Arbitration CAS 2017/A/5333 Jurgen Borg v. Malta Football Association (MFA), award of 16 April 2018 (operative part of 17 January 2018)

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

Football
Termination of the registration of a player with a club
Forum non-conveniens *doctrine*
Definition of a decision
Scope of one panel's mandate to review

1. **The *forum non-conveniens* doctrine, according to which one court may refuse to exercise its jurisdiction over a matter where there is a more appropriate forum available, is not applicable in the ambit of the 12th chapter of the Swiss Private International Law Act which governs arbitration proceedings of the nature of the litigation at hand.**

2. **In principle, for one communication to be a decision, said communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of its addressee or other parties. The form of the communication is irrelevant to determine whether there exists a decision or not.**

3. **The scope of a CAS panel's mandate is limited by the requests filed by the parties and the decision forming the subject matter of the appeal. It is only within these boundaries that the panel is entitled to review a matter.**

I. PARTIES

1. Mr Jurgen Borg (hereinafter the "Appellant") is a Maltese (semi-)professional football player.

2. The Malta Football Association (hereinafter the "Respondent" or the "MFA") is the national governing body of the sport of football in Malta with its headquarters in Ta'Qali, Malta. The MFA is affiliated to the Union Européenne de Football Association (hereinafter "UEFA") and the Fédération Internationale de Football Association (hereinafter "FIFA").

II. FACTUAL BACKGROUND

3. The present dispute concerns the registration of the Appellant with a Maltese football club that the Respondent was requested to cancel by the Appellant so that the latter is able to register with a new football club.

4. 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 and evidence may be set out, where relevant, in other parts of this award.

1. The Appellant's employment at Hibernians Football Club

5. On 19 June 2014, the Appellant and the Maltese football club, Hibernians Football Club (hereinafter the "Hibernians FC") concluded and signed an employment contract (hereinafter the "Employment Contract") whereby the Appellant was hired as a part-time professional football player with a monthly salary of EUR 350.00. The contracting parties agreed on a fixed contract term of 5 years, *i.e.* until the end of the season 2018/19.

6. On 9 June 2017, the summer transfer period for Malta opened.

7. In July 2017, Hibernians FC offered the Appellant an extension of the Employment Contract for an additional 2 years. The Appellant alleges that Hibernians FC threatened him in case he did not accept the offer he would not be allowed to join another football club neither on loan nor by transfer and, in addition, he would no longer play with Hibernians FC's first team.

2. The termination of the Appellant's employment contract with Hibernians FC

8. On 1 August 2017, the Appellant sent Hibernians FC a letter which reads as follows:

> *"I am writing you a notification notice to inform you that I am hereby unilaterally terminating my contract with Hibernians F.C. Following the recent events that transpired, whereby the club informed me that unless I sign a two (2) year extension I will not be part of the squad, I found no other option but to terminate my contract effective immediately.*
>
> *P.S Notification of my termination has also been submitted to MFA".*

III. PROCEEDINGS BEFORE THE EXECUTIVE COMMITTEE OF THE MFA, THE COMPLAINTS BOARDS OF THE MFA AND THE DISCIPLINARY BOARD OF HIBERNIANS FC

9. By letter of 1 August 2017, the Appellant informed the Executive Committee of the Respondent about the termination of the Employment Contract and requested the permission from the Respondent

> *"to register with a new club before the end of the summer transfer window without any condition except that due compensation is paid to the club in accordance with the rules and regulations of the Association, even if there is still a claim pending as to the substance of the dispute between the player and the club".*

10. With letter dated 4 August 2017 (registered as received by the Respondent on 8 August 2017), the Appellant filed a claim with the Complaints Board of the Respondent requesting the latter to rule as follows:

> *"i) The Complaints Board acknowledges the termination of the contract;*
>
> *ii) The* [Appellant] *can register with any other club with immediate effect without any condition except that due compensation is paid to the club in accordance with the rules and regulations of the Association;*
>
> *iii) No sporting sanctions or disciplinary measures shall be imposed on the player as the termination of the contract was done outside the protected period".*

11. On 21 August 2017, a hearing was held before the Respondent's Complaints Board at the MFA's headquarters in Ta'Qali.

12. On 30 August 2017, the Complaints Board issued its decision. The decision reads, amongst others, as follows:

> *"the Board:*
>
> *Declares that it does not have the competence* ratione materiae *to take cognizance of the requests submitted before it by* [the Appellant]*, and therefore abstains from taking further cognizance of the same matter.*
>
> *Orders that this case is submitted to the MFA Secretary so that the latter can submit it to the entity within the same Association that has the competence to take cognizance of the requests submitted by* [the Appellant]*".*

13. On 31 August 2017, the Maltese summer transfer window closed.

14. On 13 September 2017, Hibernians FC summoned the Appellant to appear before the club's Disciplinary Board.

15. On 15 September 2017, after discussing the Appellant's case on 3 August 2017 and 14 September 2017, the Respondent's Executive Committee sent a letter to the Appellant (hereinafter the "Letter") which reads – *inter alia* – as follows:

> *"After having heard the* [Appellant] *and the club concerned* [*i.e.* Hibernians FC] *the Board deemed it had no competence to act on the possible cancellation of the* [Appellant's] *registration, citing Article 2.1.8 of Section IV (Regulations on the Status and Transfer of Players). The decision, as communicated to* [the Appellant] *on the 31st August 2018, is being enclosed with this letter.*
>
> *(…)*

Without prejudice to the [Appellant's] *right for registration once the dispute is resolved, the Executive Committee cannot uphold the request for a provisional registration. MFA regulations do not recognise a registration of a player that is provisional in nature.*

Furthermore, no good and just cause was proven to the satisfaction of the Executive Committee to warrant the cancellation of the [Appellant's] *registration under Article 2.1.8 cited above".*

16. On the same date, the Appellant advised Hibernians FC that no disciplinary procedure could be initiated against him, since he was no longer under contract with Hibernians FC, since the Employment Contract had been terminated by letter of 1 August 2017.

17. On 20 September 2017 (registered as received by the Appellant on 26 September 2017), the Disciplinary Board of Hibernians FC suspended the Appellant for 28 days because the latter had failed to participate in the team's training sessions.

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 26 September 2017, the Appellant filed a request for provisional measures with the Court of Arbitration for Sport (hereinafter the "CAS") against the MFA. In application of Article R37 of the Code of Sports-related Arbitration (hereinafter the "Code") the Appellant requested *"the CAS to order that* [the Respondent, *i.e.* the MFA] *will allow the registration of the* [Appellant] *with any Maltese club that wants to sign him".*

19. By letter dated 29 September 2017, the CAS Court Office granted the Respondent a deadline of 10 days to file its position with respect to the Appellant's request for provisional measures pursuant to Article R37 of the Code.

20. On 5 October 2017, the Appellant filed his statement of appeal against the Letter with the CAS in accordance with Article R48 of the Code. The appeal is directed against the MFA. The Appellant requested that the present case be submitted to a sole arbitrator.

21. By letter of 6 October 2017, the Respondent was invited to inform the CAS Court Office within 5 days whether it agreed to the appointment of a sole arbitrator in the present matter.

22. On 7 October 2017, the Respondent filed its comments on the Appellant's request for provisional measures and objected to CAS' jurisdiction to hear this appeal.

23. On 10 October 2017, the Appellant was invited by the CAS Court Office to file his comments on Respondent's objection to CAS's jurisdiction, as set out in its answer to the request for provisional measures.

24. On 12 October 2017, the Appellant filed his comments to the Respondent's objection to CAS' jurisdiction.

25. On 18 October 2017, the Appellant filed his Appeal Brief, pursuant to Article R51 of the Code.

26. On 19 October 2017, the CAS Court Office noted that it had not received any submission from the Respondent within the granted deadline regarding the Appellant's request for the appointment of a sole arbitrator. Accordingly, it advised the parties that it would be for the President of the CAS Appeals Arbitration Division to decide the issue in accordance with Article R50 of the Code.

27. On 24 October 2017, the President of the CAS Appeals Arbitration Division rejected the Appellant's request for provisional measures.

28. By letter of the same date, the CAS Court Office notified the decision on the Appellant's request for provisional measures to the parties. In addition, the CAS Court Office forwarded the Appellant's Appeal Brief to the Respondent and granted the latter a deadline to file its Answer within 20 days upon receipt of this letter.

29. On 25 October 2017, the Appellant requested *"that these proceedings are continued in an expedite manner and that the final Award (or at least, its operative part) is – at the latest – issued prior to the end of the next transfer window (which is set on 31 January 2018)"* and *"that it would be more appropriate that the Final award (or its operative part) is issued before the start of the next transfer window (2 January 2018) – or at the very least – not later than 2 weeks before the end of the next transfer window"*.

30. By letter dated 26 October 2017, the CAS Court Office acknowledged receipt of the Appellant's request and advised that the request would be transmitted to the Panel/Sole Arbitrator, once constituted, for its/his/her consideration.

31. By letter dated 13 November 2017, the CAS Court Office advised the parties that the President of the CAS Appeals Arbitration Division had decided to appoint a Sole Arbitrator to hear the present appeal, pursuant to Article R50 of the Code.

32. By letter of 23 November 2017, the CAS Court Office informed the parties that the Panel had been constituted in accordance with Article R54 of the Code as follows:

    Sole Arbitrator: Prof. Ulrich Haas

33. On 30 November 2017, the Respondent filed its Answer, pursuant to Article R55 of the Code.

34. By letter dated 4 December 2017, the Appellant informed the CAS Court Office that *"we believe that an award can be issued based solely on the parties' written submissions"*. By email dated 5 December 2017, the Respondent agreed with the Appellant's view that the matter can be decided upon by the Sole Arbitrator on the basis of the written submissions filed.

35. On 15 December 2015, the CAS Court Office advised the parties that the Sole Arbitrator deems himself sufficiently well-informed to decide this case based on the parties' written submissions,

without the need to hold a hearing. Also in 15 December 2017, the CAS Court Office advised the parties that Mr Oliver Vogel had been appointed as *ad hoc* Clerk in the present matter.

36. On 18 December 2017, the CAS Court Office forwarded to the Parties an Order of Procedure and invited them to return a signed copy thereof by 27 December 2017.

37. On 20 December 2017, the CAS Court Office acknowledged receipt of the Order of Procedure signed by both parties.

38. On 17 January 2018, the Sole Arbitrator issued the operative part of the award.

V. POSITIONS OF THE PARTIES

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

A. The Appellant

40. The Appellant is – in essence – of the view that the decision contained in the Letter must be set aside. In support of his requests, the Appellant submits as follows:

(a) The Letter qualifies as a decision within the meaning of the Code and, therefore, can be appealed by the Appellant. The letter contains a ruling which affects the legal situation of its addressee, *i.e.* the Appellant.

(b) Furthermore, the decision contained in the Letter is final and binding according to Article 5.1. MFA Regulations on the Status and Transfer of Players (hereinafter the "MFA RSTP"). There is no internal instance within the MFA, to which the Letter can be appealed. Hence, the Appellant has exhausted all available internal remedies.

(c) The Respondent maintains and upholds a system whereby a player cannot terminate his employment contract with a Maltese football club without the approval of the decision-making bodies of the MFA. According to the Appellant this follows from Article 2.2.3. (g) MFA RSTP which reads as follows:

> *"Notwithstanding the above, the Complaints Board is entitled to terminate any contract or a modification of a contract or a termination of a contract between a Club and a player either conditionally or without any condition upon the application of the Club or the player provided that a good and just cause is proven to the satisfaction of the Complaints Board".*

(d) This system whereby a player cannot terminate his employment contract with a Maltese club without the approval of the decision-making bodies of the MFA is illegitimate, because

- the procedure is unfair, since the decision-making bodies lack equal representation between players and club;

- the players are prevented from seeking recourse in front of ordinary courts in Malta regarding employment-related disputes with the clubs;

- in order to obtain the termination of the contract (for just cause) the player would have to go through lengthy proceedings, *i.e.* three instances (Complaints Board, Appeals Board and Independent Arbitration Tribunal). All of these body lack equal representation of players and clubs and are, thus, constituted contrary to Article 22 FIFA RSTP. The Maltese regulatory framework puts players at a disadvantage from the outset and must be declared illegitimate. The Maltese football players, who are not members of the MFA, but are only registered with the latter, lack any legal representation in the MFA Executive Committee, the MFA Council, the Appeals Board or the Independent Arbitration Tribunal. Consequently, the player's right to a fair and equitable remedy is not guaranteed in such procedure.

- Requiring a permission from anyone in order for a player to terminate his employment contract infringes upon the player's fundamental rights. Such approach has been declared illegitimate on several occasions by CAS as it compels a player to perform an employment contract against his will.

- Because the system is illegitimate, the Appellant did not follow the termination procedure as foreseen in the MFA RSTP.

(e) According to the Appellant *"the structure (…)* [maintained by the Respondent] *results in a system wherein the Executive Committee of the MFA and the MFA Council (…) have disproportional influence to determine whether a player (playing for one of their member clubs) has a just cause to terminate his employment contract with a club. Equally, the MFA Executive Committee (…) has the ability to determine whether a player's registration can be cancelled (and thus whether a player can be registered with another Maltese club)".*

(f) The above legal framework does not comply with Article 59 of the FIFA Statutes. According thereto, the member federations must implement independent arbitration tribunals that allow for equal representation by the clubs and the players in order to ensure fair proceedings. Furthermore, the Maltese legal framework violates Article 22 of the FIFA Regulations on the Status and Transfer of Players (hereinafter the "FIFA RSTP") and is incompatible with the FIFA Circular Letter No 1010.

(g) The Appellant submits that *"it is imperative to recall that the current appeal does not require a decision from the Sole Arbitrator as to the question whether* [the Appellant] *terminated his employment contract with or without just cause on 1 August 2017. In fact, this is not what the Executive Committee of the MFA decided and therefore not what the current appeal relates to. Instead, the MFA Executive Committee determined that no "good and just cause" was proven to the satisfaction of the MFA Executive Committee to warrant the cancellation of* [the Appellant's] *registration with Hibernians FC"*.

(h) Notwithstanding the above, the prerequisite in Article 2.1.8. MFA RSTP *("good and just cause"*) for the cancellation of the registration and the fate of the contractual relationship between the player and the club are *"interlinked and cannot be considered separate issues; it would be illogical to conclude that a player no longer has a contractual relationship with the club, but that – at the same time – the player is ordered to remain registered with the club and cannot play for any other club"*. Since the contract was terminated on 1 August 2017, there *"cannot possibly be any valid reason for the MFA to maintain the registration of the player with the Hibernians FC"*. Any decision to the contrary

- is incompatible with Maltese law that is applicable subsidiarily, since the MFA is domiciled in Malta;

- unduly infringes on the Appellant's *"fundamental right to work and his right to freely-chosen employment"*;

- *prevents the* [Appellant] *from continuing his football career and thus deprives him from his right to work and his right to freely choose his employment, these rights being human rights as established in article 23 par. 1 of the Universal Declaration of Human Rights"*; and

- is in violation of CAS jurisprudence.

(i) In this context, the Appellant submits *"that there are two factual circumstances that cannot be denied in the present matter"*, namely *"(i) The Appellant terminated his employment contract on 1 August 2017, and (ii) As a consequence thereof, the Appellant is no longer contractually bound to Hibernians FC"*. Thus, *"there cannot possibly be any valid reason for the MFA to maintain the registration of* [the Appellant] *with Hibernians FC. (…) As such, for the MFA Executive Committee to conclude (without reasoning or justification (!)) that there is no "*good and just cause*" for the cancellation of the registration of* [the Appellant] *with Hibernians FC, whereas there is no longer an employment contract in existence between the player and said club, is plainly illogical and illegitimate"*.

(j) The Respondent has denied the Appellant's request arguing (in the Letter) that the legal framework within the MFA *"does not recognise the registration of a player that is provisional in nature"*. The Appellant contests this reasoning for two reasons:

- the Appellant has never requested the MFA for a provisional registration; the Appellant requested the cancelation of its registration with Hibernians FC with immediate effect in order to be declared free to register with any other club.

- the MFA is barred from arguing that it does not recognise provisional registrations, because according to Article 6 para 1 FIFA RSTP in conjunction with Article 1 para 3 a) FIFA RSTP the MFA is obliged vis-à-vis FIFA to implement these provisions within its own jurisdiction.

(k) On a subsidiarily basis the Appellant submits that *"good and just cause"* to cancel the termination follows from the fact that the Appellant – undoubtedly – terminated the Employment Contract with Hibernians FC. This conclusion is also supported by the MFA RSTP, in particular by Article 2.1.3. of the MFA RSTP. According thereto the registration of a player requires – besides the duly filled out the registration form – the filing of a written contact between the player and the Maltese club with the MFA. Consequently, where there is no longer a written contract, because the latter has been terminated, the registration must be cancelled.

41. The Appellant has filed the following prayers for relief:

"The Appellant is respectfully requesting the [CAS]*:*

a) To set aside the decision of the MFA notified to the [Appellant] *on 15 September 2017.*

b) To order the MFA to recognise that the employment contract between the Maltese club, Hibernians Football Club, and the [Appellant] *has been terminated by the* [Appellant] *on 1 August 2017.*

c) To rule that the registration of the [Appellant] *with Hibernians Football Club is automatically cancelled in view of the fact that the employment contract between the* [Appellant] *and the Maltese club has been terminated through the* [Appellant's] *termination notice of 1 August 2017.*

d) To rule that the system maintained by the MFA which does not allow a party to terminate a contract without the approval of the MFA decision-making bodies is illegitimate.

e) To rule that the [Appellant] *can register with any other Maltese club.*

f) To condemn the MFA to pay the entire CAS administration costs and the arbitration fees and to reimburse the [Appellant] *of any and all expenses he incurred in connection with this procedure.*

In the alternative:

g) To set aside the decision of the MFA notified to the [Appellant] *on 15 September 2017.*

h) To order the MFA to recognise that the employment contract between Hibernians Football Club and the [Appellant] *has been terminated by the player on 1 August 2017.*

i) To rule that there is a "good and just cause" *that warrants the cancellation of the* [Appellant's] *registration.*

j) To rule that the [Appellant] *can register with any other Maltese club.*

k) To condemn the MFA to pay the entire CAS administration costs and the arbitration fees and to reimburse the [Appellant] *of any and all expenses he incurred in connection with this procedure".*

B. The Respondent

42. The submissions of the Respondent, in essence, may be summarised as follows:

(a) According to Article R47 of the Code the Appellant must exhaust all (internal) legal remedies available to him. According to the Respondent the Appellant has failed to do so. Therefore, the procedure before the CAS is untimely, abusive and must be rejected. In particular, the Appellant could have requested the MFA Council for a revision of the Letter in accordance with Article 49 (xiii) MFA Statutes. This provision reads as follows:

> *"The Council shall have the power to annul any decision taken by an official, Board or Committee of the Association, except a decision of the Independent Arbitration Tribunal established in this Statute, if it results that such decision was taken in blatant breach of the rules, regulations and bye-laws of the Association or in blatant breach of the decisions or directives of a competent body of the Association. In such instance the Council shall refer back the case regarding which a decision is annulled to the official or body which had taken such decision to reconsider properly the case in accordance with the rules, regulations, bye-laws, decisions and directives of the Association".*

(b) The Respondent also contests CAS jurisdiction on the grounds of *forum non conveniens*. According to the Respondent the MFA Council is the more appropriate forum to decide the matter and therefore should be regarded as the competent instance in the present case.

(c) The Appellant's objections regarding the composition of the various MFA's bodies are without merits, since the MFA Complaints Board – the only organ to which the Appellant addressed his request – is a body composed of an equal number of persons representing players' and clubs' interests.

(d) The Appellant's request was and still is exclusively aimed at obtaining a provisional registration. This clearly follows from the wording of the original request of 1 August 2017 whereby the *"the player is seeking permission from the* [MFA] *to register with a new Club (…) even if there is still a claim pending as to the substance of the dispute between the player and the club"*. This request implies that:

- *"there has presumably been a 'claim', that in the humble view of the Respondent was initiated in procedural terms solely and exclusively by the Appellant himself through the unilateral non-adherence to the contract in force between him and his club; and*

- *at no moment did the Appellant appear minimally interested in addressing such claim in substance, presumably because his sole intention was to rescind the contract".*

(e) The Respondent heard also Hibernians FC. The latter held the position that there (still) was a valid employment contract between the club and the Appellant. This is also the reason why Hibernians FC initiated internal disciplinary proceedings against the Appellant which are still pending as of today and which are undisputed by the Appellant.

(f) The Appellant's request *"to register with a new club in accordance with the rules and regulations of the Association"* falls *"outside the scope of these proceedings"*. The *"Respondent is certainly not the right defendant"* and has *"no locus standi"* when it comes to examining *"the merits of the differences – if any – the* [Appellant] *could have had with his club Hibernians FC and the reasons behind such differences"*.

(g) The conditions to cancel a registration with a Maltese club solely follows from Article 2.1.8. of the MFA RSTP. The FIFA RSTP, on the contrary, are not applicable. The MFA RSTP provide that a contract can only be terminated *"either by written agreement between both parties, or unilaterally for just cause or sporting just cause according to FIFA or the Association's regulations"* (Article 2.2.2. (k) MFA RSTP). No unilateral termination of the contract is possible without just cause.

(h) Furthermore, the MFA RSTP provide that even if there is just cause, *"only the Complaints Board is entitled to terminate (…) a contract between a Club and a player (…) upon the application of the Club or the player"* (Article 2.2.3. (g) MFA RSTP). The Complaints Board will only rescind the contract if "good and just cause" is proven to its satisfaction.

(i) The Appellant never filed a request that the MFA Council shall terminate the Employment Contract with good and just cause according to article 2.2.3. (g) MFA RSTP. Instead, the Appellant was of the view that the contract came (automatically) to an end once he notified the club with the termination letter and, therefore, only requested the Complaints Board in his petition dated 4 August 2017 to *"acknowledge the termination of the contract"*. Such request was dismissed by the Complaints Board, because the latter is only entitled to bring a contract to an end if a good and just cause exists. This decision of the MFA Complaints Board has not been contested by the Appellant. Thus, the decision is vested with *res judicata*-effects and all possible legal remedies against this decision of the MFA Complaints Board are now *"fuori termine"*.

(j) A unilateral termination of the contract (independent of a just cause) is not possible according to the applicable rules and cannot be acknowledged by the Complaints Board.

The fact that Article 2.2.3. (f) MFA RSTP provides for damages in case a party unilaterally terminates a contract on the basis of the respective FIFA rules *"is not tantamount to recognising a right to terminate a contract unilaterally without just cause"*, because this *"would run counter to the principle of contractual stability"*.

(k) In view of the above, the Employment Contract is – for the time being – still valid. The issue whether the Appellant's registration may be cancelled can only be resolved once the dispute concerning the contractual matter between the club Hibernians FC and the Appellant has been resolved. Thus, the Executive Committee of the MFA – according to the Respondent – correctly stated in the Letter that the decision taken is *"without prejudice to the player's right for registration once the dispute is resolved"*.

(l) The refusal to cancel the registration does not adversely impact the Appellant in an inappropriate manner. It was the Appellant who chose to terminate the contract without just cause. The player suffers a self-inflicted hardship due to his non-adherence to his contractual obligations. Furthermore, he is not adversely affected because he has a full-time job outside of football. In addition, the Respondent also refers to the principles of *commodum ex injuria sua non habere debet* (*i.e.* one ought not to profit from his own tort) and *ex turpi causa non oritur actio* (*i.e.* from a self-created cause an action does not arise) in the present case.

(m) The Appellant cannot avail himself in the proceedings before the CAS that there is just cause to cancel the registration, since the decision of the Complaints Board of the MFA has *res iudicata* effects and, in addition, such defense violates the principle of *venire contra factum proprium* in light of the Appellant's petition before the MFA's Complaints Board. In the context of the proceedings before the Respondent's Complaints Board the Appellant and his representative stated unequivocally that the Employment Contract had been unilaterally terminated without just cause.

43. The Respondent submitted the following prayers for relief:

"the Respondent respectfully asks the CAS to reject the appeal;

- *to confirm the decision taken by the Executive Committee of* [the MFA] *on the 15th September 2017; and*

- *to order that all costs pertaining to this procedure shall be borne by the Appellant"*.

VI. JURISDICTION

44. Article R47 para 1 of the Code which reads 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".

45. The statutes of the Respondent provide for the following arbitration clause in favour of the CAS (Article 3 (ii) of the MFA Statutes):

"Subject to the provisions of clause (iii) hereunder, in so far as the affiliation to FIFA is concerned, the Association recognises the Court of Arbitration of Sport in Lausanne (…) as the supreme jurisdiction authority to which the Association, its Members and members thereof, its registered player (…) may have recourse to in football matters as provided in the FIFA Statutes and regulations".

46. In addition, the Sole Arbitrator notes that the arbitration clause in favour of the CAS is not disputed between the parties. The Respondent disputes the competence of the CAS *rationae temporis*, *i.e.* that CAS for the time being is not competent to decide the dispute, because the Appellant has not exhausted all legal remedies. This issue will be addressed later. All that is important for the time being is that – according to both parties – CAS has jurisdiction once all internal remedies have been exhausted. Consequently, the Sole Arbitrator finds that he has, in principle, jurisdiction to decide the present matter.

VII. EXHAUSTION OF LEGAL REMEDIES (*RATIONAE TEMPORIS*)

47. Article R47 of the Code further provides that CAS is only competent to decide the dispute once *"the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body"*. The Respondent submits that the Appellant has not exhausted the legal remedies available to him. The Respondent refers in particular to Article 49 (xiii) MFA Statutes. The latter provision reads as follows:

"The Council shall have the power to annul any decision taken by an official, Board or Committee of the Association, except a decision of the Independent Arbitration Tribunal established in this Statute, if it results that such decision was taken in blatant breach of the rules, regulations and by-laws of the Association. In such instance the Council shall refer back the case regarding which a decision is annulled to the official or body which had taken such decision to reconsider properly the case in accordance with the rules, regulations, by-laws, decisions and directives of the Association".

48. Article 49 (xiii) MFA Statutes is not a "legal remedy" within the meaning of Article R47 of the Code. This follows from the clear wording of the provision, since the latter does not state that an appellant must appeal to the MFA Council first, before being entitled to appeal to the CAS. Article 49 (xiii) MFA Statutes does regulate access to justice for an individual. The provision does not refer to appeals, does not provide any time limits for an appeal and fails to deal with the issue of costs (for an appeal). The only purpose of Article 49 (xiii) MFA Statutes is to install a certain hierarchy between different organs of the MFA. According thereto the Council may – *ex officio* – annul any decision by an official, Board or Committee. The Appellant rightfully refers to the provision as a kind of a "safety net" for the MFA that allows the Council to correct *ex*

officio decisions of lower organs under certain conditions (*"blatant breach of the rules"*). To conclude, therefore, the Sole Arbitrator finds that Article 49 (xiii) MFA Statutes is no obstacle for appealing to the CAS.

49. The view held here is further backed by Article 5.1.1. and Article 5.1.3. MFA RSTP. The provisions read as follows:

> Article 5.1.1.:
>
> *"Any question related to the registration of players, unless otherwise specified in these regulations, shall be decided by the Executive Committee on an appeal by the interested party. Any other question, unless specified in these regulations, shall be decided by the Council on an appeal by the interested party".*
>
> Article 5.1.3.:
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> *"The decision of the Executive Committee or the Council, as the case may be, shall be final and binding. It shall be in the discretion of the body deciding the appeal whether the appeal's fee shall be retained by the Association or refunded to the appellant".*

50. If according to the above provisions a decision of the Executive Committee is *"final and binding"*, then – obviously – there is no internal recourse available against that decision to any other instance within the MFA.

VIII. *FORUM NON CONVENIENS*-DOCTRINE NOT APPLICABLE

51. The Respondent challenges the competence of the CAS also by referring to the doctrine of *forum non-conveniens*. According to the *forum non conveniens*-doctrine a court may refuse to exercise its jurisdiction over a matter where there is a more appropriate forum available. By referring to the principle of *forum non conveniens*, the Respondent accepts that CAS is, in principle, competent to decide the dispute. However, the Respondent suggests that there is another competent forum (the Council of the MFA) that is more appropriate to decide the dispute. The Respondent fails to explain why CAS would be less appropriate than the MFA Council to dispose of the matter, particularly considering that:

- the *forum non conveniens*-doctine is not applicable in the ambit of the 12th chapter of the Swiss Private International Law Act (hereinafter the "PILA") that governs this arbitration;
- the rules and regulations of the MFA do not allude to the *forum non conveniens*-doctrine;
- the rules and regulation of the MFA do not specifically provide for an internal recourse to the MFA Council; and

- Article 5.1.3. of the MFA RSTP provides that *"decisions of the Executive Committee (…) shall be final and binding"*. If the latter is true, there is no *"more appropriate internal forum"* from the very outset.

IX. THE "DECISION" WITHIN THE MEANING OF ARTICLE R47 OF THE CODE

52. Article R47 of the Code requires that the appeal be directed against a *"decision of a federation"*. Whether this prerequisite is a condition of admissibility or the merits is questionable. In the case at hand, this issue may be left open, because the Letter (that forms the matter in dispute here) is a *"decision"* within the meaning of Article R47 of the Code. The term *"decision"* is to be understood broadly. The concept of what constitutes a decision has been well-established in CAS jurisprudence. Reference is made to CAS 2005/A/899, where the Panel stated as follows:

> *"The applicable FIFA regulations, in particular the FIFA Statutes, do not provide any definition for the term 'decision'.*
>
> *(…)*
>
> *In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties.*
>
> *(…)*
>
> *The Panel considers that the form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitute a decision subject to appeal.*
>
> *(…)*
>
> *What is decisive is whether there is a ruling – or, in the case of a denial of justice, an absence of ruling where there should have been a ruling – in the communication"* (emphasis added).

53. In application of the above principles there cannot be the slightest doubt that the Letter qualifies as a *"decision"*. The Letter is not just of a mere informative nature, but – instead – contains a clear and unequivocal ruling, which affects in a binding manner the legal situation of the addressee by rejecting the Appellant's request to cancel his registration with Hibernians FC.

X. ADMISSIBILITY

54. Article R49 of the Code provides as follows:

> *"In 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".

55. The appeal was filed within the deadline of 21 days. Furthermore, the appeal complies with all other requirements of Article R48 of the Code. It follows that the appeal is admissible.

XI. APPLICABLE LAW

56. Article R58 of the Code provides the following:

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

57. In application of Article R58 of the Code, the Sole Arbitrator finds that the present dispute shall be resolved on the basis of the applicable MFA Regulations and, subsidiarily, based on Maltese Law.

XII. THE MANDATE OF THE PANEL

58. The mandate of the Sole Arbitrator is limited by the requests filed by the parties and the decision forming the subject matter of the appeal (the Letter). It is only within these boundaries that the Sole Arbitrator is entitled to review the matter. Both the parties' request and the appealed decision define the Sole Arbitrator's mandate according to Article R57 of the Code. The Respondent submits that the matter put before the Sole Arbitrator by the Appellant exceeds the scope of the matter before its Executive Committee and that, therefore, the appeal must be dismissed.

59. In his letter dated 1 August 2017 to the MFA, the Appellant requested – *inter alia* – to be permitted immediately to register with any other club and that – consequently – he be deregistered with the club Hibernians FC. The Appellant upheld this request also once the matter was referred to the Complaints Board of the Respondent (see petition dated 4 August 2017). The MFA Complaints Board stated in its decision that *"the player's basic request (…) is relating to obtaining the possibility of registering with any other club with immediate effect (…)"* (see no. 8 of the decision) and that, therefore, *"it had no competence to cancel the registration of a professional player"*. It is for exactly this reason that the Appellant's request was referred to the MFA Executive Committee that is – according to article 2.1.8. MFA RSTP – competent to decide on registration issues (cf. also article 5.1.1. MFA RSTP). In the Letter the MFA Executive Committee dismissed the Appellant's request. It is exactly this original request that the Appellant pursues in these

proceedings before the CAS by asking the CAS *"to set aside the decision of the MFA notified to the* [Appellant] *on 15 September 2017"* (request a), and "*to rule that the* [Appellant] *can register with any other Maltese club"* (request e). Thus, the mandate of the Sole Arbitrator is solely whether or not the MFA was right to refuse the cancellation of the registration of the Appellant. All other requests that are not linked to this matter in dispute are outside of the Sole Arbitrator's mandate and cannot be entertained. Consequently, the requests b) and d) of the Appellant are inadmissible from the outset and must be rejected.

XIII. MERITS

60. It follows from the Letter that the Respondent's Executive Committee based its decision on Article 2.1.8. of the MFA RSTP. This provision states as follows:

> *"The (…) Executive Committee shall have the power to cancel the registration of a professional player either conditionally or without any condition if upon the application of the Club or the player a good and just cause is proven to the satisfaction of the (…) Executive Committee".*

61. It is undisputed that the Appellant seeks – first and foremost – the cancellation of the registration with the club Hibernians FC and that he made a respective request to the MFA. Since the present matter is a dispute relating to a "registration issue", Article 2.1.8. MFA RSTP applies. The only issue that is disputed between the parties is whether or not the Player fulfils the prerequisites for the cancellation of the registration with Hibernians FC.

1. No automatic cancellation

62. Article 2.1.8. of the MFA RSTP provides that registration may be cancelled if the player proves *"good and just cause"* to the satisfaction of the Respondent's Executive Committee. The Sole Arbitrator notes that cancellation of the registration requires a decision by the competent body according to Article 2.1.8. MFA RSTP. Thus, from the very outset registration cannot be cancelled automatically (as requested by the Appellant in his request lit. c). The requirement that cancellation of registration must follow a procedure (application by the club or player and a decision by the competent authority) does not appear to be illegitimate. Therefore, the Sole Arbitrator dismisses the Appellant's request c).

2. Termination of the Registration and Termination of the Employment Contract are distinct

63. Furthermore, the Sole Arbitrator notes that – on the face of it – Article 2.1.8. MFA RSTP

- does not require that there must be *"good and just cause"* to terminate the (underlying) employment contract. Instead, the provision only requires that there is *"good and just cause"* for the application to cancel the registration.

- Furthermore, the provision does not state that cancellation of the registration is only possible once the Complaints Board has decided to terminate the contract based on *"good and just cause"* or once all disputes arising out of the underlying employment contract are resolved.

64. The view held here that, in principle, registration and termination of the employment contract are two distinct matters is also followed by the Respondent. The latter submitted in his Answer that the *"contractual relationship and registration are considered as distinct aspects"* and that *"registration is dealt with irrespective of contractual relationships"*.

65. Of course, there are links between the registration and the contractual relationship. However, the contractual matter need not be definitely resolved in order to decide on the issue of registration, since Article 2.1.8. MFA RSTP specifically provides that the cancellation of the registration can be ordered *"conditionally or without condition"*. The latter would not make any sense if termination of the employment relationship and cancellation of the registration would always have to go in parallel. Thus, the matter of the cancellation of a registration is independent of any contractual dispute. In other words, cancellation of the registration is possible even if a contractual dispute is pending.

3. Good and just cause to cancel the registration

66. In the case at hand the Respondent claims that the Sole Arbitrator is precluded from assessing whether or not there is *"good and just cause"* to cancel the registration.

a) No limitations to the Sole Arbitrator's assessment whether there is good and just cause

67. The Respondent submits that the decision taken by the Complaints Board on 30 August 2017 has allegedly *res iudicata* effects, since the Appellant failed to appeal the decision to the competent instances. The Sole Arbitrator is not prepared to follow this argument. The Complaints Board's ruling is that it is not competent to decide the matter. Thus, there is no decision on the merits that the Appellant lacks good and just cause that could possibly have *res iudicata* effects. Consequently, the Sole Arbitrator is not barred from assessing the facts whether or not there is *"good and just cause"* in the case at hand.

68. In addition to the above, as previously mentioned, the Sole Arbitrator's view is that there must be a distinction between the existence of *"good and just cause"* for the purposes of the termination of the underlying employment contract and the existence of *"good and just cause"* for the cancellation of the registration. Therefore, even if the Complaints Board had entered into the merits of the dispute, this would not mean in principle that the issue of the cancellation of the registration would be *res iudicata*.

69. The Respondent further refers to the principle of *venire contra factum proprium*. The Respondent submits that it was the Appellant himself who acknowledged (before the Complaints Board) that he did not have good and just cause to terminate the contract. The Respondent basis this

finding on the decision of the Complaints Board where the latter stated under marg. no. 4 as follows:

> *"In accordance with the said letter and as confirmed by Dr. Sihoun Gauci (…)* [the Appellant] *opted to unilaterally terminate the contract - without just cause".*

70. The finding of the Respondent is rather surprising. It is true that the Appellant's counsel in the petition dated 4 August 2017 did not file an express application to the Complaints Board to terminate the contract for *"good and just cause"*. The Appellant's counsel explained this course of action in his petition dated 4 August 2017 as follows:

> *"the* [Appellant] *decided to proceed with a unilateral termination (…). This decision is based on a procedural reason to ensure a swift resolution to this contractual relationship with the club and is not an acceptance that he did not have grounds to terminate for just cause".*

71. Not only did the Appellant not accept that there was no *"good and just cause"* to terminate the contract, but, in addition, in all his letters/submissions he always stated the grounds for his unilateral termination. This is true for the termination notice dated 1 August 2017 and the Appellant's letter to the MFA dated 4 August 2017. In his petition to the Complaints Board the Appellant referred to the *"blackmail"* of the club that *"led to a complete breakdown of mutual trust and confidence"*. In addition, the Appellant wrote in the petition that he expressly puts forward the following considerations:

> *"The unfair treatment suffered by the* [Appellant] *at the hands of the Club, which forced the* [Appellant's] *hand into terminating the contract, was not the* [Appellant's] *doing and should not prevent him from furthering his football career".*

72. Consequently, there is no *venire contra factum proprium* that would prevent the Sole Arbitrator from examining whether or not there is *"good and just cause"* to cancel the registration. The Appellant only for procedural reasons did not submit a request that the Complaints Board rescind the contract. However, the Appellant in all his letters and submissions made it abundantly clear that his unilateral termination was solely provoked by and the consequence of the Club's unlawful and unfair behaviour.

b) The Findings of the Sole Arbitrator in relation to Good and Just Cause

73. When assessing the facts and the law of the case, the Sole Arbitrator finds that there is *"good and just cause"* to cancel the Appellant's registration according to Article 2.1.8. MFA RSTP. The MFA RSTP do not define what constitutes a *"good and just cause"* for the purposes of Article 2.1.8. MFA RSTP. When interpreting the term *"good and just cause"* the Sole Arbitrator finds that due consideration must be given to both, the interests of the players and the clubs. In application of the above, the Sole Arbitrator finds that Article 2.1.8. of the MFA RSTP only requires valid (administrative) reasons for the cancellation of a registration.

74. The purpose of Article 2.1.8. MFA RSTP cannot be that a player may be held hostage by a club until all contractual disputes between it and the player are resolved. Such a system would put the player at the mercy of a club. The latter could refuse to sign a termination agreement or file any kind of (mock) claim just to prevent the cancellation of the registration and thereby hindering the player from finding new employment even in a case where there is – obviously – no more basis for faithful cooperation between the contractual parties. The player would – in such circumstances – be forced to continue working for the club against his will. This is not only unacceptable, but also contrary to the best interests of both, the player or the club. This is all the more true, considering that the interests of the club are sufficiently taken care of by Article 2.2.3. (f) MFA RSTP, which provides for damages to be paid to the aggrieved party in case of unilateral termination of the contract. Consequently, the threshold for cancelling the registration for good and just cause should not be set too high.

75. In the present case the Sole Arbitrator finds that the threshold for good and just cause within the meaning of Article 2.1.8. MFA RSTP is easily met. The Appellant has notified a termination letter to the Respondent on 1 August 2017 and has not resumed working for the club since. The grounds submitted by the Appellant in the notice of termination and in the course of these proceedings do not appear capricious or obviously without merits. Instead, it appears to the Sole Arbitrator that the employment relationship between the Appellant and Hibernians FC appears to be disrupted to a point where it does not make any sense to (indirectly) enforce the legal relationship between the club and the Appellant by upholding his registration with Hibernians FC. Consequently, the Sole Arbitrator finds that there is good and just cause in an administrative sense to cancel the registration with Hibernians FC. This decision is taken without prejudice for any claim of the club arising under Article 2.2.3 (f) MFA RSP. It is not in the Sole Arbitrator's responsibility – not even on *prima facie* basis – to determine whether the termination of the employment contract is justified or unjustified. Such question is to be considered independently and separately from the question of the cancelation of the registration.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The CAS has jurisdiction to decide the appeal filed by Mr Jurgen Borg on 5 October 2017 against the decision of the Executive Committee of the Malta Football Association communicated to him on 15 September 2017.

2. The appeal filed by Mr Jurgen Borg on 5 October 2017 against the decision of the Executive Committee of the Malta Football Association is partially upheld.

3. The decision of the Executive Committee of the Malta Football Association communicated to Mr Jurgen Borg on 15 September 2017 is set aside.

4. There is a *"good and just cause"* for the purposes of article 2.1.8 of the Regulations on the Status and Transfer of Players of the Malta Football Association that warrants the cancellation of Mr Jurgen Borg's registration for the club Hibernians Football Club.

5. The Malta Football Association is ordered to enable the registration of Mr Jurgen Borg with any other Maltese club, in accordance with the remaining applicable provisions of the Malta Football Association.

(…)

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