Arbitration CAS 2017/A/5063 Deutscher Fussball-Bund e.V. (DFB) & 1. FC Köln GmBH & Co. KGaA (FC Köln) & Nikolas Terkelsen Nartey v. Fédération Internationale de Football Association (FIFA), award of 22 May 2017 (operative part of 19 April 2017)

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

Football
Registration of a minor professional player outside the registration period
Regulatory requirements in case of transfer of minor professional football player
Article 6 para. 1 RSTP and its unwritten exception
Interpretation of the statutes and rules of a sport association
Establishment of common (binding) practice
Termination of common (binding) practice
Communication in case of a change of rules or practice

1. **In case of a transfer of a minor (professional) football player two sets of rules of the Regulations on the Status and Transfer of Players (RSTP) apply cumulatively, *i.e.* the "normal" (procedural) rules relating to international transfers and the "specific" (procedural) rules relating to the international transfer of a minor professional football player. The ordinary (procedural) rules provide, in essence, that every international transfer of a professional football player requires an international transfer certificate (ITC) and that the issuance of the ITC mandatorily requires the use of the Transfer Matching System (TMS). The specific (procedural) rules foresee in essence that an approval of the Sub-Committee of the Players' Status Committee is a compulsory requirement for any international transfer of a minor player and must be obtained prior to any request for an ITC.**

2. **Article 6 para. 1 RSTP provides that players may only be registered *during* one of the two annual registration periods fixed by the relevant association. An (unwritten) exception has been developed in the case of a transfer of a minor, where the application for the approval to the Sub-Committee was made before the end of the registration period, but the approval by the Sub-Committee, however, was issued only after the expiry of the relevant registration period. In such case, an ITC request for the transfer of the minor (and subsequently the registration of the minor with the new federation) outside the registration period is still possible. Furthermore, the clubs may also upload the relevant data/mandatory documents in the TMS, despite the end of the registration period. Indeed, fairness requires that a request for the issuance of an ITC must still be possible in circumstances where the respective member federation was prevented from complying with the applicable deadlines because of no fault of its own, *i.e.* because of a delayed approval of the transfer by the Sub-Committee.**

3. **Statutes and regulations of an association shall be interpreted and construed according**

to the principles applicable to the interpretation of the law rather than to contracts. Specifically, the interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. It will further have to identify the intentions (objectively construed) of the association which drafted the rule, and may also take account of any relevant historical background which illuminates its derivation, as well as the entire regulatory context in which the particular rule is located. Another aspect that may be relevant as a source of interpretation of the rules is the common practice and understanding of a certain provision by the relevant stakeholders.

4. **The main prerequisites for the emergence of a "binding common practice" (also "Vereinsübung" or "Observanz") are that a certain understanding or application of a rule is practised over a certain period of time (long standing practice) and that such practice reflects the majority opinion of the relevant stakeholders.**

5. **In order to terminate a common practice similar principles apply as for the amendment of rules and regulations. For a change of rules to become binding upon the association's members it does not suffice that the competent (legislative) body within the association adopts the amendments. Instead, the new rules only take effect once the members of the association had a chance to obtain knowledge of the contents of the new rules. The question, thus, is not only whether the change in practice was adopted by the competent body of the association, but whether – in addition – the termination of the past practice was properly communicated to the relevant stakeholders.**

6. **In order for FIFA to enact a (new) practice without a period of transition, *i.e.* instantaneous, and furthermore amidst an ongoing registration period that is about to conclude in a few days and requires its member associations to advise and communicate with its affiliated clubs on this change immediately, the threshold for a proper communication of a change of rules or practice must not be set too low. In case the respective required threshold is not met, the change of practice is not properly communicated to the stakeholders concerned. Consequently, the stakeholders concerned may still rely on the (longstanding) FIFA practice in their interpretation and understanding of the relevant rules.**

I. THE PARTIES

1. The Deutscher Fussball-Bund e.V. (hereinafter also "DFB") is the national governing body of the sport of football in Germany. The DFB is affiliated to the Fédération Internationale de Football Association.

2. 1. FC Köln GmbH & Co KGaA (hereinafter also the "Club" or "1. FC Köln") is a professional football club with its registered headquarters in Cologne, Germany. The Club participates in the Bundesliga, the highest league in Germany male football and is affiliated to the DFB.

3. Mr Nikolas Terkelsen Nartey (hereinafter also the "Player") is a professional football player born on 22 February 2000 in Copenhagen, Denmark. The DFB, the Club and the Player are jointly referred to as the Appellants.

4. The Fédération Internationale de Football Association (hereinafter "FIFA" or the "Respondent") is the world governing body for the sport of football. FIFA is an association of Swiss law with its headquarter in Zurich, Switzerland.

5. The Appellants and the Respondent are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

6. The present dispute concerns the registration of the Player with the DFB. Below is a brief summary of the main facts and allegations based on the Parties' written submissions and the CAS file. Additional facts and allegations found in the Parties' submissions, pleadings and evidence may be set out, where relevant, in other parts of this award.

7. The winter registration period 2016/2017, as defined by the DFB, lasted from 1 until 31 January 2017 (hereinafter the "Registration Period").

A. The Communications exchanged between DFB and FIFA on the handling of the TMS

8. On 27 January 2017, the FIFA administration sent an email to the "TMS Manager" of the DFB, Mrs Berning. The Transfer Matching System (the "TMS") is an online system for the registration of international transfers of football players that has been introduced by FIFA in 2010.

9. The email sent by the FIFA administration on 27 January 2017 read – according to the (uncontested) translation provided by the Appellants – as follows:

> *"We refer to the administrative proceeding for international transfers of minor players, which should be registered at your association and the applicable Regulations on the Status and Transfer of Players.*
>
> *First of all, we would like to confirm that the approval of the Sub-Committee of the Players' Status Committee (hereinafter: the Sub-Committee) is a compulsory requirement for any international transfer of a*

minor player and must be obtained prior to any request for an international transfer certificate (ITC; cf. Art. 19 par. 4 of the Regulations).

In this regard, we wish in particular to draw your attention to Art. 8.2 par. 1 of Annexe 3 in combination with Art. 4 par. 3 of Annexe 3 of the Regulations, which stipulate, inter alia, that all data relating to the transfer instruction allowing the new association to request an ITC, including for a professional minor player, shall be entered into the transfer matching system (TMS) by the club wishing to register the (minor) player during one of the registration periods established by that association. When entering the relevant data, the new club shall, depending on the selected instruction type, upload all mandatory documents prior to the end of relevant registration period.

Furthermore, in consideration of the aforementioned provisions of the Regulations, we would like to clarify that the club wishing to register the minor player must immediately confirm and match the relevant data in TMS as soon as the Sub-Committee's decision, whereby the Sub-Committee accepts the pertinent application for approval, is notified to the association concerned via TMS. Please note that it is the responsibility of the association in question to immediately forward decisions of the Sub-Committee notified to them via the TMS to their affiliated clubs (cf. Art. 2 of Annexe 2 of the Regulations). If the relevant decision of the Sub-Committee is passed and notified to the association concerned during the registration period in question, the new club must therefore not only enter but also confirm and match the relevant data in TMS before the end of the registration period in order to allow the new association to request the ITC for the minor player in the TMS in time (cf. Art. 4 par. 5 of Annexe 3 and Art. 8.1 par. 2 of Annexe 3 of the Regulations).

Finally, please be informed that this information is of a general nature and as such without prejudice whatsoever.

Thank you for your attention and for informing your member associations accordingly".

10. On the same day, Mr Daub, another TMS manager of the DFB, responded to the above email – *inter alia* – as follows (uncontested translation provided by the Appellants):

"[…] many thanks for your email. Is there a reason why you are drawing our attention to the Regulations that we are already aware of?

In line with the practice in previous registration periods, we assume that the (information pertaining to) requests for an ITC for minors that will only be approved by the Sub-Committee following the end of the registration period, only needs to be entered by the new club in FIFA TMS once that approval has been granted. This means that requests that are placed within a registration period approved following the closure of the registration period in question, and only then must the relevant data (transfer agreement and TPO declaration) be uploaded into FIFA TMS by the new club".

11. On 30 January 2017, the FIFA administration responded to Mr Daub's email as follows (uncontested translation provided by the Appellants):

"[…] We are drawing your attention to the provisions of the Regulations that you are already aware of, because pursuant to the latest decision taken by the Single Judge of the Players' Status Committee on 23

November 2016, those provisions are to be strictly applied in terms of special exemptions from 'validation exceptions' in the transfer matching system (TMS). Pursuant to this decision, 'validation exceptions' in TMS can now only be approved if the prerequisites of the provisions in question are met. […]. We would be happy to discuss anything that is not clear or any questions you may have over the telephone".

12. A couple of minutes later Mr Daub replied as follows (uncontested translation provided by the Appellants):

"OK, many thanks.

Could you please send me such decision? It is apparently not available on the internet […]".

13. Still on the same day, the FIFA administration informed Mr Daub by email that due to confidentiality reasons the decision in question cannot be provided to the DFB.

14. To this email Mr Daub responded as follows (uncontested translation provided by the Appellants):

"Hence, we should observe rules which interpretation we do not know and which we never will know […].

You will understand that neither DFB nor its clubs can work with such remarks. In addition, we note that in case of a validation exemption related to a transfer of a minor it cannot be the duty of the DFB to inform FIFA that the request for approval has been submitted within the time-limit in the FIFA TMS for minors (same system). Here FIFA has to be able to realize the transfer (or the information) from the Minor – TMS to the Professional player – TMS itself. […]".

B. The transfer of the Player

15. On 30 January 2017, the Player signed an employment contract (hereinafter "Contract") with the Club. The Contract provided for a term from 31 January 2017 until 30 June 2020 and was conditional upon the registration of the Player by the DFB.

16. Still on 30 January 2017, the Club sent the mandatory documents for the request for the approval of the FIFA Sub-Committee to the DFB.

17. On the same day, the DFB confirmed that it had submitted the request to the FIFA Sub-Committee. Furthermore, the DFB advised the Club as follows (uncontested translation provided by the Appellants):

"The transfer agreement and the tpo-statement have to be uploaded in the System after the approval by FIFA. Hence these documents are not needed at the moment".

18. On 27 February 2017, the FIFA Sub-Committee notified the DFB of its approval of the transfer of the Player. On the same day, the DFB informed the Club thereof. Furthermore, the DFB

advised the Club that it may now finalize the transfer by uploading the club-related data and documents into the TMS.

19. On 28 February 2017, the Club entered the missing data and documents into the TMS.

20. On 1 March 2017, the DFB requested the ITC through the TMS. This request was blocked due to a "validation exception", because the DFB had filed the request after the expiry of the Registration Period.

21. On 2 March 2017, the DFB contacted the FIFA administration in order to obtain an exemption from the "validation exception". In its application for the exemption the DFB explained that the request to the FIFA Sub-Committee for the approval of the transfer of the Player had been filed before the end of the Registration Period and, thus, in time.

22. On 7 March 2017, the FIFA administration rejected the DFB's application.

23. On 10 March 2017, the DFB renewed its application for an exemption of the "validation exception".

24. On 14 March 2017, FIFA again rejected the DFB's application.

C. The Proceedings before the FIFA PSC

25. On 16 March 2017, the DFB filed a request with the FIFA Players' Status Committee (hereinafter the "FIFA PSC") to obtain an exemption of the "validation exception".

26. On 25 March 2017, the FIFA PSC dismissed the DFB's request. The decision with grounds ("Appealed Decision") was notified to the DFB on 28 March 2017. The Appealed Decision provides – *inter alia* – as follows:

> *"[…] in particular considering that the German club did not comply with its obligations in accordance with the applicable provisions of the Regulations as well as the formal decisions, the Single Judge – strictly applying the regulations – determined that the petition made by the DFB for permission to request an ITC for the player, Nikolas Terkelsen Nartey, and subsequently register the player for its affiliated club, 1. FC Köln, outside the registration period had to be rejected".*

27. The DFB forwarded the Appealed Decision to the Club and the Player on the same day.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

28. On 4 April 2017, the Appellants filed a statement of appeal with the Court of Arbitration for Sport (hereinafter the "CAS") directed against the Respondent with respect to the Appealed Decision. The Appellant requested an expedited proceeding in accordance with Article R52 para. 4 of the Code of Sports-related Arbitration (the "Code") without a hearing. Furthermore,

the Appellants requested the appointment of a sole arbitrator and proposed to appoint Mr Ulrich Haas.

29. On 5 and 6 April 2017, the CAS Court Office acknowledged receipt of the Appellants' statement of appeal and invited FIFA to comment on the various procedural requests.

30. On 6 April 2017, FIFA informed the CAS Court Office that it agreed with the appointment of Mr Ulrich Haas as a sole arbitrator and with the Appellants' request that the procedure be expedited pursuant to Article R52, para. 3, of the Code.

31. On 10 April 2017, the Appellants filed their Appeal Brief within the time limit agreed upon by the Parties pursuant to Article R52, para. 3, of the Code.

32. On 12 April 2017, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, advised the Parties that the dispute shall be submitted to Mr Ulrich Haas acting as sole arbitrator (hereinafter the "Sole Arbitrator").

33. Still on the same day, the Respondent filed its Answer within the time limit agreed upon by the Parties pursuant to Article R52, para. 3, of the Code.

34. On 13 April 2017, the CAS Court Office forwarded to the Parties an Order of Procedure and invited them to return a signed copy.

35. On 13 April 2017, the Appellants returned a signed copy of the Order of Procedure to the CAS Court Office. The Respondent returned a signed copy of the Order of Procedure on 18 April 2017.

36. On 19 April 2017, the operative part of the award was notified to the Parties.

IV. THE POSITIONS OF THE PARTIES

37. The following is a summary of the Parties' submissions and does not purport to be comprehensive. However, the Sole Arbitrator has thoroughly considered in its discussion and deliberation all of the evidence and arguments submitted by the Parties, even if no specific or detailed reference has been made to those arguments in the following outline of their positions and in the ensuing discussion on the merits.

A. The Appellants

38. The Appellants submitted, in essence, that they have a right to obtain the "exemption of the validation exception" from FIFA, because:

(a) the Regulations on the Status and Transfer of Players ("RSTP") only indirectly provide when a Club has to upload the Player's data and mandatory documents:

- in particular, no obligation to do so within the Registration Period follows from Article 4 paras. 2 and 3 RSTP;
- it is true that Article 4 para. 5 refers to Article 8.2 of Annex 3 RSTP. Para. 1 of this provision, however, does not stipulate when the data and/or the documents must be uploaded. According to the Appellants the provision simply says *"that a club who wishes to register a player during one of the registration periods needs to enter the mandatory player data allowing the association to request the ITC. However, it does not say, when such data has to be entered"*;
- the only prerequisite as to time may be found in Article 8.2 para. 2 of Annex 3 RSTP (to which Article 4 para. 5 RSTP refers). The provision states that at *"the very latest, the ITC must be requested by the new association in TMS on the last day of the registration period"*. By setting this deadline in respect of an ITC request, the provision also *"indirectly …* [sets] *a time limit for a club to fulfil its upload obligations if it wishes to register the player in the registration period"*, since Article 4 para. 5 of Annex 3 RSTP provides that the ITC request can only be initiated once the clubs have uploaded the relevant documents.

(b) In the case of a transfer of a minor a *lex specialis* contained in Article 19 para. 4 RSTP applies. The provision demands that all international transfers of minor players must be approved by the FIFA Sub-Committee and that *"the sub-committee's approval shall be obtained prior to any request from an association for an International Transfer Certificate …"*.

(c) Article 19 para. 4 RSTP may collide with Article 8.2 para. 2 of Annex 3 RSTP. A member federation may be prevented by Article 19 para. 4 RSTP to request an ITC within the Registration Period, if the FIFA Sub-Committee only approves the transfer of the minor after the expiry of the Registration Period. In such case – with no fault of its own – the member federation is time-barred according to Article 8.2 para. 2 of Annex 3 RSTP from requesting an ITC. In order to prevent such results it is commonly accepted to soften the strict application of Article 8.2 para. 2 of Annex 3 RSTP. Thus, if the FIFA Sub-Committee issues its approval of the transfer of a minor outside the Registration Period the member federation may still request an ITC and register the player outside the Registration Period, provided that the application to the Sub-Committee was made within the Registration Period. Thus, Article 19 para. 4 RSTP supersedes Article 8.2 para. 2 of Annex 3 RSTP. It follows from the above that in the case of a transfer of a minor also the (indirect) time limit to upload the necessary documentation into the TMS deriving from Article 8.2 para. 2 of Annex 3 RSTP is not applicable, if the approval is granted by the FIFA Sub-Committee outside the Registration Period.

(d) The Appellants see themselves comforted in their interpretation of the rules by the training material provided by FIFA for the use of the TMS. According to the Appellants the training material exactly confirms their understanding of the RSTP. The Appellants, in particular, refer to a power point slide included in the training material, which evidences the various steps that must be observed in the transfer process related to minors. The second box of such slide indicates an activity that must be performed by

the clubs. According thereto, the club has to enter all relevant information in the TMS. However, this second step only comes into play according to this slide once the new association *"received approval from the sub-committee"*. According to the Appellants the *"wording 'received', i.e. the past tense confirms what is already abundantly clear from the alignment of the boxes, and from the arrows between them, namely that each step has to follow one another"*.

(e) The Appellants argue that their interpretation of the relevant rules is also supported by FIFA practice, in particular vis-à-vis the DFB and the Club. In the past – according to the Appellants – *"FIFA has always accepted if clubs uploaded the mandatory documents after the transfer period, provided that the ITC could not be requested earlier due to the Sub-Committee's approval being still pending. In the years 2014-2016 alone, FIFA applied the interpretation of its own rules … [in line with the interpretation of the Appellants] in relation to DFB in 20 cases and in one case involving a transfer to the Club, and thereby constantly approved such understanding of its rules …"*.

(f) Contrary to what the FIFA PSC held, the construction of the relevant rules by the Appellants did not grant an (undue) advantage to the Club. The Club and the Player signed the Contract before the end of the Registration Period. There is – according to the Appellants – *"no possibility to circumvent this time frame as the employment contract has to be submitted to the Sub-Committee before the end of the registration period …. Further, any club has to have all other mandatory data available before the end of the registration period as the clubs do not know when the Sub-Committee issues its decision. If such decision is issued before the end of the registration period the association's obligation according to Article 8.1 para. 2 Annex 3 RSTP automatically forces the clubs to upload the players' data also before the end of such period"*. In fact, according to the Appellant *"a delayed Sub-Committee decision only causes disadvantages for the clubs as they cannot field the minor"*.

(g) Alternatively, the Appellants base their request on customary law. Even if the RSTP should contain an implicit obligation for the clubs to upload the relevant data into the TMS prior to the end of the Registration Period, such understanding is superseded "by customary law ('Observanz', 'Vereinsübung')". Customary law is a concept accepted under Swiss law which overrides express statutes of the association. According to the Appellants the emergence of customary law requires two elements, i.e. a long standing practice and a belief that this practice is binding (*opinio necessitatis*). The Appellants submit that both conditions are fulfilled in the case at hand:

- According to the Appellants, the practice existed for many years. *"The instrument of an 'exemption from a validation exception' was introduced with the RSTP in 2010. … From this point onwards until at least the summer transfer period 2016 … FIFA constantly accepted that clubs uploaded the relevant documents after the end of the transfer period, provided that the ITC could not be requested during the transfer period because the association needed to wait for the Sub-Committee's approval"*.
- The *opinio necessitatis* follows from the longstanding practice and is all the more relevant in light of the complexity and ambiguity of the relevant rules.

(h) The customary law that has been created through constant FIFA practice has the same rank as statutes and/or other regulations. Thus, a change of the customary practice – according to the Appellants – requires *"a change of the RSTP to the effect that a club must upload the relevant documents within the transfer period because the Sub-Committee's decision is still outstanding"*. However, no such amendment of the RSTP has been enacted so far. It is true that a long standing practice may be replaced also by a new contradicting practice. However, no such divergent long-standing exists in the present case. In any event the emails sent by FIFA to the DFB on 27 January 2017 (and thereafter) are insufficient to set aside the customary law, since the latter *"cannot be revoked merely by means of an email, much less by one which labels itself as 'purely informal in nature'"*.

(i) The Appellants submit that – independently from customary law – FIFA is estopped from invoking a requirement (whereby the necessary documents must be uploaded within the Registration Period) in light of the principle of *venire contra factum proprium*. Based on its long-standing practice to allow the clubs to upload the required information into the TMS after the expiry of the registration period, *"FIFA has created amongst clubs a reasonable expectation that they can continue to do so"*. According to the Appellants *"it would fly in the face of basic notions of good faith if FIFA could suddenly change its course without giving the clubs sufficient time to adjust to FIFA's new practice"*. There can be no doubt – according to the Appellants – that FIFA in the present matter *"failed to give the clubs sufficient time to adapt their operations"*, as required also by CAS jurisprudence. In particular, the Appellants submit that the Club was *"never informed before the end of the transfer period"* of the change of practice and that FIFA failed to communicate its change of practice in an appropriate and clear manner. Furthermore, FIFA also failed to explain the new practice to the DFB *"even when it was entirely obvious that the situation was completely unclear to the DFB"*, i.e. *"that the DFB had not received the message that FIFA had intended to send"*. FIFA, however, *"cannot in good faith invoke a change of practice if it refused to explain such change to the DFB, when the DFB (quite understandably) did not grasp that such a change was introduced and what it was about"*.

(j) The Club has not been informed of the change of practice within the relevant Registration Period (or in any event the Club has been informed too late) and, thus, *"had every reason to continue believing that it could upload the documents into TMS once the Sub-Committee had given its approval"*. According to the Appellants, one cannot attribute the DFB's knowledge to the Club, because *"in the specific setting of the TMS, it is not the club that decides to make use of its association's services in processing a transfer. Rather, it is FIFA that forces its member associations' services upon their clubs"*. It is, consequently, FIFA that – according to the Appellants – *"created the risk of any miscommunication between its members and their clubs in respect of TMS matters"* and that, therefore, *"it is FIFA that must bear this risk"*.

39. In light of the above, the Appellants submitted the following prayers for relief in their Appeal Brief:

"- to annul the Decision taken by the Single Judge dated 25 March 2017;

- *to grant DFB's request for an exemption of the validation exception in respect to the transfer of Nikolas Terkelsen Nartey from FC Copenhagen to 1. FC Köln;*
- *subsidiarily, to order FIFA to grant DFB's request for an exemption of the validation exception in respect to the transfer of Nikolas Terkelsen Nartey from FC Copenhagen to 1. FC Köln on the date of the arbitral award (operative part);*
- *to order FIFA to bear the entire costs of these arbitration proceedings; and*
- *to order FIFA to pay to the Appellants contribution towards his* (sic!) *legal fees and other expenses incurred in connection with these arbitration proceedings as well as the proceedings before the Single Judge, at least EUR 25,000".*

B. The Respondent

40. The Respondent submitted, in essence, the following:

(a) It fully shares the conclusion of the FIFA PSC according to which *"the German club did not comply with its obligations in accordance with the applicable provision of the regulations"* and therefore, *"strictly applying the regulations – determined that the petition made by the DFB for permission to request an ITC for the …* [Player] *… and subsequently register the …* [Player] *for its affiliated club, 1. FC Köln, outside the registration period had to be rejected".*

(b) Article 6 para. 1 RSTP which establishes that players, as a general rule, may only be registered during one of the two annual registration periods serves to protect the integrity of the competition. This principle has been enshrined in the different versions of the RSTP more or less since 2001.

(c) The regulatory framework for the use of the TMS (which is recognized by all stakeholders taking part in football) is to be found in Annex 3 RSTP. Member federations and their affiliated clubs must strictly comply with these provisions. The relevant provisions are, in particular, the following:

- according to Article 8.1 para. 2 of Annex 3 RSTP the ITC request must be submitted at the very latest on the last day of the registration period of the new association;
- furthermore, Article 2 para. 4 of Annex 3 RSTP provides that the club must upload certain documents into TMS as soon as the agreement has been formed;
- it is the responsibility of the clubs to enter the transfer instructions into TMS (Article 3.1 para. 1 of Annex 3 RSTP);
- Article 8.2 para. 1 of Annex 3 RSTP states that all data allowing an association to request the ITC shall be entered into the TMS by the club wishing to register a player during one of the registration periods established by that association and that the new club shall upload at least the mandatory documents depending on the selected instruction type;

- Article 4 para. 5 of Annex 3 RSTP provides that the procedure in relation to the ITC request can only be initiated once the club has complied with its obligations in line with the *"preceding paragraphs"* of this article. Article 4 para. 3 of Annex 3 RSTP, in particular, refers to Article 8.2 para. 1 of Annex 3 RSTP.

(c) The Respondent submits that if one reads the above provisions jointly, it *"can be established beyond any doubt that the new club (the club where the player is to be registered) must duly accomplish all the necessary and technically possible steps in view of registering the player in the TMS within the relevant registration period"*.

(d) In case of a transfer of a minor Article 19 para. 4 RSTP provides that the Sub-Committee's approval shall be obtained prior to any request from an association for an ITC. However, neither this provision *"nor any other provision contained in the Annex 2 of the Regulations do affect by any means the provision and the applicability of art. 8.2 para. 1 of Annex 3 of the Regulations relating to the obligations of a club wishing to register a (minor) player as a professional to enter all compulsory data and upload the mandatory documents to support the information entered in TMS … during one of the relevant registration periods. The provisions pertaining to the registration periods … have to be applied to the registration of any player regardless whether the player is a minor or not"*.

(e) In the case at hand the Club did not comply with the provisions pertaining to the registration periods. It is uncontested that the Club only provided the compulsory data and uploaded the mandatory documents in the transfer instructions at hand on 28 February 2017, i.e. clearly outside the relevant Registration Period. The applicable provisions do not provide for any exception, which would release a club from complying with its obligations.

(f) The Respondent submits that the *"training material provided by FIFA to associations and clubs"* is irrelevant for the case at hand, because it contains an explicit disclaimer that reads as follows: *"Please note that these explanations and clarifications are meant to facilitate the use of ITMS by the various users and to make them aware of their responsibilities. However, the information contained in this website is without prejudice to any decision that may be made on a specific matter in future by any of the competent decision-making bodies. Furthermore, please note that the wording of the applicable regulations will always prevail over the information contained in the present website"*. Consequently, the applicable rules and regulations are not superseded by the "training material". Irrespective of the above, the Respondent submits that – contrary to the Appellants' submissions – the training material is in line with the relevant rules. This follows from the fact that the past tense is used in every box on the slide in question.

(g) The Respondent acknowledges that customary law may complement the statutes and regulations of an association. However, the Respondent disagrees with the Appellants insofar as to whether or not customary law may derogate the existing statutes, *"in particular … in a situation in which the wording of the statutes is clear … in the interest of legal certainty customary law cannot be admitted contra legem"*. In the unlikely event that CAS was to admit customary law *contra legem*, the Respondent submits that the alleged long-standing

practice *"was terminated by means of formal decisions of the single judge of the Players' Status Committee passed on 23 November 2016, 23 February 2017 and 11 March 2017"*. Consequently, the Appellants could no longer rely on the past standing practice of the FIFA administration at the relevant time, i.e. at the end of the Registration Period. This is all the more true considering that in the email dated 27 January 2017 FIFA informed the *"DFB and its affiliated clubs of the change of the said practice by the Single Judge"*.

(h) With regard to an alleged breach of the principle of *venire contra factum proprium*, the Respondent submits that there is *"no obligation for FIFA as well as its competent deciding bodies to inform member associations, clubs or even players about a change of practice"*. This is all the more true since the decision taken by the Single Judge dated 23 November 2016, which objected to the previous practice of the FIFA administration was *"at that stage an isolated decision* … [that] *could not be considered as a clear and outstanding jurisprudence which had to be communicated, before being confirmed by other decisions"*. Furthermore, the fact that FIFA only informed the DFB shortly before the end of the Registration Period cannot be held against the Respondent. Instead, this measure must be qualified as a *"proactive communication of the FIFA Administration* … [which] *was done by courtesy in order to help and support the relevant parties concerned by international transfers of minors to be registered as professionals … in order for them to be able to duly comply with their regulatory obligations in a timely manner"*.

(i) FIFA was also not under a duty to inform a "high ranking official" of the DFB of the change of practice. It is up to the national federations to ensure that their staff has the necessary training and know-how in order to fulfil their obligations. Consequently, the FIFA administration was correct when it *"addressed its communication by email to the two persons listed in the TMS by the DFB as TMS Manager and regular TMS User"*. Furthermore, the emails sent by the FIFA administration were *"clear and undoubtedly underlined the fact that clubs intending to register a minor player as a professional have to enter all data and upload all mandatory documents related to the transfer in TMS prior to the end of the relevant registration period"*. Consequently, FIFA *"strongly believes that the* … [DFB] *had been in a position to understand that its affiliated clubs concerned intending to register minor players as professionals had to comply with their obligations … in a timely manner, prior to the end of the relevant registration period"*. In view of the answer sent by the DFB's employees to FIFA (*"alles klar, vielen Dank!"*), FIFA could *"obviously not expect that the DFB did not understand the content of its mail, and as such, the Appellants could not legitimately argue in good faith that 'it was entirely obvious that the situation was completely unclear to the DFB'"*.

(j) It was the responsibility of the DFB to forward the information received from the FIFA administration to its affiliated clubs. FIFA in its email dated 27 January 2017 explicitly reminded the DFB of this duty. Thus, the DFB should *"have at least forwarded this email to* … [the Club] *in order to share the information transmitted by FIFA Administration, as requested by the latter"*. It is, therefore, the DFB's sole responsibility that the Club was not duly informed of the change of practice.

41. The Respondent submitted the following prayers for relief:

"that the appeal be rejected as to its merits and the challenged decision be confirmed in its entirety … [and] that all costs related to the present arbitration procedure as well as the legal expenses of the Respondent shall be borne by the Appellants".

V. JURISDICTION AND MANDATE OF THE CAS

42. The jurisdiction of the CAS derives from Article R47 of the Code in connection with Article 34 para. 4 RSTP.

43. Article R47 para. 1 of the Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body".

44. Article 34 para. 4 RSTP reads as follows:

"Decisions reached by the single judge of the Players' Status Committee may be appealed before the Court of Arbitration for Sport (CAS)".

45. In the present case the Appealed Decision was issued by the Single Judge of the FIFA PSC. Moreover, none of the Parties in their correspondence with the CAS objected to the jurisdiction of the CAS. Finally, all Parties confirmed the jurisdiction of the CAS by signing the Order of Procedure dated 13 April 2017. It follows from all of the above that the CAS has jurisdiction to decide the present dispute.

46. Under Article R57 of the Code and in line with the consistent jurisprudence of the CAS, the Sole Arbitrator has full power to review the facts and the law. The Sole Arbitrator therefore dealt with the case *de novo*, evaluating all facts and legal issues involved in the dispute.

VI. ADMISSIBILITY

47. Article R49 of the Code provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the other parties".

48. Article 58 para. 1 of the FIFA Statutes provides that appeals *"shall be lodged with CAS within 21 days of notification of the decision in question"*. The Appealed Decision was rendered on 25 March 2017 and notified to the DFB on 28 March 2017. The Appellants' Statement of Appeal was filed on 4 April 2017, i.e. before the expiry of 21 days after notification of the motivated decision. It follows that the appeal is admissible.

VII. APPLICABLE LAW

49. Article R58 of the Code provides 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision"*.

50. Article 57 para. 2 of the FIFA Statutes further 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"*.

51. These provisions are in line with Article 187 para. 1 of the Swiss Private International Law Act (PILA), which in its English translation states as follows: *"The arbitral tribunal shall rule according to the rules of law chosen by the parties or, in the absence of such choice, according to the law with which the action is most closely connected"*.

52. Thus, the Sole Arbitrator applies the FIFA regulations as the "applicable regulations" within the meaning of Article R58 of the Code. In light of Article 57 para. 2 of the FIFA Statutes the Panel will apply Swiss law (subsidiarily) for the interpretation and construction of the respective FIFA regulations.

VIII. MERITS OF THE APPEAL

A. Introduction

53. This dispute pivots around the relationship and interaction between the procedural rules relating to the transfer and registration of professional football players. It is uncontested that in the case of a transfer of minor (professional) football players two sets of rules apply cumulatively, i.e. the "normal" (procedural) rules relating to international transfers and – in addition – the "specific" (procedural) rules relating to the international transfer of a minor professional football player.

1. Overview of the relevant (procedural) provisions

54. The ordinary (procedural) rules relating to an international transfer are to be found in Articles 5 *et seq*. RSTP together with Annex 3 RSTP. The specific (procedural) requirements in case of a transfer of a minor are enshrined in Articles 19 *et seq*. RSTP together with Annex 2 RSTP.

55. The ordinary or normal (procedural) rules provide, in essence, that every international transfer of a professional football player requires an ITC (Article 9 para. 1 RSTP) and that the issuance of the ITC mandatorily requires the use of the TMS (Article 1 para. 5 of Annex 3 RSTP), which is a web-based data information system designed to administer and monitor international transfers (Article 2 para. 1 of Annex 3 RSTP). The TMS was introduced in order to protect the integrity of the competitions, to increase transparency of individual transactions and to improve the standing and credibility of the entire transfer system. The regulatory framework for the use of the TMS in relation to the transfer of professional players is to be found in Annex 3 of the RSTP. The rules therein provide that in order to effectuate an international transfer, the club (to which the player shall be transferred) and the member federations to which this club is affiliated must participate in the procedure. While the club's task is to enter/upload certain data and/or documents into the TMS (see Article 4 of Annex 3 RSTP), it is incumbent on the member federation to request the ITC (Article 4 para. 5 and Article 5.2 para. 1 of Annex 3 RSTP). Furthermore, the applicable rules provide that the (new) member federation must request the ITC *"at the very latest"* on *"the last day of the registration period of the new association"* (Article 8.1 para. 2 of Annex 3 RSTP).

56. These fairly complex (procedural) rules applicable to "normal" international transfers are further complicated in case the professional football player in question is a minor. In such case certain specific provisions apply additionally. These specific rules provide, in essence, that any international transfer of a minor must be approved by the FIFA Sub-Committee and that the approval of such committee shall be obtained *"prior to any request from an association for an International Transfer certificate"* (Article 19 para. 4 RSTP). The procedural framework for obtaining such approval is to be found in Annex 2 of the RSTP. This Annex 2 provides – *inter alia* – that also the international transfer of a minor (including the application for approval by the FIFA Sub-Committee) is managed through the TMS (Article 5 of Annex 2 RSTP). The application for an approval of the transfer by the FIFA Sub-Committee must be entered in the TMS by the (new) member federation (Article 5 para. 1 of Annex 2 RSTP). Together with such application, the (new) federation must provide specific information/enter specific documents into the TMS. Article 8 para. 2 of Annex 2 RSTP provides that *"all submissions must be entered in TMS by the deadline in the time zone of the association concerned"*.

2. The problem in the case at hand

57. Article 8.1 para. 2 of Annex 3 RSTP requires that the ITC must be requested by the new association in TMS (at the latest) on the last day of the registration period. Article 8.1 para. 2 of Annex 3 RSTP serves to implement Article 6 para. 1 RSTP, which provides that *"Players may only be registered during one of the two annual registration periods fixed by the relevant association"*.

58. It is uncontested between the Parties that there is an (unwritten) exception to Article 6 para. 1 RSTP (and Article 8.1 para. 2 of Annex 3 RSTP) in the case of a transfer of a minor, where the application for the approval to the FIFA Sub-Committee (Article 19 para. 4 RSTP) was made before the end of the registration period, the approval by the FIFA Sub-Committee, however, was issued only after the expiry of the relevant registration period. In such case an ITC request for the transfer of the minor (and subsequently the registration of the minor with the new federation) outside the registration period is possible even though such exception is not provided for in Article 6 para. 1 RSTP.

59. There are good reasons justifying such an unwritten exception from the strict application of the rules. Fairness requires that a request for the issuance of an ITC must still be possible in circumstances where the respective member federation was prevented to comply with the applicable deadlines because of no fault of its own, i.e. because of a delayed approval of the transfer by the FIFA Sub-Committee. It is uncontested between the Parties that in the case at hand the application for the approval by the FIFA Sub-Committee was requested by the DFB within the Registration Period (30 January 2017) and that the FIFA Sub-Committee granted its approval only after the expiry of the Registration Period (i.e. 27 February 2017) and that, therefore, the DFB was prevented by the applicable regulations (Article 19 para. 4 RSTP) to request the ITC in time.

3. The relevant question in the case at hand

60. The Parties are in dispute over the scope of the above unwritten exception (in the context of Article 19 para. 4 RSTP and Annex 2 and Annex 3 of the RSTP). The Appellants submit that because the DFB was prevented by Article 19 para. 4 RSTP from requesting the ITC within the Registration Period, the Club need not to upload the data and the mandatory documents in the TMS before the expiry of the Registration Period. FIFA, on the contrary, submits that Article 19 para. 4 RSTP does not prevent the Club from fulfilling its obligations within the Registration Period and that, therefore, all prior steps to the request for an ITC must be undertaken within the deadline set by Article 8.1 para. 2 of Annex 3 RSTP.

61. Which of the above views is to be followed depends first and foremost on the interpretation of the relevant rules. Statutes and regulations of an association shall be interpreted and construed according to the principles applicable to the interpretation of the law rather than to contracts (see BSK-ZGB/HEINI/SCHERRER, Art. 60 SCC no. 22; BK-ZGB/RIEMER, Systematischer Teil no. 331; BGE 114 II 193, E. 5a). The Sole Arbitrator concurs with this view, which is also in line with CAS jurisprudence, which has held in the matter CAS 2010/A/2071 (cf. also CAS 2016/A/4602, no. 101; TAS 2016/A/4778. no. 73) as follows:

> *"The interpretation of the statutes and rules of a sport association has to be rather objective and always to start with the wording of the rule, which falls to be interpreted. The adjudicating body - in this instance the Panel - will have to consider the meaning of the rule, looking at the language used, and the appropriate grammar and syntax. In its search, the adjudicating body will have further to identify the intentions (objectively construed) of the association which drafted the rule, and such body may also take account of any relevant historical*

background which illuminates its derivation, as well as the entirely regulatory context in which the particular rule is located (…)" (para. 46).

62. Another aspect that may be relevant as a source of interpretation of the rules is the common practice and understanding of a certain provision by the relevant stakeholders (cf. RUSCH A. F., Observanz und Übung, Erwirkung und Rechtsschein, Jusletter 18. September 2006, no. 4 *et seq.*). The main prerequisites for such "Vereinsübung" are that a certain understanding or application of a rule is practised over a certain period of time, and that such practice reflects the majority opinion of the relevant stakeholders (cf. also RIEMER H. M., Vereins- und Stiftungsrecht, 2012, Art. 60 no. 22).

B. The view held by the Sole Arbitrator

63. The question what impact Article 19 para. 4 RSTP (together with Annex 2) has on the normal procedural provisions on the international transfer of professional football players must start with an interpretation of said article. Article 19 para. 4 RSTP reads – in its pertinent parts – as follows:

"(4) Every international transfer according to paragraph 2 … is subject to the approval of the subcommittee appointed by the Players' Status Committee for that purpose. The application for approval shall be submitted by the association that wishes to register the player. The former association shall be given the opportunity to submit its position. The sub-committee's approval shall be obtained prior to any request from an association for an International Transfer Certificate …. Any violations of this provision will be sanctioned by the Disciplinary Committee in accordance with the FIFA Disciplinary Code".

1. The wording

64. When looking at the wording of Article 19 para. 4 RSTP the Sole Arbitrator notes that it appears questionable what the precise meaning of the term *"any request from an association for an International Transfer Certificate"* is. The term is neither defined nor is it used elsewhere in the RSTP. Thus, it is not clear whether the term covers the administrative procedure for obtaining an ITC as such or whether the term only refers to the very last step in said procedure, i.e. the final ITC request of the (new) member federation. What is precisely meant by this term can also not be deduced from looking at other provisions in the RSTP. The RSTP uses a variety of different terms, without it being clear whether they refer to the procedure as such or to a single step within that procedure. The terms used e.g. are *"administrative procedures for issuing the ITC"* (Article 9 para. 1 RSTP), *"procedure in relation to the ITC request"* (Articles 4 para. 5 and 5.2 para. 1 of Annex 3 RSTP), *"Administrative procedure governing the transfer of professionals between associations"* (heading of Article 8 of Annex 3 RSTP), *"ITC procedure"* (Article 8.1 para. 1 of Annex 3 RSTP), *"ITC must be requested"* (Article 8.1 para. 2 of Annex 3 RSTP) or *"ITC request"* (Article 8.2 para. 2 of Annex 3 RSTP). Consequently, the wording of the provisions as such is inconclusive.

2. Systematic reading

65. The uncertainty as to the precise meaning of the term cannot be removed by looking at the context in which Article 19 para. 4 RSTP is placed. In this respect the Sole Arbitrator notes that the RSTP have – undisputedly – not contemplated the scenario that the approval of the international transfer by the FIFA Sub-Committee is granted after the expiry of the registration period. Insofar, the RSTP contain a lacuna that has been filled by creating an (unwritten) exception to Article 6 para. 1 RSTP (and Article 8.1 para. 2 of Annex 3 RSTP). The Sole Arbitrator further notes that there is no provision that explicitly says that the data/mandatory documents referred to in Article 8.2 para. 1 of the RSTP must be uploaded by the Club prior to the (member federation's) application for approval by the FIFA Sub-Committee. In the view of the Sole Arbitrator such obligation does not follow from Article 2 para. 4 of Annex 3 RSTP either. This provision reads as follows:

> *"In case of an international transfer where a transfer agreement exists, both clubs involved must, independently of each other, submit information and, where applicable, upload certain documents relating to the transfer into TMS as soon as the agreement has been formed".*

66. It is unclear whether the obligation *"to upload certain documents relating to the transfer"* enshrined in the above provision also applies where the transfer as such needs prior approval by the FIFA Sub-Committee (Article 19 para. 4 RSTP). In other words, the provision fails to say that in the case of a transfer of a minor the relevant data must be entered into the TMS prior to the application for approval to the FIFA Sub-Committee. Thus, also a systematic interpretation remains inconclusive.

3. Rationale

67. The rationale of the RSTP is clear. On the one hand Article 6 para. 1 RSTP tries to protect the integrity of the competition by limiting the international transfer of players to two registration periods. The goal of the provision is to avoid alterations in the competitions among clubs during the course of the season. On the other hand the rules attempt to protect minors by not allowing any international transfer without the (prior) approval of the FIFA Sub-Committee (Article 19 para. 4 RSTP). It appears that the purpose of Article 6 para. 1 RSTP does not take precedence over Article 19 para. 4 RSTP, since it is undisputed that an international transfer may also take place outside the registration period in case the approval within the meaning of Article 19 para. 4 RSTP was granted after the expiry of the relevant registration period. This unwritten exception is – in any event – compatible with the explicit exemptions contained in Article 6 para. 1 RSTP, since the latter contemplate the limited possibility of registrations outside the registration period for the very reason that the stakeholders were prevented from complying with the deadlines for no fault of their own. Whether a fair balance of these different purposes requires in the case at hand that the data and the mandatory documents be entered into the TMS within the registration period or not is difficult to answer. The Sole Arbitrator finds that both interpretations of the relevant rules submitted by the Parties are compatible with the rationale of the RSTP. In particular, the Sole Arbitrator fails to see in what way a club would gain an undue advantage or in what way a national competition would be disrupted if a club were

allowed to upload the data and the documents after the FIFA Sub-Committee's approval of the transfer. Having said this, the Sole Arbitrator does not ignore that – as has been previously acknowledged by the CAS (CAS 2011/A/2447) – FIFA has a vested interest that its rules relating to the use of the TMS are being applied strictly and rigorously. However, the Sole Arbitrator notes that the problem at hand has not been regulated in the rules. Instead, both parties, in essence, agree that this dispute is about the scope of an unwritten exception to Article 6 para. 1 RSTP. Consequently, FIFA's wish that its rules are being strictly applied carries less or little weight in light of the specific circumstances of this case.

4. Practice

68. Since the wording, the context of the provisions and the rationale of the RSTP do not point to an obvious single possible interpretation of the rules, the Sole Arbitrator turns to the standing practice of the competent FIFA bodies as an important source of interpretation.

a) The existence of a common practice

69. It is undisputed (and evidenced by a long line of cases) that the FIFA administration in the past always accepted if clubs uploaded the information/mandatory documents after the expiry of the transfer period, provided that the ITC could not be requested within the registration period due to the Sub-Committee's approval being still pending. The Sole Arbitrator qualifies such practice of the FIFA administration as a "binding common practice" ("Vereinsübung" or "Observanz"), because it lasted for a considerable period of time, concerned a multitude of different cases being treated in an identical manner and, therefore, reflected a common and binding understanding of the rules by the relevant stakeholders (*opinio necessitatis*). The common understanding is also evidenced by the training material provided by FIFA for the use of the TMS, in particular the slide referred to above (see *supra* paras. 38 (d) and 40 (f)). The alignment of the boxes, the arrows between the boxes as well as the language used in that slide point towards the understanding that the data and the mandatory documents only need to be uploaded by the club after the new association *"received approval from the sub-committee"* and that once they are "entered" one proceeds to the next step displayed by box 3 (and then eventually box 4). This understanding by the relevant stakeholders is not contradicted by the disclaimer contained in the training material, which reads as follows:

> *"Please note that these explanations and clarifications are meant to facilitate the use of ITMS by the various users and to make them aware of their responsibilities. However, the information contained in this website is without prejudice to any decision that may be made on a specific matter in future by any of the competent decision-making bodies. Furthermore, please note that the wording of the applicable regulations will always prevail over the information contained in the present website".*

70. As stated above, the wording of the rules is – with respect to the case at hand – inconclusive. Consequently, there is no *"wording of the applicable regulations"* that may prevail over the information contained on the slide.

b) The termination of a common practice

71. A common (binding) practice may not only be established at one point in time, but also terminated at a later point in time. The question in this dispute, thus, is whether or not the past practice of FIFA could still be relied upon by the Appellants when interpreting and applying the rules. The Sole Arbitrator finds that the relevant point in time in this respect is the Registration Period (and not the point in time when the FIFA Sub-Committee approved the transfer of the minor Player). The question, consequently, is whether the Appellants at that point in time, i.e. at the end of January 2017 could still rely upon the past practice of the FIFA administration.

72. The Sole Arbitrator finds that in order to terminate a common practice similar principles apply as for the amendment of rules and regulations, since the effect following from a termination of a common practice is similar to a change of rules or regulations. At what point in time a change of rules becomes binding upon the members of an association is questionable at first sight, since the Articles 60 *et seq.* of the Swiss Civil Code do not explicitly regulate this issue. However, in order for a change of rules to become binding upon the association's members it does not suffice that the competent (legislative) body within the association adopts the amendments. Instead, the new rules only take effect once the members of the association had a chance to obtain knowledge of the contents of the new rules. This follows from the fact that the rules and regulations of an association are comparable – at least with respect to their effects – to general terms and conditions in a contract (cf. BK-ZGB/RIEMER, 1990, ST n° 346 *"Da Vereinsstatuten […] durchaus mit solchen AGB vergleichen lassen, muss ein unerfahrenes Vereinsmitglied vor ungewöhnlichen Klauseln […] geschützt werden können […]";* Verwaltungsgericht Bern causa sport 2006, 50, 56: *"Da Vereinsstatuten und –reglemente sich mit Allgemeinen Geschäftsbedingungen vergleichen lassen […]"*; THALER D., Athletenvereinbarungen und Athletenerklärungen, in: Sport und Recht, 4. Tagungsband 2007, S. 19, 32: *"Soweit der regelanerkennungs-Vertragsteil in Frage steht … können aber (im Einzelfall sachgerechte) vereinsrechtliche Überlegungen … mit berücksichtigt werden, sowie insbesondere die Grundsätze über allgemeine Geschäftsbedingungen"*).

73. This view is supported now by the jurisprudence of state courts:

> [*"Da Vereinsstatuten und – Reglemente sich mit Allgemeinen Geschäftsbedingungen vergleichen lassen, muss ein Schutz vor ungewöhnlichen Klauseln gewährt werden …"* (cf. Gerichtskreis X Thun, causa sport 2006, 50, 56)].

and by CAS jurisprudence (cf. TAS 2012/A/2720, no. 10.9 *et seq.*). The question, thus, not only is whether the change in practice was adopted by the competent body of the association, but whether – in addition – the termination of the past practice was properly communicated to the relevant stakeholders.

74. In view of the above it follows that the mere fact that the Single Judge of the FIFA PSC on 23 November 2016 passed a decision deviating from the past practice of the FIFA administration is insufficient to end the "Vereinsübung", since such decision (due to its confidential nature) was only communicated to the respective parties of the proceedings, but not the Appellants.

Moreover, FIFA itself acknowledged in its Answer that the decision of the FIFA PSC on 23 November 2016 was *"at that stage an isolated decision* [which] … *could not be considered as a clear and outstanding jurisprudence"*. It was, thus, unclear at that point in time whether the decision constituted a change of the FIFA practice. Consequently, FIFA did not communicate such "change" to the relevant stakeholders.

75. Whether the termination of the past practice was properly communicated to the DFB by email correspondence starting on 27 January 2017 appears questionable for a variety of reasons:

- the first email sent by FIFA on 27 January 2017 does not specifically address the problem of the unwritten exemption from Article 6 para. 1 RSTP (and Article 8.1 para. 2 of Annex 3 RSTP) in case of a transfer of a minor (when the application for approval is pending with the FIFA Sub-Committee at the time of the expiry of the registration period). Instead, the email basically repeats the text of the various provisions in the RSTP. In addition, the email does not mention anywhere that it is intended to put an end to an established practice of the past or that it is intended to enforce a new understanding of the respective rules among FIFA's member federations and affiliated clubs. Furthermore, the true scale and importance of FIFA's email (i.e. to terminate a past practice and to enforce a new understanding of the rules) is somewhat further obscured by the statement at the end of the email according to which *"this information is of a general nature and as such without prejudice whatsoever"*. The Sole Arbitrator finds that when looking at this correspondence as a whole it is insufficient to properly communicate a change in the understanding of the relevant rules.

- Unsurprisingly, the DFB TMS manager failed to comprehend the significance and importance of FIFA's email. The latter is evidenced by his answer to FIFA in which he stated *"*[…] *many thanks for your email. Is there a reason why you are drawing our attention to the Regulations that we are already aware of?"*. Unfortunately, the response by FIFA to the DFB does not help to clarify the issue that – in fact – FIFA wished to terminate a long standing practice. The email explains that the information initially provided follows from *"the latest decision taken by the Single Judge of the Players' Status Committee on 23 November 2016"* in which it was determined that the RSTP provisions relating to the transfer of (minor) players *"are to be strictly applied in terms of special exemptions from 'validation exceptions' in the transfer matching system (TMS). Pursuant to this decision, 'validation exceptions' in TMS can now only be approved if the prerequisites of the provisions in question are met"*. Again this email falls short of properly communicating FIFA's intention, i.e. to terminate its past practice in cases in which the request for approval to the Sub-Committee was pending at the time of expiry of the registration period. The simple reason for this is that the possibility of requesting an ITC outside the registration period (when the application for an approval by the FIFA Sub-Committee is pending) is not regulated in the RSTP. Thus, the guidance given by the FIFA administration to the DFB TMS manager that – in the future – the relevant (procedural) provisions referring to the transfer of a (minor) player will be "strictly applied", is not particularly helpful. Again, it does not come as a surprise that the TMS manager fails to comprehend the true meaning of the correspondence and, therefore, requests to be provided with the relevant decision of the FIFA PSC. When the FIFA administration then

declines to provide the TMS manager with the decision the latter is left somewhat at a loss, which again is clearly evidenced by his email, in which he states *"[h]ence, we should observe rules which interpretation we do not know and which we never will know* […]*"*.

- To conclude, the Sole Arbitrator finds that the emails sent by the FIFA administration to the DFB lack sufficient clarity and, consequently, resulted in an obvious misunderstanding as to the relevance and the intended scope of FIFA's communication.

- This lack of clarity is all the more disturbing considering that FIFA not only wanted to enact the (new) practice without a period of transition, i.e. instantaneous, but amidst an ongoing registration period that was about to conclude in a few days and – in addition – required the DFB to advise and communicate with its affiliated clubs on this change immediately. In such context and, in particular, in view of the high interests at stake the Sole Arbitrator finds that the threshold for a proper communication of a change of rules or practice must not be set too low. The Sole Arbitrator determines that in this case the required threshold has not been met and that, therefore, the change of practice was not properly communicated to the Appellants.

76. Consequently, the Sole Arbitrator finds that at the relevant time, i.e. at the end of the Registration Period the Appellants could still rely on the longstanding FIFA practice ("Vereinsübung") in their interpretation and understanding of the relevant rules according to which the clubs could upload the data/mandatory documents once the transfer of the professional minor was approved by the FIFA Sub-Committee.

C. Conclusion

77. To conclude, the Sole Arbitrator finds that based on the interpretation of the applicable rules at the relevant point the request by the DFB for an exemption of the validation exception in respect to the transfer of Nikolas Terkelsen Nartey from FC Copenhagen to 1. FC Köln must be granted. Whether the Club and the Player have a claim that the exemption of the validation exception be granted to the DFB (standing to appeal) can be left unanswered here, since the standing of appeal was not disputed between the Parties.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by the Deutscher Fußball-Bund e.V., 1. FC Köln GmbH & Co KGaA and Mr Nikolas Terkelsen Nartey on 4 April 2017 against the decision rendered on 25 March 2017 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is upheld.

2. The decision rendered 25 March 2017 by the Single Judge of the Players' Status Committee of the Fédération Internationale de Football Association is set aside.

3. The request filed by the Deutscher Fussball-Bund e.V. for an exemption of the validation exception in respect to the transfer of Mr Nikolas Terkelsen Nartey from FC Copenhagen to 1. FC Köln GmbH & Co KGaA is granted.

(…)

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