Arbitration CAS 2016/A/4859 Hong Kong Pegasus FC v. Niko Tokic, award of 30 June 2017

Panel: Mr Alexander McLin (Switzerland), Sole Arbitrator

Football
Termination of the employment contract
Choice of applicable law
Exclusion of evidence under Article R57 para. 3 CAS Code
Request to remit the dispute to a third body for resolution
Applicability of an arbitration clause referring to domestic arbitration in the context of art. 22 lit. b RSTP

1. **The fact that the parties appear to have chosen a combination of rules of law does not invalidate the agreement to arbitrate, which need only conform with Swiss law further to the conflict of laws rule *in favorem validitatis* established by Article 178(2) of the Swiss Private International Law Act. Following agreement on CAS as the court of arbitration, Article R58 of the CAS Code, implicitly agreed to by the parties, takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. 58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. 58 of the CAS Code, the "applicable regulations" always primarily apply, regardless of the will of the parties.**

2. **It is clear from the language of Article R57 para. 3 of the CAS Code that while a CAS panel may exclude new evidence introduced by the parties, it is not bound to do so. Indeed the practice of the CAS with respect to the application of this rule is restrictive. In other words, exclusion of evidence should be the exception rather than the rule, and should generally be applied in exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence.**

3. **Article R57 para. 1 of the CAS Code presents a CAS panel with two clear and specific possibilities: the issuance of a new decision replacing that which was challenged, or the annulment of said decision with a referral back to the previous instance (i.e. that which issued the challenged decision). Article R57 is sufficiently unambiguous in this respect: it does not allow for the CAS to decide on attributing jurisdiction to a third body: either it finds fault with the determination of the body which established the challenged decision (in which case it either issues a new decision or refers the decision back to the previous instance), or it does not and therefore upholds the lower decision.**

4. **Art. 22 (b) of the FIFA Regulations on the Status and Transfer of Players (RSTP) states that for a national level arbitral tribunal to have jurisdiction over the dispute, such**

arbitration clause must be included directly in the contract. In the context of Art. 22 (b) RSTP, Swiss law is applicable to the interpretation of whether or not the arbitration clause is included "directly" in the contract. In accordance with the principle of good faith, consent to arbitration will be admitted as a rule, whenever the reference specifically refers to the arbitration clause and the document referred to is either physically joined to the contract, or is in some other way unmistakably defined and known to the other party. The solution is less evident where there is a global reference to a text containing an arbitration agreement, i.e. when the reference only mentions the document referred to and not the arbitration clause contained therein. Whether this is sufficient from the point of view of consent must also be decided by application of the principle of good faith and thus, by taking into account all circumstances of the case at hand. Therefore, even if the contract includes a reference to arbitration, it may be found too imprecise and too vague, in view of its drafting or of the circumstances of the case, to bind the parties to a specific national arbitration procedure, and thus not compliant within the meaning of Art. 22 (b) RSTP.

I. PARTIES

1. Hong Kong Pegasus FC, a.k.a. TSW Pegasus FC Ltd. ("Pegasus FC", the "Club", or the "Appellant"), is a Hong Kong football club affiliated with the Hong Kong Football Association (the "HKFA"), itself a member of FIFA (Fédération Internationale de Football Association, the international governing body for the sport of football).

2. Mr. Niko Tokic (the "Player" or the "Respondent") is a professional football player of Croatian nationality.

II. FACTUAL BACKGROUND

3. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced. 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 Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

4. On 15 January 2015, the Player and the Club entered into an employment contract with a term beginning on 14 January 2015 and ending on 31 May 2016 (the "Contract"). The Contract was endorsed by the HKFA and contained, on the initial page, its term and information about the Player's "basic wages", which were set at HKD 47,600 per month. The Contract also contained three pages titled *"Terms of Agreement"*.

5. Contemporaneously, the parties appear to have signed two letter agreements on Club letterhead, each labeled *"Private & Confidential"*. The first refers to the nature of additional compensation to be paid to the player, and the second sets out official holiday and annual leave entitlement. These letters are referred to herein as the "Side Letters", and, to the extent that the Side Letters and the Contract are considered together as a single agreement, they are referred to as the "Agreement".

6. The relevant portion of the first Side Letter provided as follows:

"Your agreed salary (USD12000 per month ie. HK$93600) will be as follow:-

HK$22630 paid into your bank account (on the last day of each month)
HK$20000 as cash to cover allowance for food, transport & entertainment
HK$35000 as housing allowance (as full quarters will be provided to you during your employment with us)
HK$15970 as an utility allowance (as all utilities bills within the quarters will be paid on your behalf)".

7. Article 14 of the Contract reads as follows:

"Grievance Procedure

In the event of any grievance in connection with his employment under this Agreement, the following procedure shall be available to the Player in the order set out:

14.1 grievance shall brought to the notice of the Club in the first instance; then
14.2 formal notice of the grievance to be given in writing to the Club; then
14.3 if the grievance is not settled to the Player's satisfaction within 14 days thereafter, formal notice of grievance may be given in writing to the General Secretary of the Association to be dealt with in accordance with Rules 20(4) of the Association".

8. Article 16 of the Contract provides as follows:

"This contract for Services shall be governed in all respects by the Laws of HKSAR".

9. Article 18 of the Contract states:

"Any dispute of this Agreement is subject to arbitration by the Association according to Article-65 of the Articles of the Association on the condition that the Agreement is endorsed by the Association".

10. A note following the final numbered article of the Contract states:

"The explanatory notes attached to this Agreement set out all the Rules of the Association referred to in this Agreement".

11. Article 22 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP") 2015 edition states where relevant:

"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) …

b) employment-related disputes between a club and a player of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or collective bargaining agreement. Any such arbitration clause must be included either directly in the contract or in a collective bargaining agreement applicable on the parties. The independent national arbitration tribunal must guarantee fair proceedings and respect the principle of equal representation of players and clubs".

12. On 1 April 2015, a letter signed by the team "Captain" informed all players that due to the fact that the Club had been operating at a loss for the *"past few years"*, it would be *"completely futile for the Company to carry on operation"*, and that all players were being given *"early notice"* in order to allow them to arrange for new employment.

13. This was followed by a formal notice of termination informing the Player that his last working day would be 29 May 2015, when he would receive a cheque for final salary payments.

14. Between May and September 2015, the Player sought compensation from the Club for amounts he considered owed under the Agreement in accordance with Article 17 of the FIFA RSTP, in the amount of HKD 1,123,200. The Club made a number of settlement offers that were rejected by the Player, who ultimately informed the Club that if payment of HKD 842,400 was not made by 14 September 2015, he would lodge a claim before FIFA.

15. On 21 September 2015, the Player lodged a claim against the Club before FIFA, seeking HKD 1,123,200 plus 5% interest *"starting from the respective date of maturity"* as compensation for breach of contract, the imposition of sporting sanctions against the Club, and the reimbursement of his legal expenses and procedural costs.

16. The Player later signed an employment contract with Croatian club NK Hrvatski Dragovoljac – Zagreb valid as of 15 September 2015 until 30 June 2016, for a monthly salary of HRK 3,200 (approx. USD 475 or HKD 3,700 on 11 September 2015).

17. The Club argued before the FIFA Dispute Resolution Chamber ("DRC") that it lacked jurisdiction to hear the matter, which was subject to a national arbitration body per the Agreement.

18. The DRC found that it did have jurisdiction to hear the dispute, which it did, ultimately awarding the Player HKD 1,089,200 plus 5% interest p.a. as from 21 September 2015 until effective payment (the "DRC Decision").

19. The DRC Decision was based on the applicability of the FIFA RSTP (2015 edition).

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

20. On 18 November 2016, the CAS Court Office confirmed receipt of Appellant's Statement of Appeal, filed in keeping with R48 of the Code of Sports-related Arbitration (the "Code"), to the parties. It informed them of deadlines applicable under the Code with respect to the submission of an appeal brief, as well as expressing a position on the language of arbitration and the nature of the arbitration panel. Responsibilities as to costs of arbitration were also outlined.

21. In its Statement of Appeal, Appellant named three arbitrators to be appointed by the CAS in the event a three-member panel were to be appointed, and also indicated its agreement in principle to the appointment of a sole arbitrator in the event of the Respondent's agreement thereto.

22. The Appellant's Statement of Appeal having been accompanied by a request for a stay of the challenged DRC Decision, by the same letter the CAS Court Office informed the Appellant of the unenforceability of the DRC Decision pending appeal as a result of its a financial nature. Under the circumstances, it granted the Appellant a deadline until 21 November 2016 to indicate whether it intended to maintain its request for a stay.

23. The Respondent wrote to the CAS on 22 November 2016 to state that it did not agree with the appointment of a sole arbitrator.

24. On 23 November 2016, the CAS Court Office wrote to the parties, inviting the Appellant to indicate whether it insisted on the appointment of a sole arbitrator, in which case the matter would be submitted to the President of the CAS Appeals Arbitration Division, or her Deputy, to decide the issue. It also requested that the Appellant identify which of the three arbitrators it had identified should be considered its nomination in the event a three-member panel were to be appointed.

25. On 24 November 2016, the Appellant withdrew its application for a stay of the DRC Decision, and requested that the President of the CAS Appeals Arbitration Division, or her Deputy, decide the issue of the panel size, the Appellant's position being that an experienced sole arbitrator is suitable to determine the appeal.

26. On 25 November 2016, the Respondent wrote to the CAS stating that its financial situation did not allow it to pay its share of the advance on costs, and that it therefore did not intend to do so. Receipt was acknowledged by the CAS Court Office the same day, the latter also indicating that a decision by the President of the Appeals Arbitration Division on the issue of whether this matter would be heard by a sole arbitrator or a three-member panel would be issued shortly.

27. On 29 November 2016, the President of the CAS Appeals Arbitration Division appointed Alexander McLin, attorney-at-law in Geneva, as Sole Arbitrator.

28. On 2 December 2016, the CAS Court Office acknowledged receipt of the Appellant's appeal brief dated 1 December 2016, provided it to the parties and set a 20-day deadline pursuant to Article R55 of the Code for the Respondent to file its answer.

29. On 13 December 2016, the CAS Court Office provided the parties with a copy of the letter from the Appellant's new attorneys, Dundons, advising that they were now representing Pegasus FC.

30. On 27 December 2016, the CAS Court Office acknowledged receipt of Respondent's answer to the parties, and notified them that further to Article R56 of the Code, unless the parties agree or the Sole Arbitrator orders otherwise on the basis of exceptional circumstances, *"**the parties shall not be authorized** to supplement or amend their request or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely, after the submission of the appeal brief and of the answer"* (emphasis original). The parties were also asked to inform the CAS Court Office by 3 March 2017 as to whether they preferred for a hearing to be held.

31. On 30 December 2016, the Appellant indicated its likely preference for a hearing in light of seeking the presence of a HKFA representative, but asked for a 10-day extension to respond. The CAS Court Office granted this extension on the same day.

32. On 11 January 2017, the CAS Court Office acknowledged receipt of Respondent's letter of the same day, in which the latter stated that he deemed a hearing to be unnecessary, would not be paying his share of the advance on costs, and objected to the hearing of witnesses not previously specified, in light of Article R56 of the Code.

33. On 13 January 2017, the Appellant indicated that it would pay Respondent's share of the advance on costs, and confirmed its preference for a hearing to be held, so as to hear a representative of the HKFA. It further confirmed payment of the payment of the advance on costs on 18 January 2017. The CAS Court Office confirmed receipt of these letters on 18 January 2017.

34. On 1 February 2017, the CAS Court Office notified the parties of the identity of the Sole Arbitrator appointed, and transferred the file to him.

35. On 2 March 2017, the CAS Court Office informed the parties that, pursuant to Article R57 of the Code, the Sole Arbitrator considered himself sufficiently well informed to decide the matter without holding a hearing.

36. The Appellant acknowledged receipt of this letter on 28 March 2017, and specifying that it awaited *"the final ruling from the Arbitrator"*.

37. On 19 May 2017, the CAS Court Office sent the Order of Procedure to the parties for signature, which included *inter alia* a provision that the parties' right to be heard had been respected.

38. On 22 May 2017, the Respondent returned the signed Order of Procedure.

39. On 23 May 2017, the Appellant returned the signed Order of Procedure.

IV. SUBMISSIONS OF THE PARTIES

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

- The DRC erred in determining that it had jurisdiction based on two key considerations, namely (i) that the Agreement did not make clear reference to a national dispute resolution chamber and/or "fair" arbitration at the time it was entered into, in part due to a conflict between clauses 14 and 18 of the Contract, and (ii) that when the claim was lodged with FIFA on 21 September 2015, the DRC failed to consider the existence of the HKFA National Dispute Resolution Chamber ("NDRC"), which had come into force on 3 August 2015;

- The existence of the "grievance procedure" in Article 14 of the Contract is purely optional and does not impede the validity of the mandatory arbitration clause in Article 18;

- The language of Article 18 of the Contract refers to Article 65 of the HKFA articles of association (the "HKFA Articles"), 2008 version, which sets out the arbitration procedure. While the HKFA Articles were amended on 22 July 2011 (and contain no Article 65), the relevant new Articles 34.1 and 34.2 *"maintain the same principles as the earlier version"*, and should therefore be considered validly applicable;

- By 9 March 2015, the HKFA Articles had been amended once again and the reference to applicable arbitral tribunals had been made even more specific, and this predated the dispute;

- At all relevant times, the HKFA Articles provided for an independent arbitration tribunal that met the criteria required by Article 22 of the FIFA RSTP;

- The decision of the CAS in this matter may have a bearing on other potential claims from players whose contracts were terminated concurrently with that of the Player.

41. The Appellant makes the following requests for relief:

(1) "That the FIFA DRC award of 17 June 2016 be set aside;

(2) That the dispute between the Player and the Club be remitted to the national-level arbitration for resolution, that is the HKFA;

(3) That the Club be reimbursed Legal expenses and procedural costs incurred in respect of proceedings before the FIFA DRC and before CAS.

We would kindly ask the CAS to change FIFA's above referenced decision, dismiss the Player's demand and oblige him to pay the cost of litigation".

42. The Respondent's submissions, in essence, may be summarized as follows:

- Certain evidence submitted before CAS by Appellant (namely exhibits 3, 4, 6, 7 and 8 of its appeal brief) should be excluded from the file under Article R57 para. 3 of the Code, as it was available and not produced before the DRC procedure;

- Appellant's prayer for relief to remit the matter back to the HKFA NDRC cannot be granted as, further to R57 of the Code, the Sole Arbitrator may only *"issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*, namely the DRC;

- HKFA NDRC regulations are not in line with the requisite FIFA standards, namely FIFA circular 110 and FIFA NDRC standard regulations;

- HKFA NDRC regulations could not be applicable to the instant case as they were adopted on 3 August 2015, i.e. after the termination of the Agreement on 29 May 2015;

- The Side Letters have no reference to arbitration, and the reference in the Contract is not clear or specific to a national dispute resolution chamber;

- Even if the arbitration clause in favor of the national arbitration body were found to be valid, such body does not respect the requisite principle of equal representation of players and cannot therefore bind the Player;

- Both CAS and DRC jurisprudence support such an interpretation of the Agreement.

43. The Respondent makes the following requests for relief:

"… the Respondent respectfully requests the CAS to issue an award

- *rejecting all reliefs sought by the Appellant,*

- *confirming entirely the challenged decision of the FIFA DRC decision dated 17 June 2016;*

- *ordering the Appellant to pay all of the costs of the proceedings hereof and a significant contribution towards the legal fees and other expenses incurred by the Respondent in connection with the proceedings hereof".*

V. JURISDICTION

44. 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.

45. Article 58.1 of the FIFA Statutes (2016) grants the Player a right of appeal to CAS from a decision of the DRC. In addition, the Parties have both signed the Order of Procedure, expressly consenting thereby to CAS jurisdiction.

46. The CAS, therefore, has jurisdiction to decide this appeal.

VI. ADMISSIBILITY

47. Article R49 of the Code provides, *inter alia*, 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against.

48. Art. 58.1 of the FIFA Statutes (2016) states:

Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of notification of the decision in question.

49. Art. 58.2 of the FIFA Statutes (2016) states:

Recourse may only be made to CAS after all other internal channels have been exhausted.

50. The Parties received the DRC Decision from FIFA on 26 October 2016.

51. The Appellant submitted his Statement of Appeal on 16 November 2016.

52. The appeal is therefore admissible.

VII. APPLICABLE LAW

53. Article 187(1) of the Swiss Private International Law Act (the "SPILA") provides as follows:

The arbitral tribunal shall decide on the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

54. Article R58 of the Code provides more specifically as follows:

The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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 Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

55. Article 57.2 of the FIFA Statutes (2016) provides as follows:

The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law.

56. Article 16 of the Contract provides as follows:

This contract for Services shall be governed in all respects by the Laws of HKSAR.

57. Article 10.1 of the Contract provides as follows:

The Club and the Player agree to be bound by the Rules (including competition rules and by-laws) of the Association and of any other association, league or combination of which the Association shall be a member, including but not limited to FIFA and AFC.

58. Article 178(2) SPILA provides that:

As regards its substance, an arbitration agreement is valid if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law.

59. The fact that the parties appear to have chosen a combination of rules of law does not invalidate the agreement to arbitrate, which need only conform with Swiss law further to the conflict of laws rule *in favorem validitatis* established by Article 178(2) SPILA. (BERGER/KELLERHALS, *International and Domestic Arbitration in* Switzerland, 3rd ed., Berne 2015, para. 393).

60. The manner in which a combination of rules of law and regulations should be applied in the context of a given dispute has been the subject of numerous CAS cases (see *e.g.* CAS 2013/A/3401, CAS 2013/A/3383-3385, and CAS 2014/A/3742). In his analysis of these decisions, Ulrich Haas concludes that following agreement on CAS as the court of arbitration, Article R58 of the Code, implicitly agreed to by the parties, *"takes precedence over any explicit choice of law by the parties (for example in the contract), since the purpose of Art. 58 of the CAS Code is to restrict the autonomy of the parties. This Article provides for a mandatory hierarchy of the applicable legal framework, which the parties cannot change. Consequently the parties are entitled to freedom of choice of law solely within the limits set by Art. R58 of the CAS Code, with the result that they can only determine the subsidiarily applicable law. In contrast, under Art. 58 of the CAS Code, the "applicable regulations" always primarily apply, regardless of the will of the parties"* (HAAS U., "Applicable law in football-related disputes – The relationship between the CAS Code, the FIFA Statutes and the agreement of the parties on the application of national law", *CAS Bulletin 2015/2*, p. 17).

61. Applying this hierarchy to the present matter, the FIFA Statutes and Regulations are applicable first and principally (together with the regulations of the AFC and the HKFA), and are subject to Swiss law with respect to their interpretation and application where they seek to set uniform standards internationally. Hong Kong SAR law more generally is to be considered as applicable subsidiarily.

VIII. MERITS

62. Respondent raises two matters of evidentiary and procedural nature that must be addressed at the outset. First, the Respondent seeks to exclude certain evidence introduced by the Appellant on the basis that it was available and not produced before the DRC, relying on R57 para. 3 of the Code. Second, Respondent asserts that R57 does not allow the relief sought by the Appellant to be awarded, as it only allows for either the issuance of a new decision replacing the decision challenged, or for the challenged decision to be annulled and the case referred back to the previous instance (in the instant case, the DRC and not the HKFA NDRC).

63. The relevant parts of R57 of the Code read as follows:

> *The Panel has full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance. …*
>
> *The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered. R44.2 and R44.3 shall also apply.*

a. Exclusion of evidence under Article R57 para. 3

64. The Respondent suggests that certain exhibits of the Appellant's submissions must be entirely excluded under R57 para. 3. It is clear from the language of this rule that while a CAS Panel may exclude such evidence, it is not bound to do so. Indeed the practice of the CAS with respect to the application of this rule is restrictive. In other words, exclusion of evidence should be the exception rather than the rule, and should generally be applied in *"exceptional circumstances of abusive or inappropriate conduct by the parties submitting new evidence"* (MAVROMATI/REEB, *The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials,* Alphen aan den Rihn 2015, p. 521-522)

65. The Sole Arbitrator does not find the presence of circumstances justifying the exclusion of new evidence, and finds that to the extent that the Respondent was granted the opportunity to address such evidence, which it was, such an approach is in keeping with the CAS's *de novo* power of review under R57 of the Code, and with the parties' right to be heard.

b. Compatibility of the nature of relief sought with Article 57 para. 1

66. The Respondent asserts that certain relief sought by the Appellant, namely the remittance of the dispute to the HKFA for resolution at the national level, cannot be granted in view of the language of Article R57.

67. Indeed, Article R57 presents the Sole Arbitrator with two clear and specific possibilities: the issuance of a new decision replacing that which was challenged, or the annulment of said decision with a referral back to the previous instance (i.e. that which issued the challenged decision, in this case the DRC). Article R57 is sufficiently unambiguous in this respect: it does

not allow for the CAS to decide on attributing jurisdiction to a third body: either it finds fault with the determination of the body which established the challenged decision (in which case it either issues a new decision or refers the decision back to the previous instance), or it does not and therefore upholds the lower decision.

68. As a result, the Sole Arbitrator must first determine whether, on the basis of the evidence in the case file, the challenged decision should be set aside or not. Only in the event that it is will the need arise to address the question of whether or not to remand the case to the DRC.

c. Existence, scope and validity of the arbitration clause(s)

69. The Appellant contends that the DRC erred in finding a conflict between Articles 14 and 18 of the Contract, both of which propose dispute resolution mechanisms. Article 14 refers to a "grievance procedure", whereas article 18 refers to Article 65 of the HKFA Articles, which, despite the fact that the specific Article no longer existed in the then-current HKFA Articles, makes reference to arbitration.

70. It therefore becomes necessary to determine whether (i) the reference to arbitration in the Contract is of the nature to apply to the entirety of the parties' Agreement; (ii) whether the reference to arbitration in the contract is sufficient (as a matter of form and substance) to bind the parties to a specific national arbitration procedure under the auspices of the HKFA, and (iii) whether, if this is the case, the national arbitration procedure foreseen is compliant within the meaning of Art. 22(b) of the FIFA RSTP.

i. The scope of the arbitration clause

71. It is noteworthy that the parties' Agreement is composed not only of the Contract (itself composed of a one-page form and the Terms of Agreement), but also of the Side Letters. While the Contract Terms of Agreement make a reference to the *"arbitration by the Association according to Article-65 of the Articles of Association"*, the Side Letters make no reference to arbitration whatsoever, and the Contract makes no reference to the Side Letters. Indeed, aside from the contemporaneous nature of the execution of both documents, there is nothing on their face tending to indicate that the parties intended for the arbitration provisions of the Contract to extend to the subject matter of the Side Letters. On the contrary, there may have been a rationale, for reasons that the Sole Arbitrator ignores, to keep them deliberately separate. This could have a bearing on the extent to which the specific national arbitration provisions are applicable, as we examine below.

ii. The nature of the arbitration procedure foreseen, and its validity

72. Setting aside Article 14 of the Contract which purportedly proposes an optional "grievance procedure", the Appellant contends that the text of Article 18 of the Contract is nevertheless a clear and binding arbitration clause. This is due to the fact that it references the HKFA Articles, which themselves contain an arbitration provision. Since the July 2011 version of the HKFA Articles (in force at the moment of signature of the Agreement) *"maintain the same*

principles as the earlier version", the fact that the contractual language refers to Article 65 of the previous HKFA Articles and not to Articles 34.1 and 34.2 of the HKFA Articles in force at the time the Agreement was entered into, the Appellant maintains that the incorporation by reference of the arbitration agreement was sufficient to bind the parties.

73. The Respondent argues that the reference to arbitration in the agreement is insufficiently specific. The HKFA NDRC regulations could not be applicable to the present case as they were only adopted on a date (3 August 2015) that followed the termination of the Agreement on 29 May 2015. The Appellant however notes that the HKFA Articles provided for HKIAC rules to apply prior to the establishment of the HKFA NDRC rules.

74. It therefore becomes necessary to examine the validity of Article 18 of the Contract under Art. 22 (b) of the FIFA RSTP, which states that for a national level arbitral tribunal to have jurisdiction over the dispute, *"such arbitration clause must be included […] directly in the contract"*.

75. Scholars consider that *"[a]rbitration clauses in 'articles of association' … are merely a specific instance of arbitration agreements by reference. … An arbitration clause contained in articles of association can therefore only be relied upon if it has been accepted by all parties involved in the dispute"* (BERGER/KELLERHALS, paras. 466-467).

76. According to Christoph Müller *"[i]t may also be necessary to resort to contractual interpretation where arbitration agreements are incorporated by reference. … The central issue in this context is to determine under what conditions such a reference complies with the requirement of consent, so that the text referred to will be part of the contract. To the extent that this question is to be resolved under Swiss substantive law (pursuant to Art. 178(2) [PILA]), the principle of good faith, which was developed in this context in connection with Art. 1 CO, namely with regard to general terms and conditions, will govern the solution"* (MÜLLER C., in ARROYO, *Arbitration in Switzerland, the Practitioner's Guide,* Alphen aan deen Rijn 2013, p. 68, para. 61).

77. It is worth noting at this point that in the context of Art. 22 (b) of the FIFA RSTP and under the Haas doctrine (see *supra* at para. 60), Swiss law is applicable to the interpretation of whether or not the arbitration clause is included "directly" in the contract. As a result, Respondent's references to the application of the Hong Kong Arbitration Ordinance are only relevant subsidiarily, to the extent that Swiss law does not cover aspects of the application of the FIFA RSTP.

78. Müller's next observations are of direct relevance to the case at hand:

> *"In accordance with the principle of good faith, consent to arbitration will be admitted as a rule, whenever the reference specifically refers to the arbitration clause and the document referred to is either physically joined to the contract, or is in some other way unmistakably defined and known to the other party, e.g. through previous commercial dealings between the same parties…*
>
> *The solution is less evident where there is a global reference to a text containing an arbitration agreement, i.e. when the reference only mentions the document referred to and not the arbitration clause contained therein. Whether this is sufficient from the point of view of consent must also be decided by application of the principle*

of good faith and thus, by taking into account all circumstances of the case at hand" (MÜLLER C., in ARROYO, p. 68 - 69, para. 63).

79. The Sole Arbitrator considers that while the Contract did include a reference to HKFA arbitration, two key elements are problematic when it comes to binding the Player to arbitrate under such rules. First, the reference to arbitration is indirect in more than one way: it references a specific article in the HKFA Articles which no longer exists, thereby burdening the Player with the need to divine that newer articles on similar subject matter would be applicable. It is also imprecise (when it comes to the applicability of the arbitration provisions of the HKFA Articles) as to which procedures are to be applied (FIFA, AFC, or HKFA). As Respondent rightly observes, at the time the Agreement was entered into (15 January 2015), the 2011 version of the HKFA Articles were in force. Those dated 5 March 2015 were the first to mention the creation of an HKFA arbitral tribunal, and provided for "interim" applicability of the HKIAC Domestic Arbitration rules in the absence of "special regulations", which were only drawn up subsequently.

80. As a result, the Sole Arbitrator finds that the reference to domestic arbitration under HKFA regulations were too vague to sufficiently bind the Player, who was entering into his first contract with the Club and had no knowledge of its internal mechanisms as to dispute resolution. Moreover, by consulting the 2011 version of the HKFA Articles, not only would he have not found the specific provision that was referred to in the Contract, but he would have found language broad enough to suggest that his dispute could be brought before FIFA. Indeed, Art. 34 of the HKFA Articles (2011) reads as follows:

"34.1 HKFA, its Members, Players, Officials and Match and Player Agents will not take any disputes to ordinary courts unless specifically provided for in the Constitution and the FIFA Regulations. Any disagreement shall be submitted to the jurisdiction of FIFA, AFC, or the HKFA.

34.2 HKFA shall have jurisdiction on internal matters or disputes, i.e., disputes between parties belonging to the HKFA. FIFA shall have jurisdiction on international disputes, i.e., disputes between parties belonging to different associations or confederations".

81. In light of the foregoing language, it is not unreasonable for the Player to believe that he had some degree of choice as to the body before which he should address his claim. Moreover, in the absence of clear reference to a specific HKFA arbitration procedure, it would not have been unexpected for him to bring his claim before FIFA.

82. In light of the Appellant's argument that the HKFA Articles (2015) provided for a specific arbitration procedure, this is of little help if the reference to the HKFA Articles in the Contract itself is insufficiently clear to bind the Player.

83. Finally, with respect to the Appellant's point regarding similarly situated players and the dispute resolution procedures that may or may not be applicable to them, the Sole Arbitrator can only note that there were no other affected parties in the instant dispute, and that any conclusions as to the applicability of his determinations in this award to other individuals would be speculative in nature.

iii. The compliance of the HKFA procedure with the FIFA RSTP requirements

84. In light of the Sole Arbitrator's finding that the on the lack of validity of the contractual provision purporting to bind the Player to HKFA arbitration by reference, it is unnecessary to address the issue of whether the HKFA NDRC is compliant with Art. 22 (b) of the FIFA RSTP.

d. Conclusion

85. Having found that the jurisdiction of the DRC was appropriate, the Sole Arbitrator notes that Appellant does not seek relief with respect to the merits of its decision. There is therefore no remaining basis to question its determination.

86. As a result of the foregoing, the Sole Arbitrator does not see a basis upon which to change the decision of the DRC.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Hong Kong Pegasus FC / TSW Pegasus FC on 16 November 2016 against the decision issued by the FIFA Dispute Resolution Chamber on 17 June 2016 is dismissed.

2. The decision issued by the FIFA Dispute Resolution Chamber on 17 June 2016 is confirmed.

3. (…).

4. (…).

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