to employ the Player with a minimum amount of 400.000€ net per year. Partizan grants that the Player will give his consent, sign all necessary documents and will undertake all the necessary actions for the realization of his transfer from Partizan into a third club in accordance with the instructions of the Parties. If such consent could not be procured Partizan Should have the obligation to pay Apollon an amount equal to the percentage which Apollon was entitled to receive from such transfer to third party that was rejected by the player plus 10% interest per year.

**3. The purchase of 50% of the economic rights**

3.1 Partizan sells to Apollon and Apollon purchases from Partizan 50% of the economic rights from Partizan Rights over the Player.

3.2 The Parties wish that the Player shall keep playing for Partizan, however, under section 5.3 below, Apollon shall have the right to order Partizan to transfer the player federative rights to any other club according to Apollon's instructions, not earlier than the winter transfer period of 2015.

3.3 In consideration for the purchase of the 50% of the economic rights, Apollon shall pay Partizan a total sum of **€1,200,000** (One Million Two Hundred Euro) (the "**Consideration**").

*The Consideration will be paid as follows:*

3.3.1 **€900,000** (Nine Hundred Euro) within 2 business days following the execution of this agreement.

3.3.2 **€300,000** (Three Hundred Euro) not later than 31.08.2014.

3.4 It is also agreed that Partizan will be entitled to receive an additional payment, equal to 10% from Apollon's Net Profit, of any sum above 4,000.000 Euro to be received as consideration for future transfer of the rights over the Player.

3.5 For the purposes of clause 3.4 above the "**Net Profit**" shall be the consideration which Apollon shall be

*entitled to receive from the future transfer of the rights over the Player after deduction of all and any amounts including but not limited to: The Consideration under section 3.3. Taxes, expenses, solidarity mechanism payments, agent fees and any other payments that may occur to Apollon with respect to the transfer of the Player.....*

...

#### **4. Future transfer of the Player**

*4.1 It is agreed by the parties that they will do their best effort to transfer the Player to a new club during his registration under Partizan. The future consideration from such future transfer will be agreed by mutual consent of the Parties.*

*4.2 The total consideration that shall be received from any Player's future transfer shall be divided between Apollon (50%) and Partizan (25%) ... - such distribution shall be made pro rata on the payment dates established in the respective transfer agreement or immediately after they are effectively received by the Partizan, whichever the earlier.*

...

#### **9. Arbitration**

*9.1 This Agreement shall be subject to the law and regulations of FIFA. Any disputes, controversy, or claim arising out of or relating to this agreement or the breach, termination or invalidity thereof, shall be subject to the jurisdiction of the judicial organs of FIFA and the Court of Arbitration in Sport. All proceeding in any arbitration shall be conducted in English.*

...

#### **11. Waiver**

*11.1 No behaviour on the part of any of the parties may be deemed a waiver of any of its rights under this Agreement or by any law, or a waiver or consent on its part for any breach or non-compliance with any term, unless the waiver, consent, delay, change, cancellation or addition have been expressly made in writing and signed by the parties”.*

7. On 20 August 2014 and 27 August 2014 Apollon fulfilled its payment obligations to Partizan.
8. On 23 March 2015 the Portuguese Football Club Sport Lisboa e Benfica Futebol S.A.D. (“Benfica”) sent a letter to the well-known football players’ agent, Mr Pini Zahavi, which stated in material part

“Re: **A. (d.o.b. [...]) 1996**”

*Dear Sir,*

*By virtue of this letter SL Benfica SAD appoint Mr. Pini Zahavi to undertake and carry out, on behalf and*

*representing BENFICA SAD, with respect to the existing Regulations, all the necessary diligences to the disentanglement of the aforementioned player in order to allow him to celebrate with BENFICA SAD, a labour contract to take effect in the next 5 (five) seasons in the following terms and conditions: i) season 2015/16 an amount of €450.000 net/season plus bonus team; ii) season 2016/17 an amount of €475.000 net/season plus bonus team; iii) season 2017/18 an amount of €500.000 net/season plus bonus team; iv) season 2018/19 an amount of €525.000 net/season plus bonus; v) season 2019/20 an amount of €550.000 net/season plus bonus team.*

*This offer is subject to (i) the player undergoing, and passing, a medical examination satisfactory to SL Benfica, (ii) SL Benfica agreeing personal terms with the player as mentioned, (iii) being received by the Portuguese FA the player's ITC.*

*This mandate is valid up to 1 April 2015”.*

9. On 21 April 2015 Benfica sent a letter to Partizan which stated in material part:

*“Re: Player A. (d.o.b. [...] 1996)*

*Dear Sirs,*

*Please take note that SL Benfica – Futebol, SAD (“SL Benfica”) hereby offers €5.000.000 (in words, five million euros) for the transfer of the registration of your player A. (the “player”) and 100% of the economic rights.*

*This offer is subject to (i) 1. FK Partizan and SL Benfica agreeing all of the other terms of a definitive transfer agreement and the transfer being effected on or before 1 July 2015; ii) the player undergoing, and passing, a medical examination satisfactory to SL Benfica up to 30 June 2015; (iii) S Benfica agreeing personal terms with the player for an employment contract on or before 30 June 2015”.*

10. On 20 May 2015 Apollon sent a letter to Partizan, which stated, in material part:

*“On 24.04.2015 Fk Partizan Belgrade (“**Partizan**”) have received an offer from Benfica – Futebol, SAD (“**Benfica**”) to purchase 100% of the economic rights over the player A. (“**Player**”) in a total amount of 5,000,000 euros, along with an offer employ the Player for an amount that exceed 400,000 euros net per year (“**Offer**”).*

*Until the date of this letter Benfica didn't receive any response to the Offer above.*

*Please be informed that according to section 2.9 to the purchase agreement between Apollon and Partizan in respect of the Player (“**Purchase Agreement**”), Partizan had undertaken to take all necessary actions in order to complete a transfer of the player to a third party once it receives an offer to purchase the Player's rights and to employ the Player for a minimum sum of 400,000 euro net per year.*

*Apollon wishes that Partizan will go ahead with the conditions of the Offer and transfer the Player to Benfica.*

*Please be aware that as stipulated in section 2.9 to the Agreement, in case Partizan will not give its consent to the Offer it should compensate Apollon for the Offer amount + 10% interest.*

*In light of the above, please let us know about your decision whether to proceed with Benfica offer or to pay the purchase Offer amount to Apollon within 7 days as from this letter”.*

11. On 1 June 2015 Apollon sent a letter to Partizan, which stated in material part:

“Re: **A.**

Dear Sir,

*I write to you on behalf of Apollon Football (Public) Ltd. (hereinafter “Apollon”) and in relation to A. (hereinafter the “Player”).*

*As you know Apollon co-owns 50% of the economic rights of the Player as a result of an agreement with FK Partizan (hereinafter “Partizan”) dated the 18<sup>th</sup> of August, 2014 (hereinafter the “Agreement”). Pursuant to article 2.9 Partizan agreed to transfer the Player to a subsequent club on the condition that the Player is to receive an offer where he is to earn in excess of €400,000 per year in wages. In addition article 2.9 of the Agreement stipulates that if the transfer does not take place, then Partizan must compensate Apollon by paying an amount equal to what Apollon would have received from the transfer of the Player, plus 10% interest per annum.*

*As you know SL Benfica SAD (hereinafter “Benfica”) made an offer for the permanent transfer of the Player on the 21<sup>st</sup> of April 2015 for €5,000,000. We attach to this correspondence the letter of the 21<sup>st</sup> April 2015 (hereinafter the “Transfer Offer”). In addition, Benfica offered to the Player a five year contract where the Player was to be paid €450,000, €475,000, €500,000, €525,000 and €550,000, plus bonuses, for the 2015/16 through 2018/19 seasons, respectively. We attach a letter dated the 23<sup>rd</sup> of April, 2015 from Benfica demonstrating that this is the offer that was to be made to the Player. Partizan has entirely ignored Benfica’s Transfer Offer and as a result the Player will not be transferred.*

*Therefore article 2.9 of the Agreement is clearly engaged. Benfica’s offer for the Player satisfies the conditions of article 2.9 of the Agreement as the Player was to receive more than €400,000 per year. Partizan has not responded to Benfica regarding the Transfer Offer. Apollon also wrote to Partizan on the 20<sup>th</sup> of May, 2015 requesting clarification as to whether the Player will be transferred to Benfica. This correspondence, which is attached, has also been entirely ignored. Partizan’s refusal to address the Transfer Offer necessarily means that the Player will not be transferred to Benfica. Therefore, by this letter, we put you on notice that as of today’s date it is clear that the Transfer Offer has been rejected, again engaging article 2.9 of the Agreement.*

*As a result, Partizan, as of today’s date, the 1<sup>st</sup> of June 2015, currently has an overdue payable to Apollon in the amount of €2,400,000. This amount is 50% of the transfer fee that Apollon would have received under article 2.9 of the Agreement and a reduction in the amount of 10% of the transfer fee in excess of €4,000,000 per article 3.4 of the Agreement. We request that this amount be paid in full to Apollon within 30 days of this date, by the 28<sup>th</sup> of June, 2015. Failure for Apollon to receive this amount by the 1<sup>st</sup> of July, 2015 would result in the increase of the overdue payable by 10%, to €2,640,000, as a result of the application of article 2.9 of the Agreement.*

*Therefore please consider this letter notification that should Apollon fail to receive €2,400,000 on or before the 1<sup>st</sup> of July, 2015 it shall initiate the process to enforce the debt in the amount of €2,640,000 pursuant to*

*article 12BIS of the FIFA Regulations on the Status and Transfer of Players (hereinafter "R.STP") as at that point the due payment will have been delayed more than 30 days.*

*Finally we note that if Apollon is forced to pursue this claim before the appropriate judicial and/or arbitration bodies it will be pursuing the satisfaction of legal and arbitration costs. Therefore it is most probably that if these amounts are not received by the 1<sup>st</sup> of July, 2015 Partizan will be require to compensate Apollon amounts in excess of those requested.*

...

*We note that the date of the 1<sup>st</sup> of July 2015 is firm, and that a failure to respond will not extend the timeline as Apollon will initiate the process as soon as the 30 days has expired".*

12. On 30 June 2015 Partizan sent a letter to Apollon in response to its letter of 1 June 2015, which stated in material part:

*"We have received your letter and paid very much attention to the letter that you have sent us on June 1<sup>st</sup> and this related to the economic rights on A., football player dated from 18 of Aug, 2014.*

*We would like to underline that we are fully aware of the obligations that we have undertake [sic] under the Contract. We would like to mention as well that we do not want to ignore our contractual obligations contrary to that our wish is that for the 2 clubs the realization of the best possible payment for the transfer of A., football player.*

*Taking in consideration that the summer transfer period 2015, starts tomorrow and will last for 2 next months it is our opinion that for this transfer conditions will be much better then Benfica has proposed and that our 2 clubs will earn a much bigger earning. We should take in consideration that the player A. has shown his best performance at the World Championship for players U-20 which will influence as well on his value on the market.*

*Considering all upper mention facts, we are suggesting that the delay has to be up to the 31 of July, where we will continue on the transfer of the player and procure better conditions form the ones that has offer FC Benfica".*

13. On 7 July 2015 Apollon sent a letter to Partizan which stated in material part:

*"I write in relation to your letter of the 30<sup>th</sup> of June, 2015 with regards to the economic rights of A. (hereinafter the Player)".*

*We are pleased to learn that FK Partizan recognizes the contractual obligations that arise as a result of the agreement with Apollon Football (Public) Ltd. (hereinafter "Apollon") dated the 18<sup>th</sup> of August, 2014 (hereinafter the "Agreement"). From your letter we understand that FK Partizan is attempting to transfer the Player in the current transfer period, likely before the 31<sup>st</sup> of July, 2015, on terms that will be more favourable than those offered by Benfica.*

*For this purpose Apollon is willing to agree to delay the enforcement of the existing obligation regarding the transfer of the Player until the 31<sup>st</sup> of July, 2015. This approval is given subject that FK Partizan will update Apollon, in due time, upon any new offer regarding the Player. Furthermore it will not execute or reach an*

*understanding with any club regarding the transfer of the Player without receiving written approval by Apollon to the terms and conditions of such potential transfer.*

*In this sense Apollon is looking forward to mutual co-operation with your esteemed club. As an aside, please note that Apollon considers that there is a right of compensation over the Benfica offer for the transfer of the Player and that if there is no further transfer Apollon will pursue its existing right.*

*Finally, we wish you all the best over the summer transfer window period and please advise Apollon by the 31<sup>st</sup> of July, 2015, as to the further course of this issue”.*

14. On 12 July 2015 in a statement to Sport Magazine the Player confirmed his and his family’s wish to remain with Partizan despite (unspecified) six-figure offers from other clubs.

15. On 3 August 2015 Apollon sent a letter to Partizan which stated in its material part:

*“I write in relation to your letter of the 30<sup>th</sup> of June, 2015 and our response of the 7<sup>th</sup> of July, 2015 with regards to the economic rights of A. (hereinafter the “Player”).*

*As we previously mentioned Apollon was willing to agree to delay the enforcement of the existing obligation regarding the transfer of the Player until the 31<sup>st</sup> of July, 2015. I note that we have also asked that Apollon be kept apprised of any developments with respect to the transfer of the Player on or before the 31<sup>st</sup> of July, 2015.*

*As we have yet to receive an update please be notice that if the payment of Apollon’s contractual share is not made on Monday the 5<sup>th</sup> of August, 2015, we will have no other way but to bring a claim to recover the outstanding debt”.*

16. Partizan did not, however, make any payment to Apollon thereafter in response or at all.

17. On 30 June 2016 the Player’s contract with Partizan came to an end.

18. In July 2016, the Player, who was by then a free agent, became employed by Benfica.

## **B. Proceedings before the Single Judge of the Players’ Status Committee (“FIFA PSC”)**

19. On 13 August 2015 Apollon lodged before the FIFA PSC a claim against Partizan for breach of contract indicating that Partizan had failed to pay the compensation fee stipulated in clause 2.9 of the Agreement. In view of the foregoing, Apollon requested the payment of €2,750,000 plus 5% interest p.a. as of 1 June 2015 from Partizan.

20. On 16 January 2016 the Single Judge decided that Apollon’s claim was inadmissible. At paragraph 5 of his decision (“the Decision”) he referred to Article 1 paragraph 1 of the Regulations, being the Regulations on the Status and Transfer of Players (2015 ed) (“RSTP”) “These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different association” and at paragraph 6, on account of (i) the aforementioned provision read in conjunction with Article 22 lit. f) of the



Regulations (ii) the standard practice of FIFA (iii) the fact that the agreement at the basis of the dispute between Apollon and Partizan is not related to a transfer of the player, the Single Judge concluded that he could not intervene in the present case due to a lack of jurisdiction over the matter. On 14 April 2016, the Decision was received by Apollon.

### **III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT (“CAS”)**

21. In accordance with Articles R47 and R48 of the Code of Sports-related Arbitration (“the Code”), Apollon filed its statement of appeal on 4 May 2016 and appointed Mr Efraim Barak, Attorney-at-law in Tel-Aviv, Israel, as arbitrator.
22. On 31 May 2016 Partizan appointed Prof. Luigi Fumagalli, Attorney-at-law, in Milan, Italy, as arbitrator, this appointment was accepted by FIFA on 2 June 2016.
23. In accordance with Article R51 of the Code, Apollon filed its appeal brief on 15 June 2016.
24. On 7 July 2015 the parties were informed that the Panel was constituted of Mr Barak and Prof. Fumagalli as well as of the Hon. Michael J. Beloff, M.A. Q.C, Barrister in London, UK.
25. In accordance with Article R55 of the Code, FIFA filed its answer on 21 July 2016.
26. In accordance with Article R55 of the Code, Partizan filed its answer on 15 August 2016.
27. An order of procedure was issued on 18 October 2016: it was signed by all parties on 25 October 2016.

#### **Oral presentation**

28. In accordance with Article R57 of the Code, a hearing took place on 8 November 2016 at the CAS Court Office, in Lausanne, Switzerland.

Submissions on behalf of Apollon were made by Dr Jan Kleiner, Mr Udi Shochatovich and assisted by Mr Marc Rautenberg, Adviser.

Submissions on behalf of Partizan were made by Dr Marco Del Fabro and Mr Zoran Damjanovic, and assisted by Ms Gordana Bogicevic, interpreter.

Submissions on behalf of FIFA were made by Mrs Isabel Falconer and Mr Ludovic Delechat, Counsel at the FIFA Players’ Status Department.

There were no witnesses.

At the start of the hearing all parties stated that they had no objection to the composition of the Panel and at its conclusion confirmed that their right to be heard had been fully respected.

#### IV. SUBMISSIONS OF THE PARTIES

29. Apollon's submissions, in essence, may be summarised as follows:

- On a proper construction of the Article 22 (f) of the RSTP the Single Judge had jurisdiction over the dispute between the Apollon and Partizan since it was a dispute between clubs belonging to different associations that does not fall within other provisions expressly provided for in same article.
- Even if, as Partizan and FIFA contended, the RSTP, so far as material, only concerned such disputes if they were transfer-related, the dispute between Apollon and Partizan should be so classified.
- The Panel should therefore find that the FIFA PSC has jurisdiction over the claim and allow the appeal against the Decision.
- Further, and in any event, the Panel has jurisdiction and should adjudicate upon the merits of the dispute, even if it will find that FIFA did not had jurisdiction over the matter. This, in accordance with Article 9 of the Agreement.
- As to merits, Partizan was clearly in breach of Article 2.9 of the Agreement and entitled to the payment claimed.
- FIFA should sanction Partizan for its delay in making payment pursuant to Article 12bis of RSTP.

30. In its Prayer for Relief Apollon requested CAS to rule that:

- *"The Appeal of Apollon Football (Public) Ltd. is admissible;*
- *The decision of the Single Judge of the FIFA Players' Status Committee dated 26 January 2016 is set aside;*
- *Partizan Football Club is ordered to pay to Apollon Football (Public) Ltd. an amount of EUR 2,500,000.00, with interest at a rate of 10% p.a. as from 1 June 2015.*
- *Partizan Football Club is imposed a sanction in accordance with article 12bis of the FIFA Regulations on the Status and Transfer of Players;*

*In the alternative to Prayer 3 and Prayer 4 above, to rule that the Single Judge of the FIFA Players' Status Committee has jurisdiction to decide over the matter at hand and to refer the matter back to the Single Judge of the FIFA Players' Status Committee for a decision on the merits;*

- *In any event to order that Partizan Football Club and FIFA shall bear the costs of the arbitration and that Partizan Football Club and FIFA shall contribute to the legal fees incurred by the Appellant in an overall amount of CHF 25,000.00".*

31. Partizan's submissions, in essence, may be summarised as follows:

- On a proper construction of RSTP the Single Judge was right to hold that he had no jurisdiction over the dispute, since albeit it was a dispute between clubs belonging to different associations, it did not relate to a transfer;
- The Panel should therefore dismiss the appeal against the Decision;
- The Panel had no jurisdiction to determine the merits since Article 9 of the Agreement contemplated that it could do so only as an appellate body which, if the Decision was correct, was a role the Panel could not perform;
- Apollon, if it wished to have the merits determined by CAS, must institute a fresh arbitration between CAS in ordinary proceedings.
- In any event the Apollon's claim on the merits must fail: there was no breach of Article 2.9 of the Agreement since on the facts the payment obligations of Partizan were not triggered.
- In any event Article 2.9 is invalid;
- Absent such breach Article 12bis of RSTP was inapplicable.

32. Partizan requested CAS to rule as follows:

- To dismiss Apollon's appeal against the Decision;
- If it accepted jurisdiction over the merits, to dismiss the Apollon's claim;
- To rule that Article 12bis of the RSTP is inapplicable;
- To rule that Apollon shall bear the entire arbitration costs and contribute to Partizan's legal fees.

33. FIFA's submissions may, in essence, be summarised as follows:

- FIFA endorsed the submissions of Partizan set out in paragraph 29 and above;
- CAS has jurisdiction over the dispute and should nonetheless adjudicate on the merits of the dispute pursuant to Articles 57-59 of the FIFA Statutes a-d in accordance with Article 9 of the Agreement;
- FIFA did not make any submissions on the merits.

34. FIFA requested that *"the present appeal against the challenged decision of the Single Judge of the PSC dated 26 January 2016 to be rejected and the relevant decision to be confirmed in its entirety. All costs related to the present procedure as well as the legal expenses of the second Respondent shall be borne by the Appellant"*.

35. Further consideration of the detail of the parties' submissions is given in the section on merits below.

## V. JURISDICTION

36. Article R47 of the Code provides as follows:

*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.*

37. Apollon relied on Article 58 of the Statutes of FIFA as conferring jurisdiction on CAS. The jurisdiction of CAS was not contested by either Respondent and was confirmed by all parties' signature of the Order of Procedure.

## VI. ADMISSIBILITY

38. Article R49 of the Code provides as follows:

*In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.*

39. In the light of the chronology set out in paragraphs 20 and 21 above the Appeal is admissible.

## VII. APPLICABLE LAW

40. Article R58 of the Code provides as follows:

*The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*

41. Pursuant to Article 58 of the Code and Article 57 paragraph 2 of the Statutes of FIFA, CAS shall, as to the substance of the appeal, apply primarily the RSTP of April 2015 and subsidiarily Swiss law.

42. RSTP provide, so far as material, as follows:

### ***"1. Scope***

- 1. These regulations lay down global and binding rules concerning the status of players, their eligibility to*

*participate in organised football, and their transfer between clubs belonging to different associations*

*2. The transfer of players between clubs belonging to the same association is governed by specific regulations issued by the association concerned in accordance with article 1 paragraph 3 below, which must be approved by FIFA. Such regulations shall lay down rules for the settlement of disputes between clubs and players, in accordance with the principles stipulate in these regulations ...*

...

### **18. Special provisions relating to contracts between professionals and clubs**

*If an intermediary is involved in the negotiation of a contract, he shall be named in that contract.*

...

### **22. Competence of FIFA**

*Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:*

- a) Disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party I relation to said ITC request, in particularly regarding the issue of the ITC, sporting sanctions or compensation for breach of contract;*
- b) ...*
- c) Employment-related disputes between a club or an association and a coach of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings exists at national level;*
- d) Disputes relating to training compensation (article 20) and the solidarity mechanism (article 21) between clubs belonging to different associations;*
- e) Disputes relating to the solidarity mechanism (article 21) between clubs belonging to the same association provided that the transfer of a player at the basis of the dispute occurs between clubs belonging to different associations;*
- f) Disputes between clubs belonging to different associations that do not fall within the cases provided for in a), d) and e).*

### **23. Players' Status Committee**

*1. The Players' Status Committee shall adjudicate on any of the cases described under article 22 c) and f) as well as on all other disputes arising from the application of these regulations, subject to article 24.*

*2. The Players' Status Committee has no jurisdiction to hear any contractual dispute involving intermediaries.*

3. *In cases of uncertainty as to the jurisdiction of the Players' Status Committee or the Dispute Resolution Chamber, the chairman of the Players' Status Committee shall decide which body has jurisdiction.*

...

### **Annexe 3**

...

## **8 Administrative procedure governing the transfer of professionals between associations**

### **8.1 Principles**

1. *Any professional player who is registered with a club that is affiliated to one association after an ITC has been delivered by the former association and the new association has confirmed receipt of the ITC. The ITC procedure must be conducted exclusively via TMS. Any form of ITC other than one created by TMS shall not be recognized*".

### **Commentary on the RSTP (2005)**

*"FIFA is competent for:*

...

*e) Disputes between clubs belonging to different associations in the event of a failure to respect a transfer or a loan contract. Such disputes are dealt with by the Players' Status Committee*".

## **VIII. MERITS**

### **A. Issues**

43. The following issues arise:

- What is the basis for the jurisdiction of the Single Judge of the FIFA PSC ("the Single Judge's jurisdiction");
- Does the dispute engage the jurisdiction ("the dispute");
- Can the Panel, whether or not it allows the appeal on grounds of FIFA's jurisdiction, adjudicate on the merits of the dispute ("the Panel's jurisdiction");
- If it can, was Partizan in breach of its payment obligations on the facts ("breach");
- If Partizan is in such breach, can Apollon require FIFA to apply Article 12bis of RSTP ("Article 12bis").

### **B. The Single Judge's jurisdiction**

44. On the clear language of Article 22f) of the RSTP a dispute between clubs belonging to different

jurisdictions which do not fall within the expressly excluded categories, i.e those in a) d) and e), falls within the jurisdiction of FIFA and by reason of Article 23.1 within that of its Players' Status Committee.

45. The Panel sees no reason to read down that language by reference to Article 1. Notably (i) Article 1 is concerned with scope of the RSTP, not jurisdiction. Article 22 is concerned specifically with jurisdiction, while (ii) Article 1 is designed to differentiate between the role of FIFA and the role of national associations dealing with, on the one hand, domestic and, on the other hand, international transfers, and (iii) Article 22 itself contemplates that FIFA has jurisdiction over matters other than player transfers, status or eligibility, e.g. in c), concerned with coaches only.
46. The Panel also sees no reason to limit the ambit of Article 1.1 or 22f) by reference to what is said to be stakeholder practice. The fact that the Appellant's construction had not been advanced previously cannot by itself show that it was incorrect. In *CAS 2011/A/2539* a very experienced CAS panel had to consider similar arguments to those ventilated in the present appeal. It said:

*"58. ... the Panel has firstly noted that the wording of article 22e) does not include limits, restrictions or precisions on the kind of disputes "between clubs belonging to different Associations that do not fall within the cases foreseen in a) and d)" comprised therein.*

*Even if in the Commentary to the RSTP, FIFA intends to restrict such disputes to those deriving from loans and transfers ("FIFA is competent for e) disputes between clubs belonging to different associations in the event of a failure to respect a transfer or a loan contract"), it appears to be clear that the text of the referred article does not per se foresee such an express imitation or restriction.*

*59. The Panel shall also acknowledge that, at least in abstract, the claim of Borussia (German club) against Boca (Argentinian club) should be considered a "dispute between clubs belonging to different Associations that do not fall within the cases foreseen in a) and d)."*

*60. This being said, it shall be also pointed out that (i) indeed, article 1.1 defines the scope of the RSTP, i.e. the matters on which such RSTP rules, namely the status of players, their eligibility to play and the transfer of players belonging to clubs of different associations, and (ii) it cannot be denied that article 22e) is part of the RSTP.*

*61. The above described situation, in the Panel's view, could theoretically open a discussion on the coordination and joint interpretation of article 1.1 and article 22e) RSTP, which in fact has been brought by the parties in their respective written submissions.*

*62. Notwithstanding this, the Panel considers that in this particular case, given the nature and specificities of the Cooperation Agreement and the subsequent facts occurred after its signature, it is not necessary to enter into such a discussion, as even if one will accept that FIFA jurisdiction under article 22e) RSTP is limited to disputes concerning transfers or loans as Boca and FIFA hold, the Panel considers that in the present case, (i) the Cooperation Agreement, in a certain way and among other issues, certainly deals or has to do with transfers and (ii) Boca and Borussia somehow confirmed it in crossed correspondence exchanged as regards the Cooperation Agreement".*

47. That Panel clearly regarded it as sufficient, on any reading, to engage what is now Article 22 f) that the Agreement there in play was at least partially a transfer-related agreement.
48. While those *obiter dicta* cannot be said dispositively to support Apollon's argument as to the open-ended nature of Article 22 f) they are certainly not inconsistent with it.
49. Finally the phrase relied on by FIFA must be read as a whole. It refers to rules "*concerning ... players ... and their transfer between clubs belonging to different associations*" not to rules as to a specific actual transfer as suggested by FIFA.

### C. The Dispute

50. The Panel is also satisfied that the Agreement here in play is at least a partially transfer-related agreement albeit as a common ground (i) it is not a contract for the transfer of the Player from Partizan to the Apollon (ii) the Apollon's primary purpose was to make an investment. It does not accept that the Agreement has to relate to a specific transfer between the parties or that its investment aspect detracts from that analysis.
51. The Panel is content to adopt in support of this conclusion and in rebuttal of the arguments of Partizan and FIFA to contrary effect, the reasoning in the Appeal Brief, subject to the proviso that *CAS 2011/A/2539* provides guidance rather than an exact precedent.

“54. *Exactly as in the matter CAS 2011/A/2539, if not even more, the Agreement here in question is directly linked to the transfer of a player. Even more obvious than in the quoted CAS Award, the very essence of the Agreement is the transfer of a professional football player.*

55. *The wording of the Agreement contains repeated and direct references to the transfer of the Player:*

*2.9 (...) Partizan grants that the Player will give his consent, sign all necessary documents and will undertake all the necessary actions for the realization of his **transfer** from Partizan into a third club in accordance with the instructions of the Parties.*

*(...)*

*3.2 The Parties wish that the Player shall keep playing for Partizan, however (...), Apollon shall have the right to order Partizan to **transfer the player federative rights** to any other club according to Apollon's instructions (...).*

*3.4 It is also agreed that Partizan will be entitled to receive an additional payment, equal to 10% from Apollon's Net Profit, of any sum above 4,000,000 Euro to be received as consideration for **future transfer of the rights over the Player.***

*3.5 For the purpose of clause 3.4 above the "Net Profit" shall be the consideration which Apollon shall be entitled to receive from the **future transfer of the rights over the Player** after deduction of all and any amounts (...).*



56. *Exactly as in the matter CAS 2011/A/2539, the correspondence exchanged between the parties further evidences that the Agreement directly aimed at the execution of a transfer:*

3. (...) *Partizan had undertaken to take all necessary actions in order to complete a **transfer** of the player to a third party once it receives an offer to purchase the Player's rights (...).*

4. *Apollon wishes that Partizan will go ahead with the conditions of the Offer and **transfer** the Player to Benfica.*

*(Letter of Appellant to First Respondent of 20 May 2015)*

*Pursuant to article 2.9 Partizan agreed to **transfer** the Player to a subsequent club on the condition that the Player is to receive an offer where he is to earn in excess of €400,000 per year in wages. In addition article 2.9 of the Agreement stipulates that if the **transfer** does not take place, then Partizan must compensate Apollon by paying an amount equal to what Apollon would have received from the **transfer** of the Player (...).*

*(Letter of Appellant to First Respondent of 1 June 2015)*

*We would like to underline that we are fully aware of the obligations that we have undertake under the Contract. We would like to mention as well that we do not want to ignore our contractual obligations contrary to that our wish is that for the 2 clubs the realization of the best possible payment for the **transfer** of A., football player.*

*Taking in consideration that the **summer transfer period 2015** starts tomorrow and will last for 2 next months it is our opinion that for this **transfer conditions** will be much better then FC Benfica has proposed (...).*

*Considering all upper mention facts, we are suggesting that the delay has to be up to the 21 of July, where we will continue on the **transfer** of the player and procure better conditions (...).*

*(Letter of First Respondent to Appellant of 30 June 2015)*

*From your letter we understand that FK Partizan is attempting to **transfer** the Player in the current **transfer period**, likely before the 31<sup>st</sup> July, 2015, on terms that will be more favourable than those offered by Benfica.*

*This approval is given subject that FK Partizan will update Apollon, in due time, upon any new **offer regarding the Player**. Furthermore, it will not execute or reach an understanding with any club regarding **the transfer of the Player** without receiving written approval by Apollon to the terms and conditions of such **potential transfer**.*

*As an aside, please note that Apollon considers that there is a right of compensation over the Benfica offer **for the transfer of the Player** and that if there is not further **transfer** Apollon will pursue its existing right.*

*(Letter of Appellant to First Respondent of 7 July 2015)*

*I note that we have also asked that Apollon be kept apprised of any developments with respect to the **transfer of the Player** on or before 31<sup>st</sup> of July, 2015.*

*(Letter of Appellant to First Respondent of 3 August 2015 states)*

57. *All these references show that the very essence of the Agreement was a transfer of the Player and the execution of this transfer. This transfer was the main cause that motivated the parties to conclude the Agreement and the actual motivation for Apollon to make the investement.*
58. *What is more, just as in the matter CAS/2011/A/2539, the parties agreed in Clause 9.1 of the Agreement that the Agreement shall be “subject to the laws and regulations of FIFA” and that “Any disputes, controversy, or claim arising out of or relating to this agreement or the breach, termination or invalidity thereof, shall be subject to the jurisdiction of the judicial organs of FIFA and the Court of Arbitration in Sport”.*
59. *As CAS has already established, the correct interpretation of the will of the Parties can only be that they wanted to submit disputes arising out of the Agreement to FIFA jurisdiction. As it has been stated by CAS “such a will has to be taken into account when deciding on jurisdiction”. CAS 2011/A/2539 Para 66.*
60. *This last, important aspect has also been confirmed by the Swiss Federal Tribunal, which held – in a dispute concerning CAS jurisdiction – that it is inter alia decisive that the will of the parties indicates that they wanted to submit their dispute to a specialized, sports-specific jurisdiction. See SFT, Decision 4A\_246/2011, at para.2”.*
52. The Panel reiterates its awareness that the facts of this case are similar, and not “exactly” the same as in CAS 2011/A/2539. However with respect to the question at stake in the present case, i.e. the competence of the FIFA PSC, the rationale of the Panel in that case and the correct interpretation of the FIFA RSTP and in particular Article 22f) are highly relevant and support the conclusions of this Panel. Specifically, the Panel considers that Clause 9.1 indicates that the parties’ will was to submit to FIFA’s jurisdiction and that, for reasons set out above, FIFA did have jurisdiction over the dispute. Such coincidence of parties wishes and FIFA’s competence is, the Panel recognizes, necessary, but is here established and therefore dispositive.
53. The Panel does not construe SFT Decision 4A\_246/2011, as Partizan argues, as in any way contradicting this analysis.

#### **D. The CAS jurisdiction to rule as a “first instance”**

54. The Panel has concluded (see the above analysis under the rubrics The Single Judge’s Jurisdiction and The Dispute) that the FIFA PSC had jurisdiction over the dispute. Accordingly, the issue of the CAS jurisdiction in the event that FIFA would not have had jurisdiction is

technically moot.

55. The Panel notes here that, as FIFA never addressed the merits of the case, the CAS would de facto be the first instance tribunal to review them. The Panel however also notes that public policy does not require that a case be heard at two levels and that none of the parties requests that the case be referred back to FIFA. Indeed, Apollon insistently requested the CAS to rule directly on the merits of the case, FIFA expressly agreed that the CAS decides “*on the substance of the contractual dispute*” and Partizan, on a modified basis, “*would leave it up to the Panel to refer the case back to the previous instance or to issue a new decision*”. Further in its subsidiary prayers for relief, Partizan does not request that the case be referred back to FIFA but rather that the Appellant’s case be dismissed
56. In view of the above and of the full power of review conferred to CAS panels by Article R57 of the Code, the Panel will proceed with the analysis of the Appellant’s substantive claims.

#### **E. Breach?**

57. It is common ground that, if Partizan had a payment obligation, it had failed to discharge it. In the Panel’s view, the sole question is whether the Benfica’s letter of 21 April 2016 was an offer within the ambit of the first clause of Article 2.9. The Panel considers that it clearly was. It was (i) presented to Partizan (ii) offered to purchase the Player (iii) at a sum in excess of that stipulated in that Clause.
58. Partizan contends that the offer was not unconditional as required by Article 2.9. The Panel cannot accept that the first two conditions – need to fulfil the usual formalities/satisfactory medical examination – conventional in any such offer, take it outside the scope of the clause. As to the third – agreement of personal terms with the player - in the Panel’s view it is clear that such terms were offered, see (i) Apollon’s letter of 1 June 2015 referring to a letter of 23 April 2015 (such letter, albeit said to be attached, was not in the Panel’s file but the Panel is disinclined to conclude that Apollon inaccurately, *a fortiori* falsely referred to a non-existent attachment and notes in particular that Partizan’s response of 30 June 2015 did not allude to any such omission); (ii) the Player’s interview with Sport Magazin of 12 July 2015; (iii) the fact that the Player did join Benfica once he became a free agent, suggesting that he merely bided his time until he was free to accept the terms Benfica offered. By reason of the language of the last sentence of Article 2(9) itself, Partizan’s failure to procure (the sense in which the verb ‘grant’ is used in the Article) the Player’s consent to the transfer to Benfica at the time it was made is actually the trigger for the payment obligation, not a basis for its repudiation.
59. In this context the Panel notes that in their response of 1 June 2015 to Apollon’s letter of 20 May 2015, which asserted the existence of such obligation, Partizan did not deny any of the facts set out in that letter nor the legal consequence drawn by Apollon in it; on the contrary, they apparently acknowledged the obligation and certainly by saying that if accorded time they could “*procure better conditions form(sic) the ones that has offer(sic) Benfica*” thus recognizing unequivocally that Benfica had made an offer with the opening clause of Article 2.9.
60. Partizan has now enhanced its argument with a submission that Article 2.9 is itself invalid, as

restricting the Player's freedom of choice of his employer, and contravening public policy.

61. The Panel rejects such submission. It sees nothing in the Article 2.9 which restricts the Player's freedom of choice, which in time he duly exercised. Partizan did not, and could not under that Article, compel the Player to join Benfica or any other third club but rather took the financial risks and consequences of the Player's refusal to accept the offer. In a way, this responsibility assumed by Partizan is the best evidence to the fact that the Player was indeed not denied from his freedom of choice of his employer.
62. As appears from paragraphs 85 and 88 of Apollon's appeal brief and paragraphs 18 and 74 of Partizan's answer, the calculation of the due amount made by the Apollon, if breach is found, is not in dispute. Consistently with Article 102 of the Swiss Code of Obligations Apollon is therefore entitled to be paid by the Partizan EUR 2,750,000 with interest at the rate of 10% p.a. as from 1 August 2015 rather than 1 June 2015 as originally requested.

**F. Article 12 bis of the FIFA RSTP**

63. Given the delay in making payment due by Partizan it is open to FIFA to impose the sanction contemplated by Article 12 bis of the FIFA RSTP. In the Panel's view, however, it is for FIFA, where a FIFA decision or CAS decision finds that a payment was delayed for more than 30 days (Art. 12 bis (2)), to decide in the first instance whether or not to do so. The Panel is of the opinion that the distinction between monetary claims and disciplinary proceedings should be preserved in the sense that FIFA will be the first instance body to deal with disciplinary sanctions under Article 12 bis and the CAS should deal with such questions only as an appellate body and once FIFA has addressed it on the merits.
64. In the instant case, where FIFA decided not to enter into the merits for what it perceived to be reasons of lack of jurisdiction, the Panel considers that the proper course is for it to refer the issue of sanctions under Article 12 bis to be dealt with by FIFA, if FIFA decides to do so as a consequence of the findings of this Panel.

## **ON THESE GROUNDS**

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

1. The appeal filed by Apollon Football (Public) Ltd. on 4 May 2016 is partially upheld.
2. Partizan Football Club is ordered to pay a total amount of EUR 2,500,000 with an interest rate of 10% p.a as from 1 August 2015 to Apollon Football (Public) Ltd.
3. The issue of sanctions under Article 12bis of the FIFA RSTP is referred back to the Fédération Internationale de Football Association.
4. (...).
5. (...).
6. All other motions or prayers for relief are dismissed.