Arbitration CAS 2017/A/5065 Jacksen Ferreira Tiago v. Football Association of Penang & Football Association of Malaysia (FAM), award of 25 October 2017

Panel: Mr Rui Botica Santos (Portugal), Sole Arbitrator

Football
Termination of employment contract between a coach and a club by the latter
Lack of jurisdiction of CAS provided by the employment contract
Lack of evidence of a pathological clause allowing an appeal to CAS
Lack of jurisdiction of CAS deriving from the Statutes of a federation

1. **It follows from Article 186 of the Swiss Private International Law Act (PILA) that the CAS has the power to decide on its own jurisdiction. This power stems from the international arbitration doctrine of "Kompetenz-Kompetenz". Arbitration is by its very nature consensual. It requires an arbitral tribunal to be satisfied that the parties appearing before it have indeed mutually agreed to have their differences resolved by way of arbitration. A literal reading and construction of an employment contract, and the application of the doctrine of *pacta sunt servanda*, may establish that there exists no specific arbitration agreement in favour of the CAS especially when the employment contract contains an arbitration agreement in favour of a national arbitration council.**

2. **A clause is generally said to be pathological if it contains any of the following features that are not common in arbitration agreements: a) if it is vague or ambiguous as regards private jurisdiction or contains contradicting provisions; b) if it fails to mention with precision the institution which will appoint the arbitral body chosen by the parties; c) if it fails to produce procedural mandatory consequences for the parties in the event of a dispute; d) if it fails to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award; e) if it does not vest powers to the arbitrators to resolve the disputes likely to arise between the parties; and f) if it does not permit the putting in place of a procedure leading under the best conditions of efficiency and speed to the rendering of an award that is susceptible of judicial enforcement.**

3. **Article R47 of the CAS Code in its strict sense requires an appellant to move the CAS jurisdiction by relying on the statutes or regulations of the body that rendered the challenged decision. The question as to whether jurisdiction might be derived from the statutes or regulations of a national federation is moot and irrelevant if the parties have expressly agreed to refer any appeals to national arbitration. In any event, if the national federation's Statutes do not contain any provision allowing an appeal to CAS against a final and binding decision rendered by the federation's judicial bodies, CAS has no jurisdiction.**

I. THE PARTIES

1. Jacksen Ferreira Tiago (the "Appellant" or the "Coach") is a Brazilian professional football head coach.

2. The Football Association of Penang (the "First Respondent" or the "Club") is a Malaysian football club and a member of the Football Association of Malaysia.

3. The Football Association of Malaysia (the "Second Respondent" or the "FAM") is the governing body of football in the Federal Republic of Malaysia. It is a member of the Asian Football Confederation ("AFC") and the Fédération Internationale de Football Association ("FIFA").

II. THE FACTS

A. The Club's contractual relationship with the Coach

4. On 5 November 2015, the Parties signed a one-year employment contract valid from 1 December 2015 to 30 November 2016 (the "Employment Contract") under which the First Respondent agreed to employ the Appellant as the Club's head coach.

5. The relevant parts of the Employment Contract as regards the dispute resolution mechanism provided as follows:

"(…)

All terms in this Contract (…) will be (…) as per the explanation below:

1. (…).

8. "Arbitration Council" is a body which will make the final decision regarding Contract grievances between Member and Player. Both Member and Player must abide to the Council's decision and the decision cannot be appealed.

(…)

6. GRIEVANCE PROCEDURE

If there is any grievance relating to the Official's terms and conditions of service under this Contract, the following procedure shall apply:

6.1. A formal written notice of complaint must be given to the Member within 7 days from the day grievance arising.

6.2. If the Official is not satisfied with the Member's decision, the Official can appeal to FAM Status Committee within 7 days after receiving the Member's decision.

6.3. If the Official is not satisfied with the outcome from FAM Status Committee, the Official can refer his case to FAM Appeal Committee, and if the decision remains unsatisfactory, then the official and the Member have to refer to the Arbitration Council in accordance to the Arbitration Act 1952, presided by an arbitrator

that is agreed upon by both parties. The decision of the arbitrator shall be final and conclusive and binding all parties concerned. The costs of arbitration shall be borne by both parties or as determined by the Arbitrator.

10. FINAL SETTLEMENT OF DISPUTES

10.1. Any dispute arising between the parties in connection with this Contract and which is not resolved amicably shall be referred to the FIFA Status Committee and the decision by FIFA Status Committee will be final.

10.2. If this dispute is still not resolved by FAM Appeal Committee, it will be decided in accordance with the Arbitration Act by an Arbitrator mutually agreed by the Member and the Official. The Arbitration will be held in Malaysia. The decision of the Arbitrator shall be final and conclusive and binding all parties concerned. The costs of arbitration shall be borne by the parties as determined by the Arbitrator.

(…)".

6. On 14 June 2016, the Club served the Coach with a notice (the "Notice of Termination") terminating the Employment Contract.

B. The FAM Status Committee Proceedings

7. On or about July 2015, the Coach filed a claim before the FAM Status Committee seeking compensation for the termination of the Employment Contract, which he claimed was without just cause. He sought among other things, to be either reinstated as the Club's head coach and/or damages, being the value remaining under the employment Contract. He also sought exemplary damages against the Club amounting to RM 200,000.

8. On 1 August 2015, the Club filed its defence in which it justified the termination.

9. On 20 October 2016, the FAM Status Committee rendered its decision and held as follows:

"1.The complaint filed by the Complainant is received in part;

2. The Notice of termination of the Complainant's Contract is set aside, struck out and illegal;

3. The Respondent, Football Association of Penang must pay the salary compensation amounting to RM485,000-00 to the Complainant, Mr. Jacksen Ferreira Tiago within fourteen (14) days from the date of receipt of this decision;

(…)".

C. The FAM Appeals Committee Proceedings

10. On 8 December 2016, the Club appealed the FAM Status Committee decision to the FAM Appeals Committee. The Club reiterated that it had just cause to terminate the Employment Contract.

11. The Coach filed his defence in which he asked to dismiss the appeal and to uphold the FAM Status Committee decision.

12. On 2 March 2017, the FAM Appeals Committee overturned the FAM Status Committee decision and held as follows:

"(i) The appeal by the Appellant, Football Association of Penang against the decision decided by the FAM Status Committee dated 20 October 2016 [Decision of Status No: FAM/17/JKS/22/(2016)] is received;

(ii) That the Respondent Jacksen Ferreira Tiago's contract was lawfully terminated by the appellant;

(iii) No payment is required to be done by the Appellant to the Respondent; (…).

Any right for an appeal to be brought to the Court of Arbitration is reserved as stated in article 77 [of the FAM Disciplinary Code]".

III. THE PROCEEDINGS BEFORE THE COURT OF ABITRATION FOR SPORT

13. On 22 March 2017, the Appellant filed his statement of appeal before the CAS, pursuant to Article R47 *et seq* of the Code of Sports-related Arbitration (the "CAS Code") and requested that the matter be submitted to a Sole Arbitrator.

14. On 3 April 2017, the Appellant filed his appeal brief together with the documents and evidence he intended to rely on. On the same date, the Respondents were granted 20 days within which to file their respective answers.

15. On 11 April 2017, the First Respondent objected to the CAS jurisdiction and asked that the proceedings be discontinued pending a ruling on this issue.

16. On 11 April 2017, the CAS Court Office invited the Appellant to reply to the First Respondent's jurisdictional objections by 21 April 2017. Meanwhile, the First Respondent's deadline for filing its Answer was suspended.

17. On 18 April 2017, the Second Respondent also objected to the CAS jurisdiction. On the same date, the CAS Court Office invited the Appellant to reply to the Second Respondent's jurisdictional objections by 21 April 2017. Meanwhile, the Second Respondent's deadline for filing its Answer was suspended.

18. On 24 April 2017, the Appellant replied to the Respondents' jurisdictional objections.

19. On 2 May 2017, the CAS Court Office informed the Parties that the President of the CAS Appeals Division had decided that the Panel, once constituted, would decide the issue of jurisdiction. The CAS Court Office informed the Respondents that the deadlines for filing their respective answers would remain suspended subject to further directions from the Panel, once constituted.

20. On 4 May 2017, the Respondents agreed to submit the matter to a Sole Arbitrator.

21. On 10 May 2017, the Appellant replied to the First Respondent's further jurisdictional submissions dated 4 May 2017.

22. On 28 June 2017, the CAS Court Office informed the Parties that pursuant to Article R54 of the CAS Code and on behalf of the President of the CAS Appeals Arbitration, Mr. Rui Botica Santos, attorney-at-law in Lisbon, Portugal had been appointed as Sole Arbitrator in this matter.

23. On 6 July 2017, the CAS Court Office sought the Parties' views on whether they preferred a hearing or wanted the matter to be decided on the basis of their written submissions. The Appellant was also asked to adduce an English translation of exhibit 21 to the appeal brief. On the same date, the following questions (the "Interrogatories") were sent to the Parties on behalf of the Sole Arbitrator, with instructions that they respond to them in the form of short submissions by 21 July 2017:

"1. Are the Parties applying the dispute mechanism resolution established in clause 6?

2. What is the impact of clause 6.3 in relation to CAS jurisdiction?

3. Did the Parties try to refer the matter to the Arbitration Council in accordance with the Arbitration Act 1952? If no, why?

4. What is the impact of the Arbitration Act 1952 in relation to CAS jurisdiction in case there is no agreement between the Parties to appoint the arbitrator that should preside the Arbitration? Please provide a copy of this Act.

5. Can CAS/Sole Arbitrator be considered an agreed Arbitration Court to resolve the dispute in a final, conclusive and binding way?

6. Can clause 6.3 be treated as a pathological clause? Why and how to interpreter it?

7. What is the subsidiary law or laws to be applied in construing clause 6?".

24. On 7 July 2017, the CAS Court Office informed the Parties that Mr. Felix Majani, Attorney-at-law in Nairobi, Kenya, had been appointed as *ad hoc* clerk.

25. On 21 July 2017, the Parties filed their submissions with answers to the Interrogatories, in which the First Respondent requested a hearing on the issue of jurisdiction.

26. On 25 July 2017, the CAS Court Office granted the Appellant and the Second Respondent a further deadline of 31 July 2017 within which to state whether they wanted a hearing or preferred to have the issue of jurisdiction decided on the basis of the Parties' written submissions. The Appellant was also granted a similar deadline to adduce an English translation of exhibit 21 to the Appeal Brief.

27. On 27 July 2017, the First Respondent retracted its request for a hearing and requested that the CAS jurisdiction be decided on the sole basis of the Parties' written submissions.

28. On 31 July 2017, the Second Respondent requested that the CAS jurisdiction to be decided on the sole basis of the Parties' written submissions. On the same date, the Appellant filed an English translation of exhibit 21 to the appeal brief and requested that the CAS jurisdiction to be decided on the sole basis of the Parties' written submissions.

29. On 2 August 2017, the CAS Court Office requested the Second Respondent to file a copy of the Statutes of the Football Association of Malaysia.

30. On 7 August 2017, the Second Respondent filed a copy of the Statutes of the Football Association of Malaysia.

31. On 15 August 2017, the CAS Court Office informed the Parties that pursuant to Article R57.2 of the CAS Code, the Sole Arbitrator deemed himself to be sufficiently well informed and, in accordance with the position expressed by the Parties, would render a preliminary award on jurisdiction based on the Parties' written submissions.

IV. THE PARTIES' JURISDICTIONAL POSITIONS

32. Below is a summary of the facts and allegations raised by the Parties on the CAS jurisdiction and their replies to the Interrogatories. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, he refers in this award only to the submissions and evidence he considers necessary to explain his reasoning as regards the issue of jurisdiction.

A. The Appellant

33. It is the Coach's submission that the CAS has jurisdiction to hear and determine this dispute.

34. The Coach submits the CAS jurisdiction is derived from the 2015 edition of the AFC Statutes, the 2016 FAM Disciplinary Code and the 2016 FIFA Statutes which respectively provide as follows:

(i) The 2015 edition of the AFC Statutes:

"ARTICLE 61 Court of Arbitration for Sport (CAS)

1. The AFC recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between the AFC and the other Confederations, Member Associations, Leagues, Clubs, Players, Officials, Intermediaries and licensed match agents. (….).

ARTICLE 65 Jurisdiction of CAS as an Appeals Arbitration Body

1. Any final decision made by an AFC body may be disputed exclusively before CAS in its capacity as an appeals arbitration body, to the exclusion of any ordinary court or any other court of arbitration.

2. Recourse may only be made to CAS after all other internal AFC channels have been exhausted. Appeals shall be lodged with CAS within twenty-one (21) days of notification of the decision in question. (…)".

(ii) The 2016 edition of the AFC Disciplinary Code

"75.1 Certain decisions passed by the AFC Appeal Committee may be appealed before the Court of Arbitration for Sport if such appeal is in accordance with the relevant articles of the AFC Statutes and this Code. (…)

127.1 The AFC Appeal Committee rules, in principle, as a body in the last instance.

127.2 The right is reserved for an appeal to be made to the Court of Arbitration for Sport as set out in Article 128.1.

128.1 The AFC Statutes stipulate which decisions passed by the judicial bodies may be appealed before the Court of Arbitration for Sport. (…)".

(iii) The 2016 FIFA Statutes

"57 Court of Arbitration for Sport (CAS)

1. *FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.*
2. *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.*

58 Jurisdiction of CAS

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

59 Obligations relating to dispute resolution

1. *The confederations, member associations and leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated players and officials comply with the decisions passed by CAS. The same obligation shall apply to intermediaries and licensed match agents.*
2. *(…).*
3. *The associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the association or disputes affecting leagues, members of leagues, clubs, members of clubs, players, officials and other association officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration. Such disputes shall be taken to an independent and duly constituted arbitration tribunal recognised under the rules of the association or confederation or to CAS".*

35. The Coach reiterates that all the remedies available at internal level as provided for in the 2015 edition of the AFC Statutes and the 2016 FAM Disciplinary Code have been exhausted, hence reference to the CAS.

36. The Coach further submits that pursuant to Article 77 of the FAM Disciplinary Code, an appeal to the Malaysian Arbitration Chamber is optional as opposed to mandatory. Article 77 of the FAM Disciplinary Code provides as follows:

"Certain decisions passed by the Appeal Committee may be appealed against before an independent and duly constituted the Court of Arbitration pursuant to the Arbitration Act currently in force in Malaysia by an arbitrator mutually agreed by the Appellant and FAM".

37. The Coach therefore argues that he can choose between referring the appeal to CAS or the Arbitration Council. He however prefers the CAS given its expertise in sports dispute resolution, and adds that referring the appeal to optional arbitration in Malaysia *"(…) violates the right to a specialised court (…)".*

38. The Coach finally submits that clause 6.3 of the Employment Contract is pathological given its failure to provide the procedure and deadline for appealing. He argues that the pathological nature of this clause is further corroborated by the failure of the 2015 edition of the FAM Disciplinary Code (if applicable) to contain any provisions or directions regarding an appeal to the Arbitration Council. He argues that clause 6.3 of the Employment contract must therefore be construed "liberally" (SFT judgment no. 4A_460/2008 of January 2009).

39. The Appellant concludes his submissions on CAS jurisdiction by making the following prayers:

"In case this court understands that the appellant should have appealed to the Arbitral Court informed in clause 6.3, we kindly request that this appeal be turned into a precautionary measure or that the deadline and the possibility of appeal be declared (Article R57, CAS Code), as well as that the Respondents should inform the procedure and other statutes and Regulations that the Appellant must follow, under penalty of having his right violated in the justified manner".

B. The First Respondent

40. It is the Club's submission that the CAS lacks jurisdiction over this matter.

41. The Club submits that there is no specific arbitration agreement or clause in the Employment Contract providing for CAS jurisdiction as required under Article R27 of the CAS Code.

42. The Club adds that the appeal has also not met the prerequisites of Article R47 of the CAS Code, which requires the Coach to show that:

a) the FAM's statutes or regulations contains a provision allowing the Coach to lodge an appeal with the CAS or that the Coach and the Club have concluded a specific CAS arbitration agreement; and

b) The Coach has exhausted all remedies available prior to the appeal.

43. The Club reiterates that the Coach is bound by the Employment Contract and should submit to Malaysian Arbitration, and that his remedies are to be found under Articles 77 and 129 of the 2015 FAM Disciplinary Code that direct him to file his appeal to Malaysian Arbitration.

44. In calling for the appeal to be dismissed on technical grounds, the First Respondent makes the following requests for relief:

"(…) that the issue of jurisdiction of the CAS must be decided as a preliminary point before deciding on the merits and any hearing must be limited to CAS jurisdiction.

The First Respondent prays that the appeal be dismissed with costs of CHF 15,000.00 to be paid by the Appellant to the First Respondent".

C. The Second Respondent

45. It is the FAM's submission that the CAS lacks jurisdiction over this matter.

46. The FAM refers to clause 6.3 of the Employment Contract which it submits only allows an appeal to the Arbitration Council.

47. The FAM also cites Articles 77 and 129 of the 2015 FAM Disciplinary Code, which permits an appeal to a Court of Arbitration constituted pursuant to the Arbitration Act currently in force in Malaysia.

48. The FAM further cites Articles R27 and R47 of the CAS Code arguing that neither the statutes nor regulations of the FAM provide for an appeal to the CAS nor have the parties concluded a specific CAS arbitration agreement. It also submits that the Parties have not exhausted all the remedies available before appealing to the CAS.

49. In calling for the appeal to be dismissed on technical grounds, the Second Respondent makes the following requests for relief:

"(…) CAS has lack of jurisdiction to hear the case (…). This matter supposedly should be heard at the Court of Arbitration in Kuala Lumpur as stated in the Appellant official Contract and also FAM Disciplinary Code 2015. Based on the above reasons, we humbly pray that this case be dismissed".

D. The Parties' Answers to the Interrogatories

Questions from the Sole Arbitrator	Coach's Answer	Club's Answer	FAM's Answer
1. Are the Parties applying the dispute mechanism resolution established in clause 6?	Clause 6.3 of the Employment Contract *"does not meet the requirements of clarity and information of FIFA and CAS".*	The Coach failed to adhere to the dispute resolution process provided under the employment	Yes. Clause 6.3 of the Employment Contract requires the Coach to appeal to the Court of Arbitration in

	Pursuant to Article 77 of the FAM Disciplinary Code, an appeal to the Malaysian Arbitration Chamber is optional as opposed to mandatory.	Contract. Clause 6.3 of the Employment Contract provides for an appeal to the Arbitration Council in accordance with the Malaysian Arbitration Act 1952 and not to the CAS.	Malaysia. The Coach however seeks to overlook this clause by appealing to the CAS.
2. What is the impact of clause 6.3 in relation to CAS jurisdiction?	Referring the appeal to optional arbitration in Malaysia would contravene Article 79 of the FAM Disciplinary Code, which foresees disciplinary matters being heard and determined by bodies specialised in sports arbitration such as the CAS.	The Parties agreed under paragraph 8 of page 2 of the Employment Contract that the Arbitration Council's decision would be final and un-appealable. In essence, clauses 6.3 and 10.2 as read together with paragraph 8 of page 2 of the Employment Contract expressly exclude CAS jurisdiction.	Clause 6.3 of the Employment Contract requires the Coach to refer the matter to the Arbitration Council in accordance with the Arbitration Act 2005 (previously known as the Arbitration Act 1952), with the decision thereof being final and binding. In essence, clause 6.3 requires the Coach to exhaust all legal remedies before bringing the matter to arbitration in accordance with the Arbitration Act 2005.
3. Did the Parties try to refer the matter to the Arbitration Council in accordance with the Arbitration Act 1952? If no, why?	The Parties have not attempted to refer the appeal to the Arbitration Council given the lack of information regarding the deadline and procedure for appealing to this body.	The Coach has so far not approached the Club with a view to seeking an agreement to appoint an Arbitration Council as provided for under clause 6.3 of the Employment Contract nor has he	The Coach has not made any attempt. The FAM has no objection to the Coach referring the matter to the Arbitration Council in Malaysia.

		made any direct attempt to appeal to the Arbitration Council.	
4. What is the impact of the Arbitration Act 1952 in relation to CAS jurisdiction in case there is no agreement between the Parties to appoint the arbitrator that should preside the Arbitration?	The Coach refers to its answer to question 2 above.	In the event of the parties failing to agree on the appointment of the arbitrator, section 13 of the Arbitration Act 2005 would apply to the effect that either party could file an application to the Kuala Lumpur Regional Centre for Arbitration seeking for the appointment of an arbitrator.	The FAM refutes the statement that *"in case there is no agreement between the Parties to appoint the arbitrator that should preside the Arbitration"*. Bearing in mind the arbitration agreement in clause 6.3 of the Employment Contract, the FAM refers to chapter 2 Article 9.5 of the Arbitration Act 2005 which stipulates that *"[a] reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement"*.
5. Can CAS/Sole Arbitrator be considered an agreed Arbitration Court to resolve the dispute in a final, conclusive and binding way?	Yes. All the remedies available at internal level as provided for in the 2015 edition of the AFC Statutes and the 2016 FAM Disciplinary Code have been exhausted, hence reference to the CAS.	No, for the reasons mentioned in its answer to question 2 above.	No. There is no arbitration clause as required under Article R47 of the CAS Code. The appeal ought to be referred to the Court of Arbitration in Kuala Lumpur as provided in the Employment

			Contract and stipulated in Article 77 of the 2015 FAM Disciplinary Code.
6. Can clause 6.3 be treated as a pathological clause? Why and how should the clause be interpreted?	Yes, because it does not provide the procedure and deadline for appealing. It must therefore be construed "liberally" (SFT judgment no. 4A_460/2008 of January 2009).	CAS lacks jurisdiction to address this question. This question can only be determined by the Malaysian courts pursuant to section 18 of the Arbitration Act 2005, which vests the arbitral tribunal with power to rule on its own jurisdiction.	No. Clause 6.3 should be read together with Articles 77 and 129 of the 2015 FAM Disciplinary Code. Articles R27 and R47 of the CAS Code also requires the parties' consent to arbitrate a matter before the CAS. This consent is lacking.
7. What is the subsidiary law or laws to be applied in construing clause 6?	Articles 61, 64 and 65 of the 2015 edition of the AFC Statutes. Articles 75, 127.1, 127.2 and 128.1 of the 2016 AFC Disciplinary code. Articles 57-59 of the FIFA Statutes.	The Arbitration Act 2005 supplemented by the Kuala Lumpur Regional Centre for Arbitration Rules (2017).	Articles 77 and 129 of the FAM Disciplinary Code, Articles R27 and R47 of the CAS Code and sections 4(1), 9, 10 and 18 of the Arbitration Act 2005.

V. JURISDICTION OF THE CAS

50. Given that the Parties appearing before the CAS are neither domiciled nor resident in Switzerland, reference shall be made to Chapter 12 of the Swiss Private International Law Act (the "PILA") in determining the extent to which the CAS has jurisdiction to rule on its own jurisdiction. Indeed, pursuant to Article 176.1 of the PILA, *"[t]he provisions of this chapter shall apply to arbitrations if the seat of the arbitral tribunal is in Switzerland and if at least one of the parties at the time the arbitration agreement was concluded was neither domiciled nor habitually resident in Switzerland"*.

51. Article 186 of the PILA adds as follows:

"1. The arbitral tribunal shall rule on its own jurisdiction.

2. The objection of lack of jurisdiction must be raised prior to any defence on the merits.

3. In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision".

52. That Article 186 of the PILA is applicable in CAS proceedings has long been settled by various CAS panels, with the Panel in CAS 2013/A/3099 stating as follows at paragraph 5.4:

"Article 186 of the PILA has been held to be applicable in CAS proceedings as well (RIGOZZI A., L'arbitrage international en matère de sport, thesis Geneva, Basel 2005, p.524)".

53. It follows from Article 186 of the PILA that the CAS has the power to decide on its own jurisdiction. This power stems from the international arbitration doctrine of "Kompetenz-Kompetenz" which Swiss legal scholars have long stated:

a) *"(…) gives priority to the arbitral tribunal to decide on its own competence if its competence is contested before it […]. It is without doubt up to the arbitral tribunal to examine whether the submitted dispute is in its own jurisdiction or in the jurisdiction of the ordinary courts, to decide whether a person called before it is bound or not by the arbitration agreement"* (See MÜLLER C., International Arbitration – A Guide to the Complete Swiss Law, Zurich et al. 2004, p. 115-116).; and is

b) *"Corollary to the principle of the autonomy of the arbitration agreement"* (See ABDULLA Z., The Arbitration Agreement, in: KAUFMANN-KOHLER/STUCKI (eds.), International Arbitration in Switzerland – A Handbook for Practitioners, The Hague 2004, p. 29).

54. The autonomy of the CAS to rule on its own jurisdiction has also been extensively addressed by legal scholars such as Matthieu Reeb, Despina Mavromati and Prof. Ulrich Haas who have respectively observed as follows:

a) *"According to Article 186 paragraph 1 Swiss PILA, the Arbitration Court has priority when deciding on its jurisdiction on the dispute. This arbitration principle of the so-called 'Kompetenz-Kompetenz' is internationally recognized and applies to CAS arbitration and is constantly affirmed in many CAS awards. More precisely, the principle of Kompetenz-Kompetenz means that it is up to the arbitral tribunal to decide whether a person called before it is bound or not by the arbitration agreement, and whether the submitted dispute lies within its jurisdiction or with the jurisdiction of the state courts (…). The arbitral tribunal thus has priority, the so-called own competence"* (See MAVROMATI/REEB, *"The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials"*, page 27); and

b) *"The CAS's possibility of issuing an interim arbitral award does not derive directly from the CAS Code but from Art. 186(3) of Switzerland's Federal Code on Private International Law"* (See HAAS U., *"The "Time Limit for Appeal" in Arbitration Proceedings before the Court of Arbitration for Sport (CAS)"*, CAS Bulletin 2/2011 at paragraph 2.3.1.).

55. In light of the above, it is clear that the CAS is competent to rule on its own jurisdiction.

56. The Sole Arbitrator notes that arbitration is by its very nature consensual. It requires an arbitral tribunal to be satisfied that the parties appearing before it have indeed mutually agreed to have their differences resolved by way of arbitration.

57. Pursuant to Article R47 of the CAS Code, *"[a]n 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 him prior to the appeal, in accordance with the statutes or regulations of that body".

58. Article R47 of the CAS Code in essence requires the Appellant herein to discharge his burden of proving that the CAS has jurisdiction to hear and determine the substance of an appeal by either:

(a) Establishing that there exists a specific arbitration agreement that allows an appeal against a decision rendered by the FAM Appeals Committee to the CAS; or

(b) Establishing that the statutes or regulations of the body or federation that rendered the Appealed Decision allow an appeal to the CAS.

59. The same principles extend to parties appearing before the CAS, with the Bulletin TAS CAS Bulletin 2015/1, stating as follows at page 14:

"Several CAS panels have insisted on the consensual nature of the arbitration agreement in order to bring the dispute before the CAS. Consequently, any appeal against a national federation's decision requires the parties' agreement to arbitrate, i.e. an "offer" to arbitrate and an "acceptance" thereof".

A. Is there a specific arbitration agreement providing for an appeal to CAS?

60. A careful look at the Employment Contract refers the Sole Arbitrator to clause 6.3, which the Parties agree to be the relevant provision as regards the issue of jurisdiction. Clause 6.3 of the Employment Contract gives an indication on the body to which an appeal against a decision rendered by the FAM Appeals Committee should be directed by providing as follows:

"If the Official [Coach] *is not satisfied with the outcome from FAM Status Committee, the Official can refer his case to FAM Appeal Committee, and if the decision remains unsatisfactory, then the official and the Member have to refer to the Arbitration Council in accordance to the Arbitration Act 1952, presided by an arbitrator that is agreed upon by both parties. The decision of the arbitrator shall be final and conclusive and binding all parties concerned".*

61. The Sole Arbitrator notes that although clause 6.3 of the Employment Contract directs the Parties to refer any appeal against a decision rendered by the FAM Appeals Committee to arbitration, it goes a step further by expressly designating (i) the arbitral body (i.e. the Arbitration Council), (ii) the country in which the arbitration should be held (i.e. Malaysia) and (iii) the law to be applied in conducting the arbitration proceedings (i.e. the Arbitration Act 1952 which was repealed in 2005 and replaced by the Arbitration Act 2005 Laws of Malaysia).

62. It is therefore clear and unequivocal that the Parties intended and agreed to refer the appeal to the Arbitration Council (and not the CAS), which has been defined in the Employment Contract as *"[a] body which will make the final decision regarding Contract grievances between Member and Player. Both Member and Player must abide to the Council's decision and the decision cannot be appealed".*

63. It follows from a literal reading and construction of the Employment Contract, and the doctrine of *pacta sunt servanda*, that there exists no specific arbitration agreement in favour of

the CAS. To the contrary, the Employment Contract contains an arbitration agreement in favour of the Malaysian Arbitration Council. A similar conclusion would be reached even if one were to refer to clause 10.2 of the Employment Contract.

a) Is clause 6.3 of the Employment Contract pathological?

64. The Appellant also contends that clause 6.3 of the Employment Contract is pathological. The Swiss Federal Tribunal has discussed the issues surrounding pathological arbitration clauses at length. For instance, at paragraph 2.2.3 of its judgment No. 4A_246/2011, the Swiss Federal Tribunal defined a pathological arbitration clause as one which is *"[i]ncomplete, unclear or* [contains] *contradictory provisions"*.

65. The features and characteristics of pathological arbitration clauses have also been extensively expounded, with the Swiss Federal Tribunal stating as follows at paragraph 3.2.3.2 of its judgment 4A_676/2014:

"It hardly needs to be emphasized that the clause is not only pathological because it does not mention with sufficient precision the institution to be called upon to appoint the Arbitral Tribunal allegedly chosen by the parties (i.e. the Zürich Chamber of Commerce or the International Chamber of Commerce [ICC/CCI] with Zürich as seat of the arbitration). Furthermore, it is not a valid arbitration agreement because it does not express in a sufficiently clear manner the objective will of the parties to waive the jurisdiction of the state courts for their possible disputes. That the real meaning of the clause at hand may remain relatively obscure, ultimately, does not change this. The Appellant must live with this as the parties cannot be sent to an arbitral jurisdiction when it is not established – as is the case here – that a mandatory item of the arbitration agreement – in the case at hand, the duty to submit the dispute to a private arbitral tribunal – was included".

66. The Swiss Federal Tribunal went on to add as follows in its judgment No. 130 III 66.

"3.1 (…). Allgemeine Voraussetzung einer Schiedsvereinbarung ist zudem ihre Klarheit und Bestimmtheit hinsichtlich der privaten Jurisdiktion, d.h. das zur Entscheidung berufene Schiedsgericht muss entweder eindeutig bestimmt oder jedenfalls bestimmbar sein (…). Bestimmungen in Schiedsvereinbarungen, die unvollständig, unklar oder widersprüchlich sind, gelten als pathologische Klauseln".

Free English translation:

"A prerequisite for an arbitration agreement is, in addition, its clarity and unambiguity with regard to private jurisdiction. The arbitration court which is called upon to make a decision must be either unmistakably determined or in any event determinable (…). Provisions in arbitration agreements that are incomplete, unclear or inconsistent are considered pathological clauses".

67. A clause is therefore generally said to be pathological if it contains any of the following features that are not common in arbitration agreements:

a) If it is vague or ambiguous as regards private jurisdiction or contains contradicting provisions;

b) If it fails to mention with precision the institution which will appoint the arbitral body chosen by the parties;

c) If it fails to produce procedural mandatory consequences for the parties in the event of a dispute;

d) If it fails to exclude the intervention of state courts in the settlement of the disputes, at least before the issuance of the award;

e) If it does not vest powers to the arbitrators to resolve the disputes likely to arise between the parties; and

f) If it does not permit the putting in place of a procedure leading under the best conditions of efficiency and speed to the rendering of an award that is susceptible of judicial enforcement.

68. Relating requirement (a) above to the Employment Contract, clause 6.3 is express and unequivocal as regards private jurisdiction. It designates the Arbitration Council as the body exclusively mandated to hear and decide any appeal against the FAM Appeals Committee decision. To that extent, the Sole Arbitrator considers that such clause 6.3 is not vague, ambiguous or contradictory as regards private jurisdiction.

69. In addition, clause 6.3 of the Employment Contract has met (b) above by designating the institution (i.e. the Arbitration Council) which will appoint the arbitral body chosen by the parties.

70. Clause 6.3 of the Employment Contract also contains a mandatory arbitration clause directing the Parties *"to refer* [any appeal] *to the Arbitration Council",* thereby meeting requirement (c) above. By directing the Parties to refer any appeal to the Arbitration Council, clause 6.3 has effectively excluded any appeal to a State Court, thereby fulfilling requirement (d) above. Corroborating this is the last sentence of clause 6.3, which states that *"(…) the decision of the arbitrator shall be final and conclusive and binding all parties concerned".*

71. Clause 6.3 further gives the Parties the freedom to have the arbitration *"(…) presided by an arbitrator that is agreed upon by both parties",* thereby satisfying requirement (e) above.

72. Finally, by stipulating that the Arbitration Council is to adjudicate the appeal *"(…) in accordance to the Arbitration Act 1952"* (now the Arbitration Act 2005), clause 6.3 has effectively put in place the procedure leading to a speedy and efficient appeal mechanism that culminates in an award capable of judicial enforcement and in the process, met requirement (f) above. To that extent, the Sole Arbitrator is not persuaded by the Coach's submission that clause 6.3 *"does not provide the procedure for appealing".*

73. The Sole Arbitrator thus notes that the Arbitration Act 2005 contains mechanisms for appealing the FAM Appeals Committee decision. The Coach has not taken any positive steps towards setting the appeal in motion. In addition, the Coach has not substantiated that any arbitration proceedings in Malaysia would contravene the principles of natural justice and/or the principles generally applicable to international arbitration.

74. It follows that the Coach has failed to discharge his burden of proving that there exists a specific arbitration agreement providing for appeal to the CAS.

b) Do the statutes or regulations of the FAM provide for an appeal against a decision rendered by the FAM Appeals Committee to the CAS?

75. The Appellant further argues for the CAS jurisdiction by relying on the following regulations:

a) Articles 61, 64 and 65 of the 2015 edition of the AFC Statutes;

b) Articles 75, 127.1, 127.2 and 128.1 of the 2016 AFC Disciplinary Code; and

c) Articles 57-59 of the FIFA Statutes

76. Article R47 of the CAS Code in its *strict sense* requires an appellant to move the CAS jurisdiction by relying on the statutes or regulations of the body that rendered the challenged decision.

77. This, in the Sole Arbitrator's view, means that the Appellant should have referred to the statutes or regulations of the FAM and not the AFC Statutes, the AFC Disciplinary Code or the FIFA Statutes as wrongly cited by the Appellant. The FIFA Statutes could possibly have come into focus had the Appellant chosen to initially refer the matter to the FIFA Status Committee as provided for under clause 10.1 of the Employment Contract.

78. To that extent, the Sole Arbitrator finds the rules and regulations cited by the Appellant in these proceedings to be irrelevant as regards the issue of CAS jurisdiction.

79. In any case, the question as to whether jurisdiction might be derived from the statutes or regulations of the FAM is moot and irrelevant by virtue of the Parties' express agreement to refer any appeals to Malaysian arbitration (clause 6.3 of the Employment Contract). In any event, and bearing in mind that the CAS is competent to rule on its own jurisdiction, the Sole Arbitrator further notes that the FAM Statutes do not contain any provision allowing an appeal to CAS against a final and binding decision rendered by its judicial bodies the FAM's judicial bodies.

B. Conclusion

80. Pursuant to clause 6.3 of the Employment Contract and in application of the principle of *pacta sunt servanda*, the Sole Arbitrator finds that the CAS has no jurisdiction to decide on the present dispute.

81. Nonetheless, and for sake of completeness, the Sole Arbitrator wishes to address the Coach's prayer at page 5 of his Answer to the Interrogatories where he requests as follows:

"In case this court understands that the appellant should have appealed to the Arbitral Court informed in clause 6.3, we kindly request that this appeal be turned into a precautionary measure or that the deadline and the possibility of appeal be declared (Article R57, CAS Code), as well as that the Respondents should inform

the procedure and other statutes and Regulations that the Appellant must follow, under penalty of having his right violated in the justified manner".

82. The Sole Arbitrator finds that the CAS cannot grant the above prayer given that:

a) Primarily, the CAS lacks jurisdiction to entertain this prayer;

b) In any event, it was filed in contravention of Article R56 of the CAS Code, after the Appellant had already filed his Appeal Brief; and

c) It falls outside the scope of issues for review. The scope of the CAS is only limited to reviewing its jurisdiction to deal with this matter and not to any procedural matter or directions as to how the Malaysian arbitration proceedings should be conducted.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. It does not have jurisdiction to decide on the appeal filed on 22 March 2017 by Mr. Jacksen Ferreira Tiago against the Football Association of Penang and the Football Association of Malaysia.

2. The appeal filed by Mr. Jacksen Ferreira Tiago is not entertained.

3. (…).

4. (…).

5. (…).