Arbitration CAS 2017/A/5054 Martin Fenin v. FC Istres Ouest Provence, award of 16 April 2018

Panel: Prof. Ulrich Haas (Germany), Sole Arbitrator

Football
Termination of the employment contract with a club in liquidation
Recognition of the effects of foreign insolvency proceedings without prior recognition procedure in Switzerland
Subsistence of the parties' arbitration agreement in spite of a contractor entering into insolvency proceedings
Party's legal capacity
Relevant entity to be sued when claiming a payment out of a bankrupt estate
Assessment of a party's legal interest
Advance effect of art. 107 FIFA Disciplinary Code

1. **According to art. 166 *et seq.* of the Swiss Private International Law Act (PILA), which rationale aim to protect the Swiss national sovereignty, the effects of a foreign insolvency proceeding cannot be recognised automatically in Switzerland. Enforcement proceedings pertain to public law, since they deal with the exercise of public powers. The situation however is different in case of arbitration. No issues of sovereignty arise, since arbitration before the CAS is a private dispute resolution mechanism. An arbitrator acting in the context of the 12th chapter of the PILA does not exercise delegated Swiss powers. Instead, he or she derives the mandate to adjudicate the matter from a (private) agreement of the parties. Consequently, by recognizing the foreign effects of an insolvency proceeding, an arbitrator does not bow to a foreign power. Furthermore, the only link of the arbitration procedure at hand to the Swiss territory is that the seat of the arbitration (that can be freely chosen by the parties) is located in Switzerland.**

2. **According to Swiss law, an arbitration agreement is neither terminated *ex officio* nor voidable in case of the opening of insolvency proceedings. Furthermore, Article 211(2) of the Law on debt enforcement and insolvency proceedings that grants the liquidator discretionary powers whether to execute an agreement entered into by a debtor or to discontinue it, is not applicable to arbitration agreements.**

3. **The capacity to be a party in the proceedings is dependent of the preliminary question related to the legal capacity. The latter is determined by the personal statute or the company statute, *i.e.* the applicable law determined by art. 33 *et seq.* of the PILA (for natural persons) or art. 154 and 155 lit. c. PILA (for legal persons).**

4. **Under French law, the proper party - if payment is sought out of a bankrupt estate - remains the debtor who in the proceedings is represented by a liquidator.**

5. **In order for a claim to be admissible, the appellant must have a legal interest. Since the**

requirement of legal interest determines in a given case whether a claimant has access to justice, the bar must be set with prudence and - in any respect – not too high. What disputes shall be considered deprived of any legal interest differ in cases in which the State provides and pay for courts that adjudicate a dispute compared to cases where the parties mandate and pay (in full) a private institution to adjudicate the matter. In the latter case, a legal interest should only be denied if there is no benefit for the party whatsoever in obtaining a judgement in her/his matter in her/his favor.

6. FIFA regulations do not include any provision whereby insolvency proceedings are to be taken into account already at a procedural stage prior to enforcement proceedings. However, "advance effects" can be conferred to art. 107(b) of the FIFA Disciplinary Code already during CAS proceedings and, thus, to deny a legal interest already in the adjudication procedure if there are no prospects of a possible CAS award to be executed against a debtor. By turning insolvency proceedings in a liquidation procedure, a (French) court clearly expresses the opinion that there are no prospects of recovering and that all of the debtor's estate will be distributed to the creditors before the debtor's legal existence comes to an end. In such context, there is no legal interest for a creditor to pursue its claim before CAS, *i.e.* outside the (French) insolvency proceedings.

I. PARTIES

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

2. FC Istres Ouest Provence is the name of a professional football team that is (or was) run by the "Société Anonyme Sportive Professionnelle Football Club Istres Ouest Provence" (the "Respondent" or "SASP FCIOP"). SASP FCIOP is a company listed in the French commerce registry with its registered office in Istres, France.

II. FACTUAL BACKGROUND

3. Below is a summary of the main relevant facts, as established on the basis of the parties' written submissions and the evidence examined in the course of the present appeal arbitration proceedings. This background is set out for the sole purpose of providing a synopsis of the matter in dispute. Additional facts may be referred to, where relevant, in connection with the legal discussion.

A. Background Facts

4. On 12 August 2014, the Player and SASP FCIOP concluded an employment contract (the "Employment Contract"), valid as from 13 August 2014 until 30 June 2015. Pursuant to the terms of the Employment Contract, the Player was entitled to a monthly salary of EUR 6,500

gross. Pursuant to an additional agreement (the "Additional Agreement") concluded between the Player and SASP FCIOP, the Player was entitled to a monthly amount of compensation of EUR 500 for his transportation costs during the 2014/2015 sporting season.

5. On 10 November 2014, SASP FCIOP notified the Player that he allegedly missed a match of the B team. The Player maintains that he was never advised to participate in such match.

6. Also on 10 November 2014, the Player was instructed by his coach to undergo a blood test, which was carried out the following days.

7. On 15 December 2014, the Player underwent another blood test.

8. On 31 December 2014, SASP FCIOP notified the Player to participate in a meeting with its Board on 9 January 2015.

9. On 9 January 2015, the Player met with SASP FCIOP's Board, during which the Player was informed that SASP FCIOP was considering the option of prematurely terminating his Employment Contract because of an alleged breach of his professional obligations.

10. On 19 January 2015, SASP FCIOP notified the Player that his Employment Contract was terminated. SASP FCIOP, *inter alia*, justified the termination by stating that the Player did not comply with the required way of life of a professional football player.

A. Proceedings before the Dispute Resolution Chamber of FIFA

11. On 20 February 2015, the Player lodged a claim against "FC Istres Ouest Provence" with the FIFA Dispute Resolution Chamber (the "FIFA DRC"). The legal entity targeted by the Appellant with this claim was SASP FCIOP. This clearly follows from the FIFA file, since the claim filed by the Appellant is directed against his former employer. The Appellant submitted before the FIFA DRC that "FC Istres Ouest Provence" unlawfully terminated the Employment Contract. The latter, however, was concluded between the Appellant and SASP FCIOP. Furthermore, the entity assuming the role of a respondent in the FIFA proceedings is SASP FCIOP. Thus, the matter in dispute before the FIFA DRC was a dispute opposing the Appellant and SASP FCIOP.

12. The Appellant in the proceedings before the FIFA DRC claimed an amount of EUR 39,200 plus interest as compensation for breach of contract. Said amount can be broken down as follows:

    i. EUR 32,500 as compensation for breach of contract, corresponding to his contractual remuneration as from February until June 2015 pursuant to the Employment Contract;

    ii. EUR 2,500 as compensation for breach of contract, corresponding to his transportation costs as from February until June 2015 pursuant to the Additional Agreement;

iii. EUR 4,200 as reimbursement for the moving costs the Player referred to in an email dated 27 February 2015 sent by the Player to FCIOP.

13. SASP FCIOP objected to the Player's claim, arguing that his arguments were unjustified and that his claim had to be rejected.

14. On 3 November 2016, the FIFA DRC rendered its decision (the "Appealed Decision"), with the following operative part:

"1. The claim of the [Player] *is rejected".*

15. On 7 March 2017, the grounds of the Appealed Decision were communicated to the parties, determining, *inter alia*, the following:

- *"The members of the Chamber noted that according to* [SASP FCIOP]*, the player underwent medical tests following reports and statements made by its coach and other players regarding problematical signs in the* [Player's] *fitness state, including reports on alcohol consumption, and that prior to receiving the test results,* [SASP FCIOP] *had asked the* [Player] *to train and play with the reserve team in order not to take risks with his health.*

- *In continuation, the members of the Chamber referred to the first medical analysis dated 12 November 2014, as well as to the study made thereof by* [SASP FCIOP's] *doctor, according to whom his concerns on the* [Player's] *state of health were consistent with the results of said medical analysis, in the sense that the* [Player's] *blood analysis at hand was showing a high percentage of "CDT". The Chamber took into account that* [SASP FCIOP] *submitted the player's medical analysis dated 12 November 2014, showing a measurement for CDT of 4.8%, with the norm being below 1.7%. According to* [SASP FCIOP]*, such percentage of CDT corresponds to a situation of alcoholism.*

- *In this respect, the Chamber further took note of the undisputed fact that* [SASP FCIOP's] *doctor advised the* [Player] *to abstain from consuming alcohol and that a follow-up blood analysis would be made a month later.*

- *Furthermore, the Chamber noted that a second medical test was made in December 2014, the result of which showed an increase in the percentage of CDT in the* [Player's] *blood. In this regard, the Chamber took note of the subsequent opinion issued by* [SASP FCIOP's] *doctor, namely that the* [Player's] *state of health was incompatible with a professional practice of football.*

- *The Chamber took into account that according to* [SASP FCIOP]*, the result of the medical test demonstrates that the* [Player] *was in breach of his contractual obligations and of* [SASP FCIOP's] *instructions regarding his lifestyle. In addition, the members of the Chamber noted that in order to protect the* [Player's] *health,* [SASP FCIOP] *had suspended the* [Player] *as a conservatory measure.*

- *As regards this course of events, the Chamber further noted that according to the* [Player]*, who considered that he was put in the reserve team due to the Respondent's* [sic] *alleged poor performance,* [SASP FCIOP] *arranged for the aforementioned medical tests with the purpose to prematurely terminate the*

[Employment Contract]. *In this regard, the members of the Chamber wished to stress that the* [Player] *had not been able to corroborate these allegations with documentary evidence.*

- *As regards* [SASP FCIOP's] *position with respect to the* [Player's] *state of health and lifestyle, in particular the consumption of alcohol, the Chamber took into account that according to the* [Player] *he had a normal consumption of alcohol for a football player.*

- *In this regard, the Chamber also noted that, for his part, the* [Player] *had neither contended the relevance of the "CDT" measurement, nor the actual results shown by the two aforementioned medical tests.*

- *Given the aforementioned elements, the Chamber concluded that the* [Player] *had not followed* [SASP FCIOP's] *instructions following the result of the first medical test.*

- *In continuation, the Chamber wished to highlight that in addition to* [SASP FCIOP's] *rules of conduct that the* [Player] *agreed to comply with, it is also the general responsibility of a football player to take care of his own fitness condition, to adapt his lifestyle to the need of his activity and possibly to seek help in order for the player to remain able to perform his services in a way that is compatible with such activity, especially within a professional framework.*

- *The members of the Chamber deemed it important to highlight that* [SASP FCIOP]*, for its part, had shown diligence in its dealing with the situation by undertaking actions not only to monitor, but to also preserve and to contribute to improve the* [Player's] *health state, which was linked to the* [Player's] *level of alcohol consumption.*

- *On account of the aforementioned and in light of the* [Player's] *incompliance with his contractual responsibility and obligations as a professional football player, the Chamber decided that* [SASP FCIOP] *has terminated the* [Employment Contract] *with just cause.*

- *Consequently, the Chamber decided that the* [Player's] *claim for compensation based on* [SASP FCIOP's] *alleged breach of contract without just cause had to be rejected.*

- *It is highlighted that this decision was passed with the casting vote of the Deputy Chairman of this Chamber in favour of the rejection of the* [Player's] *claim (cf. art. 14 par. 1 of the Procedural Rules).*

- *In continuation, and with regard to the* [Player's] *claim for reimbursement by* [SASP FCIOP] *of his moving costs in the amount of EUR 4,200, the Chamber referred to art. 12 par. 3 of the Procedural Rules, in accordance with which any party claiming a right on the basis of an alleged fact shall carry the burden of proof.*

- *Applying the aforementioned rule to the case at hand, the Chamber concluded that the* [Player] *had not presented credible and conclusive evidence in support of his allegation that that* [sic] [SASP FCIOP] *was liable to cover his moving expenses in the amount of EUR 4,200 and, hence, decided to reject such claim".*

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 28 March 2017, the Player lodged a Statement of Appeal with the Court of Arbitration for Sport ("CAS") in accordance with Article R48 of the Code of Sports-related Arbitration (the "CAS Code"), challenging the Appealed Decision. The Player requested that the present matter be submitted to a Sole Arbitrator. The Player's appeal was directed at the time solely against "FC Istres Ouest Provence". The legal entity targeted with this appeal was the entity that was already party to the first instance proceedings before the FIFA DRC, *i.e.* SASP FCIOP (see below).

17. On 5 April 2017, the CAS Court Office granted SASP FCIOP a deadline of 5 days to inform the CAS Court Office whether it agreed to the appointment of a Sole Arbitrator.

18. On 7 April 2017, FIFA renounced its right to request its possible intervention in the present arbitration pursuant to Article R41.3 of the CAS Code.

19. On 12 April 2017, in the absence of any Answer from SASP FCIOP being received by the CAS Court Office, the parties were informed that the President of the Appeals Arbitration Division would decide on the number of arbitrators.

20. On 13 April 2017, the CAS Court Office informed the parties that the President of the Appeals Arbitration Division had decided to submit the matter to a Sole Arbitrator, pursuant to Article R50 of the CAS Code.

21. On 21 April 2017, the courier company informed the CAS Court Office that according to its local staff notification to SASP FCIOP was not possible due to a change of address[1].

22. On 24 April 2017, the CAS Court Office requested the Player to provide it with a valid address for the Respondent.

23. On 26 April 2017, further to a request for legal aid filed by the Player, the Board of the International Council of Arbitration for Sport ("ICAS") issued an Order on Request for Legal Aid, with the following operative part:

> *"1. The Applicant's request for assistance for CAS arbitration costs in the procedure CAS 2017/A/5054 Martin Fenin vs. FC Istres Ouest Provence is granted.*
>
> *2. The Applicant's request for assistance for his own costs, costs of witnesses, experts, and interpreters in the procedure CAS 2017/A/5054 Martin Fenin vs. FC Istres Ouest Provence is granted as follows:*

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1 All documents forwarded by CAS to SASP FCIOP prior to and including the letter from the CAS Court Office dated 10 April 2017 (forwarding FIFA's letter and enclosure dated 7 April 2017) were properly notified to SASP FCIOP, including the Statement of Appeal.

- *The travel and accommodation costs of the Applicant and those of his witnesses, experts and interpreters in connection with any CAS hearing, shall be borne by the CAS up to a maximum amount of CHF 500 in total; and*

- *The above-mentioned legal aid will be granted upon presentation of receipts.*

3. *The present order is pronounced without costs".*

24. On 27 April 2017, the Player filed his Appeal Brief in accordance with Article R51 of the CAS Code. This document contained a statement of the facts and legal arguments giving rise to the appeal. The Player also requested the Sole Arbitrator to order "FC Istres Ouest Provence" (*i.e.* SASP FCIOP) to produce *"the full report of the laboratory test conducted on the Appellant"*. Furthermore, the Player submitted the following requests for relief:

"1. To accept this appeal against the Decision pronounced by the FIFA Dispute Resolution Chamber on the 3rd of November 2016.

2. To adopt an award annulling said decision and declaring that:

a. The Respondent shall pay to the Appellant the NET sum of EURO 32,500.00/- (Thirty Two Thousand Five Hundred Euro);

b. To order the Respondent to reimburse to the Appellant the amount of EURO 4,200.00/- (Four Thousand Two Hundred Euro) together with interests at a rate of 5% per annum of the sum referred to above, to be calculated since its due date until the date of effective payment.

c. To order the Respondent to reimburse to the Appellant the amount of EURO 2,500.00/- (Two Thousand Five Hundred Euro) together with interests at a rate of 5% per annum of the sum referred to above, to be calculated ever since its due date until date [sic] *of effective payment.*

3. Order the Respondent to disburse in favour of the Appellant the amount of 5,000.00/- (Five Thousand Swiss Francs) as a contribution to its legal fees and other expenses incurred in connection with the present proceedings.

4. Awarding any such other relief as the Panel may deem necessary or appropriate".

25. On 3 May 2017, the courier company informed the CAS Court Office that according to its local staff notification to the Respondent was not possible at the address provided by the Appellant.

26. On 3 May 2017, the CAS Court Office again requested the Player to provide it with a valid address for the Respondent, as the address provided by the Player did not appear to be valid.

27. On 4 May 2017, the Player provided the CAS Court Office with a new address for the Respondent.

28. On 12 May 2017, the CAS Court Office acknowledged receipt of the Player's Appeal Brief and forwarded it to the Respondent. Pursuant to Article R55 of the CAS Code, the Respondent was invited to file an Answer within 20 days of receipt of this letter by courier. The parties were also informed that, if the Respondent would fail to submit an Answer within the given time limit, the Sole Arbitrator could nevertheless proceed with the arbitration and issue an award.

29. On 18 May 2017, the courier company informed the CAS Court Office that according to its local staff the (new) address provided by the Appellant was not valid and that the Respondent apparently changed its address sometime after 6 April 2017.

30. On 18 May 2017, in accordance with Article R54 of the CAS Code, and on behalf of the President of the CAS Appeals Arbitration Division, the CAS Court Office informed the parties that the arbitral tribunal appointed to decide the present matter was constituted as follows:

    Mr Ulrich Haas, Professor of Law in Zurich, Switzerland

31. On 6 June 2017, the CAS Court Office informed the parties that the Respondent's address provided by the Player was no longer valid. The Player was invited to provide the CAS Court Office with a new address of the Respondent.

32. On 7 June 2017, the Player provided the CAS Court Office with a new address for the Respondent.

33. On 8 June 2017, according to the courier delivery report, the Appeal Brief was delivered to the new address provided by the Player.

34. On 20 June 2017, the CAS Court Office informed the parties that Mr Dennis Koolaard, Attorney-at-Law in Arnhem, the Netherlands, would act as *Ad hoc* Clerk.

35. On 6 July 2017, the CAS Court Office informed the parties that according to the date of delivery of the Appeal Brief as set out in the courier delivery report, the Respondent's deadline to file an Answer had expired on 28 June 2017, but that no Answer had been received. It was reiterated that the Sole Arbitrator could nevertheless proceed with the arbitration and deliver an award. The CAS Court Office also invited the parties to state whether their preference was for a hearing to be held.

36. On 13 July 2017, the Player informed the CAS Court Office that he left it to the discretion of the Sole Arbitrator whether to hold a hearing or not. The Respondent did not reply to the CAS Court letter dated 6 July 2017.

37. On 26 July 2017, on behalf of the Sole Arbitrator, the CAS Court Office inquired with the Respondent's counsel in the first-instance proceedings before FIFA (Maître Elisabeth Van Montagu-Masamba) whether she still had a power-of-attorney to represent the Respondent. In addition, the CAS Court Office invited the Player to provide guidance on the following matters:

"i) To clarify against whom he pursues the claim filed with CAS under CAS 2017/A/5054, i.e. either against Istres FC or FC Istres Ouest Provence or both. The Appellant must specify the exact identity(ies) of the Respondent(s);

ii) In case the Appellant calls (also) Istres FC before the CAS, that he informs the Sole Arbitrator (backed by evidence) whether the names Istres FC and FC Istres Ouest Provence refer to legally identical entities or not. In this context, the Appellant is advised that it appears from publicly available information that FC Istres Ouest Provence still exists and currently is under court-supervised liquidation proceedings;

iii) In case Istres FC and FC Istres Ouest Provence are not legally identical, the Appellant is invited to explain on the basis of which provisions and/or legal principles (FIFA Regulations, Swiss law or any other law) backed by legal literature/jurisprudence:

- *Whether this Sole Arbitrator has jurisdiction over Istres FC;*
- *Whether the Appellant has exhausted all internal remedies against Istres FC within the meaning of Art. R47 CAS Code;*
- *Whether Istres FC would have standing to be sued in relation to a FIFA decision issued in a dispute between the Appellant and FC Istres Ouest Provence; and*
- *Why and on what basis Istres FC would be liable for obligations entered into by FC Istres Ouest Provence.*

iv) In view of FC Istres Ouest Provence's non-participation in these proceedings so far, whether or not the Appellant maintains his request for document production (full report of the laboratory test, cf. Appeal Brief p. 14)".

38. On 3 August 2017, following a request of the Sole Arbitrator pursuant to Article R57 of the CAS Code, FIFA provided the CAS Court Office with a copy of its file relating to the first-instance proceedings before the FIFA DRC.

39. On 9 August 2017, the Player submitted - *inter alia* - the following in response to the Sole Arbitrator's questions:

i) The Player's claim is directed against both SASP FCIOP and Istres FC ("IFC"), IFC being the Respondent's "successor";

ii) Both clubs are represented by the same legal entity (*i.e. Financiere Croissance Investissement SA (MLFCI.PA)*). According to the Appellant the financial assets of "FC Istres Ouest Provence" are retained by the same entity and a change in name does not absolve the club from its obligations of payment. Hence, the Player submits that the claim is against the same entity. The Player further adds that a) the facilities are the same; b) the address is the same; c) the fan base is the same; d) the history is the same; e) the logo and colours are practically the same; f) it is publicly acknowledged that it is the same entity having

only been through a change of name; g) the Board of Directors is related; h) the overall sporting identity is the same.

iii) With respect to the jurisdiction of CAS, the exhaustion of legal remedies and the Respondents' standing to be sued the Appellant submits that:
   a) CAS' jurisdiction has not been challenged. Pursuant to Article 57 of the FIFA Statutes, CAS is recognised and, as such, any question of CAS jurisdiction is moot.

   b) Since the Respondent and IFC are identical, the only recourse for the Player is to go to CAS. Should the Sole Arbitrator feel that there is further recourse, the case should be referred back to FIFA, giving IFC the ability to respond to the Player's claim. In order to avoid further delays, CAS has the ability to hear the case *de novo.*

   c) As a general rule, a party in appeals arbitration proceedings before the CAS proceedings must have been a party to the first-instance proceedings, whose decision is being appealed to the CAS. However, according to the Appellant the facts of this case are exceptional. IFC "did not exist" when the previous proceedings were ongoing. IFC is the sporting successor of the Respondent. Both clubs have a "similar sporting identity". Consequently, it is only "natural" that IFC is drawn into the proceedings before the CAS and has "sufficient" standing to be sued.

   d) Referring to CAS jurisprudence the Appellant submits that a sporting successor who has effectively and/or practically taken over the place and the sporting identity of another club is liable for the debts of this other club. It is not admissible to discard debts via legal succession.

iv) With respect to the request for document production filed in the Appeal Brief, the Player submits that he upholds such request. However, the Appellant agreed to *"an additional deadline being set for the issue to be addressed by the Respondent"*.

40. On 10 August 2017, the Player filed an additional document in support of his previous submissions.

41. On 16 August 2017, Maître Elisabeth Van Montagu-Masamba informed the CAS Court Office that her firm had no power of attorney to represent the Respondent in the CAS proceedings and that she was unable to contact SASP FCIOP. She noted, in addition, that a research on the internet had shown that the Respondent was in liquidation proceedings. However, she was unable to provide any information regarding the progress or the status of these liquidation proceedings.

42. On 25 August 2017, the CAS Court Office informed the parties that following the Appellant's submissions the Sole Arbitrator had decided that IFC shall be included as Second Respondent in these CAS proceedings. Consequently, IFC was to be provided with a copy of the complete case file. In addition, IFC was granted a deadline of 20 days to file an Answer. IFC was also

requested to state whether it was in possession of the report of the laboratory test requested by the Player in the context of his request for document production.

43. On 29 August 2017, the CAS Court Office advised the parties that the address provided for both Respondents was no longer valid. The Player was granted a deadline to provide the CAS Court Office with the correct address for both Respondents.

44. On 10 October 2017, the Player provided the CAS Court Office with an address.

45. On 13 October 2017, upon an inquiry by the CAS Court Office, the Player clarified that the address provided refers to both Respondents, *i.e.* SASP FCIOP and IFC.

46. On 16 October 2017, the CAS Court Office acknowledged that the Player had provided the address after the expiry of the deadline set by the CAS Court Office and invited the Respondents to file their comments in this respect.

47. On 18 October 2017, the courier company informed the CAS Court Office that receipt of the delivery has been refused by a person named "ORLO".

48. On 18 December 2017, the Sole Arbitrator issued a partial arbitral award, with the following operative part:

> *"1. The appeal filed on 28 March 2017 and 27 April 2017 by Mr Martin Fenin against the decision issued on 3 November 2016 by the Dispute Resolution Chamber of the Fédération Internationale de Football Association is inadmissible insofar it is directed against association Istres FC.*
>
> *2. The costs of the present partial award, to be determined and served to the parties by the CAS Court Office, shall be borne in their entirety by Mr Martin Fenin.*
>
> *3. All other motions or prayers for relief will be set out in the final award".*

49. On 22 December 2017, further to an inquiry from the Sole Arbitrator in this regard, the Player informed the CAS Court Office that he wished to proceed with his appeal procedure against SASP FCIOP.

50. On 5 January 2017, further to a request from the Sole Arbitrator to provide the CAS Court Office with evidence that SASP FCIOP still exists, the Player argued that SASP FCIOP was still in liquidation proceedings and therefore still existed.

51. On 15 January 2017, further to a request from the Sole Arbitrator to explain what his legal interest is to pursue a claim against SASP FCIOP which is in Court-ordered liquidation, the Player maintained that because SASP FCIOP was still under liquidation *"and said process not being finalized, means that the* [SASP FCIOP] *still has some assets which can serve to cover a favourable ruling to be eventually issued in favour of the Appellant by CAS".*

52. The Sole Arbitrator confirms that he has taken into account all of the submissions, evidence, and arguments presented by the parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. JURISDICTION

53. The jurisdiction of CAS derives from article 58(1) of the FIFA Statutes (2016 edition) as it determines that *"*[a]*ppeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question"* and Article R47 of the CAS Code.

54. On 9 February 2017, a liquidation procedure was opened against SASP FCIOP in France.

55. The question therefore arises whether the Sole Arbitrator must take account of the French insolvency proceedings, and if answered affirmatively, what law shall be applicable to the effects of the opening of insolvency proceedings on the arbitration agreement.

A. Non-applicability of Article 166 *et seq.* Swiss Private International Law Act

56. Since the present dispute is submitted to CAS, which has its seat in Lausanne, Switzerland, the law governing the procedural aspects of this arbitration (*i.e.* the *lex arbitri*) is Swiss law, and more specifically chapter 12 ("International Arbitration") of the Swiss Private International Law Act ("PILA"), since at least one of the parties had its domicile outside Switzerland at the time of the execution of the arbitration agreement (Article 176 PILA).

57. Article 166 *et seq.* PILA establishes the principle of territoriality with respect to insolvency proceedings (Swiss Federal Tribunal ("SFT"), decision of 18 February 2013 – 4A_380/12, consideration 4.2; decision of 26 October 2011 - 4A_389/2011, consideration 2.3.1; BSK-BERTI/MABILLARD, 3rd ed. 2013, Vor Art. 166 ff. no. 1 *et seq.*; see also CAS 2015/A/4162 para. 78). According thereto, the effects of a foreign insolvency proceeding cannot be recognised automatically in Switzerland. Instead, the effects of a foreign arbitration procedure may only be recognised following a specific recognition procedure (Article 166 PILA). The question is, thus, whether the Sole Arbitrator can take into account the effects of the foreign insolvency proceedings without such special or specific recognition procedure.

58. The better arguments speak in favour of admitting such effects in this case without any prior special recognition procedure (BERNET M., Schiedsgericht und Konkurs einer Partei, in Kellerhals, 2005. p. 3, 5 *et seq.*). The rationale behind Article 166 *et seq.* PILA is the protection of Swiss national sovereignty. According to Swiss law, enforcement proceedings pertain to public law, since they deal with the exercise of public powers. In line with this perception, national Swiss authorities are barred from automatically accepting such foreign intrusion onto their territory. The situation in case of arbitration, however, is very different. No issues of sovereignty arise here, since arbitration before the CAS is a private dispute resolution mechanism. An arbitrator acting in the context of the 12th chapter of the PILA does not exercise

delegated Swiss powers. Instead, he or she derives the mandate to adjudicate the matter from a (private) agreement of the parties. Consequently, by recognizing the foreign effects of an insolvency proceeding an arbitrator does not bow to a foreign power. Furthermore, the only link of this arbitration procedure to the Swiss territory is that the seat of this arbitration (that can be freely chosen by the parties) is located in Switzerland. Consequently, Article 166 *et seq.* PILA are not applicable in this case and the Sole Arbitrator can take account of the effects of the French insolvency proceedings without prior recognition procedure in Switzerland.

B. The law applicable to the effects of foreign insolvency proceedings

59. According to the SFT, the law applicable to effects of an insolvency proceeding on the arbitration agreement follows from Article 178(2) PILA (SFT 16 October 2012 4A_50/2012 E. 6). The provision provides as follows:

> *"As to substance, the arbitration agreement shall be valid if it complies with the requirements of the law chosen by the parties or the law governing the object of the dispute and, in particular, the law applicable to the principal contract, or with Swiss law".*

60. According to Swiss law, an arbitration agreement is neither terminated *ex officio* nor voidable in case of the opening of insolvency proceedings. Furthermore, Article 211(2) of the Law on debt enforcement and insolvency proceedings ("LP") that grants the liquidator discretionary powers whether to execute an agreement entered into by the debtor (before the opening of the insolvency proceedings) or to discontinue it, is not applicable to arbitration agreements. The SFT has stated (in SFT 16 October 2012 4A_50/2012 E. 3.6) as follows:

> *"Jedenfalls nach schweizerischem Recht berührt ein Konkurs die Gültigkeit der Schiedsvereinbarung nicht".*

Free translation:

> *"In any event, according to Swiss law the opening of insolvency proceedings does not affect the validity of the arbitration agreement".*

61. Consequently, the Sole Arbitrator finds that the arbitration agreement entered into between the parties has remained unaffected by the opening of the insolvency proceedings and that he, thus, has competence to adjudicate and decide the present matter.

I. TIMELINESS OF THE APPEAL

62. The appeal was filed within the deadline of 21 days set by Article 58(1) of the FIFA Statutes. The appeal complies with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fees. It follows that the appeal was filed within the prescribed deadlines.

II. DEFAULT OF THE RESPONDENT

63. The Respondent did not submit any Answer nor did it participate in this procedure even though the documents instituting the proceedings were properly notified to it and the proceedings, consequently, became pending. Article R55 provides as follows:

> *"If the Respondent fails to submit its answer by the stated time limit, the Panel may nevertheless proceed with the arbitration and deliver an award".*

64. In light of the above the Sole Arbitrator decided - despite the Respondent's absence in these proceedings - to proceed and to deliver an award in the present matter.

III. STATUS OF THE RESPONDENT AND ITS CAPACITY TO BE A PARTY IN THESE PROCEEDINGS

65. While the opening of the insolvency proceedings leaves the arbitration agreement untouched (according to Swiss law), the debtor as such, *i.e.* the Respondent in the matter at hand, is affected by the opening of insolvency proceedings.

66. Such consequences upon the debtor follow the law applicable to the personal statute of the Respondent. In this respect the SFT has held as follows (SFT 31 March 2009 4A_428/2009, E. 3.2):

> *"Es gilt daher der allgemeine prozessuale Grundsatz, wonach die Parteifähigkeit von der materiellrechtlichen Vorfrage der Rechtsfähigkeit abhängt (vgl. auch BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, Rz. 326, 340). Diese wird durch das Personal- bzw. Gesellschaftsstatut, also das gemäss Art. 33 f. IPRG (für natürliche Personen) bzw. Art. 154, 155 lit. c IPRG (für juristische Personen) anwendbare Recht bestimmt (SIEHR K., Das Internationale Privatrecht der Schweiz, 2002, S. 714; BERGER/KELLERHALS, a.a.O., Rz. 328; POUDRET/BESSON, Droit comparé de l'arbitrage international, 2001, Rz. 271). Die besondere Kollisionsnorm von Art. 178 Abs. 2 IPRG spielt in dieser Hinsicht mithin keine Rolle".*

Free translation:

> *"Thus, the general principle applies in this case according to which the capacity to be a party in the proceedings is dependent of the preliminary question related to the legal capacity.* […] *The latter is determined by the personal statute or the company statute, i.e. the applicable law determined by Art. 33 et seq. of the PILA (for natural persons) or Art. 154, 155 lit. c. PILA (for legal persons). The special conflict-of-law-rule in Art. 178(2) PILA, consequently, is not applicable in this respect".*

67. According to French law, the opening of "liquidation proceedings" in respect of the Respondent on 9 February 2017 left the latter's legal capacity untouched. Nevertheless, the court decision had the effect that the debtor (and his organs) lost any ability to administer or dispose of any part of its estate (LE GALLOU C., Droit des sûretés - Droit des entreprises en difficultés, 2nd ed., 2015, no. 717). This inability of the debtor extends also to any assets the

debtor might obtain after the opening of the liquidation proceedings, *i.e.* in the course of the insolvency proceedings (LE GALLOU C., Droit des sûretés - Droit des entreprises en difficultés, 2nd ed., 2015, no. 717). As of the moment of the opening of the liquidation proceedings only the liquidator (Maître Eric Verracchia) is in charge of disposing and administrating the estate (LE GALLOU C., Droit des sûretés - Droit des entreprises en difficultés, 2nd ed., 2015, no 715 *et seq.*; BAUERREIS J., in KINDLER/NACHMANN, Hdb Internationales Insolvenzrecht in Europa/Frankreich, no. 167). Furthermore, in view of the fact that the original object of the company can no longer be pursued considering that the estate must now be distributed to the creditors, the law provides that the company (here the SASP) must be dissolved (LE GALLOU C., Droit des sûretés - Droit des entreprises en difficultés, 2nd ed., 2015, no 722).

68. Since the Appellant seeks payment out of the Respondent's estate, the question arises who is the proper respondent after the opening of the insolvency proceedings. This question depends on the legal position of the liquidator according to French law, *i.e.* whether in fulfilling the above duties he acts as a representative of the Respondent (then the claim must be pursued against the Respondent), as an organ or representative of the estate (then the claim must be pursued against the bankrupt estate) or as an independent organ of justice (then the claim must be directed against the liquidator himself).

69. The different jurisdictions do not follow a universal approach. It appears that according to French law, the proper party - if payment is sought out of the bankrupt estate - remains the debtor who in the proceedings is represented by the liquidator (LEGEAIS D., Droit Commercial et des affaires, 20th ed., 2012, no. 1089).

70. Thus, the Appellant correctly directed its claim against SASP FCIOP in the present matter.

IV. LEGAL INTEREST

71. In order for the claim to be admissible, the Appellant must have a legal interest ("Rechtsschutzinteresse", "intérêt d'agir"). Since the requirement of a legal interest determines if in a given case whether a claimant has access to justice, the bar must be set with prudence and - in any respect - not too high. The requirement of a legal interest is of a procedural nature. Consequently, the Sole Arbitrator applies Article 182 PILA in this respect. This provision reads as follows:

> *"(1) The parties may directly or by reference to rules of arbitration regulate the arbitral procedure; they may also subject the procedure to the procedural law of their choice.*
>
> *(2) If the parties have not regulated the procedure, it shall be fixed, as necessary, by the arbitral tribunal either directly or by reference to a law or rules of arbitration.*
>
> *(3) Irrespective of the procedure chosen, the arbitral tribunal shall accord equal treatment to the parties and their right to be heard in an adversarial proceeding".*

72. In the case at hand, the parties have not agreed on any rule specifying the requirements for a legal interest. Thus, the Sole Arbitrator has to decide the issue according to Article 182(2) PILA.

73. In doing so, the Sole Arbitrator does not take recourse to the Swiss law of civil procedure. In principle, the Sole Arbitrator finds that the threshold for a legal interest must be set low before an arbitral tribunal. The prerequisite of a legal interest is designed to protect the courts from being deadlocked with needless disputes. The prerequisite, thus, helps to manage the work load of the courts and to protect scarce public resources.

74. The answer to the question, however, what disputes shall be considered "needless" is very different in cases in which the state provides and pays for courts that adjudicate a dispute compared to cases where the parties mandate and pay (in full) a private institution to adjudicate the matter. In the latter case, a legal interest should only be denied if there is no benefit for the party whatsoever in obtaining a judgement in this matter in his or her favour. The latter is the case here, because even if the Sole Arbitrator were to award the claim in the Appellant's favour, the latter is in any event barred from enforcing it against the Respondent's estate. Since, however, according the Appellant's letter dated 15 January 2018 the sole purpose of pursuing the claim is to seek satisfaction from the Respondent's estate, this proceeding is devoid of any legal interest.

A. The legal status of the claim

75. French law differentiates between claims that have arisen before ("créances antérieures") and after the opening of insolvency proceedings ("créances postérieures"). The alleged claim of the Appellant arose - at the latest - in January 2015, *i.e.* well before the opening of the (first phase of the) insolvency proceedings, *i.e.* the "procédure de redressement judiciaire" over the estate of the Respondent. Thus, the alleged claim of the Appellant is a "créance antérieure".

B. No possibility to enforce the alleged claim in France by French authorities

76. Claims qualified as "créances antérieures" can only be enforced in French insolvency proceedings, if such claims have been submitted for entry in the schedule of insolvency claims. Accordingly, such claims can only be enforced in France through participation in the insolvency proceedings.

77. A CAS award granting the Appellant's request does in no way bind the French authorities and, in particular, does not oblige the liquidator to distribute anything to the Appellant from the Respondent's estate. Consequently, the arbitral award issued by the CAS is unenforceable in France.

78. In the case at hand, the Appellant has not convincingly submitted that there are assets of the Respondent outside of France that he could seize. As a side note, the Sole Arbitrator observes that the European Insolvency Regulation (*Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015*) - unlike Swiss law - follows the universality principle, which -

in essence - precludes that a creditor may proceed by individual compulsory enforcement in any other country belonging to the European Union.

C. No possibility to enforce the alleged claim through FIFA

79. The Sole Arbitrator is aware of FIFA's alternative enforcement mechanism[2]. However, in the view of the Sole Arbitrator, the Appellant is barred from enforcing any possible award in this matter through FIFA.

80. The "enforcement system" introduced by FIFA is simple and cost-effective. The judgment creditor merely has to submit an appropriate request to the FIFA Disciplinary Committee and apply for enforcement of the CAS arbitral award. This "application" is free of charge.

81. The "enforcement" is then, in principle, implemented in a two-stage procedure (CAS 2008/A/1658 para. 117). In the first stage, the FIFA Disciplinary Committee establishes that the debtor has failed to comply with the order to make a payment or effect performance, and for this imposes a fine on the judgment debtor, which is payable within a particular deadline (usually 30 days). In addition, a deadline is fixed for the judgment debtor to comply with the order to make payment (contained in the CAS award). In the second stage, in the event that the judgment debtor fails to comply with said request within the deadline, the FIFA Disciplinary Committee imposes disciplinary sanctions on the debtor until the debtor complies with its obligations.

82. However, there is an obstacle to the FIFA enforcement proceedings in case of insolvency proceedings, since Article 107 FIFA Disciplinary Code (hereinafter "FDC") provides as follows:

> *"Proceedings may be closed if:*
>
> *a) the parties reach an agreement;*
>
> *b) a party declares bankruptcy;*
>
> *c) they become baseless".*

83. The key idea behind Article 107 FDC is not so much because FIFA wants to do its bit towards safeguarding the equal treatment of creditors principle (which probably does not form part of

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[2] In the decision SFT 5.1.2007 - 4P.240/2006, consideration 4, the Swiss Federal Tribunal qualified the FIFA "enforcement" system as a disciplinary sanctioning system of a Swiss association. This due to the fact that an enforcement/"Zwangsvollstreckung" in the Swiss legal terminology is reserved exclusively and only to the State and not to a private association. However, in FIFA and also CAS terminology the notion of enforcement is often used if reference is made to the disciplinary sanctioning system of FIFA. Therefore, in the subsequent considerations, when referred to the enforcement system of FIFA it is always the FIFA disciplinary sanctioning system that is meant.

the Swiss international public policy)[3]. Instead, the central aspect of the consideration is that the enforcement measure, *i.e.* the threatened "detriment", is a disciplinary measure that is punitive in nature. The latter, however, not only requires fault on the part of the judgment debtor but also that the non-payment is in fact attributable to the person concerned. If, however, the insolvency debtor can no longer manage and no longer dispose of his assets as of the opening of insolvency proceedings and if the liquidator is bound by strict rules how to distribute the estate (subject to criminal sanctions), then it is not possible for fault to be attributed to either the liquidator or to the Respondent if they do not comply with the (possible) award (see also CAS 2015/A/4162 para. 79). In the face of such impossibility to freely dispose of the estate it would be contrary to public policy to sanction the debtor (or liquidator) for not complying with a CAS award (*cf.* also SFT (27.3.2012) 4A_558/2011). Therefore, no sanction can be imposed according to the FIFA Disciplinary Code to enforce any CAS award. This finding is also supported by CAS jurisprudence (CAS 2012/A/2750 para. 121):

> *The objective of administration proceedings is to rescue a company and for this purpose governments have established two measures: the company's assets are protected and the company does not have control of payment. In this context, it would not be correct for FIFA to sanction a club if the club can, in reality and due to a decision of an ordinary court, not make any payments without the authorization of an administrator nominated by the court. There is clearly a lis pendens in favour of national courts.*

84. The Sole Arbitrator is aware that Article 107(b) FDC does not categorically exclude the enforcement of CAS decisions if insolvency proceedings have been opened. Instead, the provision provides for the discretion of the Disciplinary Committee. Thus, under certain conditions the Disciplinary Committee can exercise its discretion and continue the enforcement proceedings despite the opening of insolvency proceedings. Ultimately, such exceptions concern in particular those cases where execution is not subject to any restrictions under the national laws (*e.g.* obligations incumbent on the estate, see CAS 2013/A/3049 para. 123 & 126). For in such circumstances FIFA's enforcement mechanism can be applied in parallel. However, no such exception is applicable in this case.

D. Advance effect of Article 107 FDC

85. FIFA's rules and regulations do not include any express provision whereby the insolvency proceedings are to be taken into account already at a procedural stage prior to enforcement proceedings. The question is, however, whether and to what extent "advance effects" are accorded to Article 107(b) FDC already at this stage of the proceedings. Various CAS panels have dealt with this question, however, not in a consistent manner (see CAS 2012/A/2750 paras. 132 *et seq.*; CAS 2011/A/2586 paras. 55 *et seq.*; CAS 2012/A/2754 para. 79). The better arguments speak in favour of an advance effect and, thus, to deny a legal interest already in the adjudication procedure if there are no prospects of a possible CAS award to be executed against the debtor. This, however, is the case here, since by turning the insolvency proceeding in a liquidation procedure on 7 February 2017, the competent French court clearly expressed its

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[3] As regards the very narrow concept under Swiss international public policy (ordre public), BG [Swiss Federal Tribunal] (13.11.1999) ASA Bull 1999, 529, 532; "chose rarissime"; see also BGE [Decisions of the Swiss Federal Tribunal] 132 III 389; BG [Swiss Federal Tribunal] 21.2.2008 - 4A_370/2007, consideration 5.1.

opinion that there are no prospects of recovering and that all of the Respondent's estate will be distributed to the creditors according to the applicable French rules and that the legal existence of the Respondent will finally be brought to an end. In such circumstances, there is simply no legal interest for the Appellant to pursue his claims before CAS, *i.e.* outside the French insolvency proceedings.

V. CONCLUSION

86. The Appellant's claim must be dismissed for lack of legal interest. Since the Sole Arbitrator is prevented from looking at the merits of the contractual dispute between the Player and SASP FCIOP, the Player's request to the Sole Arbitrator to order SASP FCIOP to produce *"the full report of the laboratory test conducted on the Appellant"* is moot and must, therefore, be equally dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 28 March 2017 by Mr Martin Fenin against the decision issued on 3 November 2016 by the Dispute Resolution Chamber of the *Fédération Internationale de Football Association* is dismissed.

2. (…).

3. (…).

4. All other and further motions or prayers for relief are dismissed.