Arbitration CAS 2020/A/7168 MKS Cracovia SSA v. Miroslav Covilo & FC Lugano SA, award of 27 May 2021

Panel: Prof. Stephan Breidenbach (Germany), President; Mr Efraim Barak (Israel); Mrs Raphaëlle Favre Schnyder (Switzerland)

Football
Transfer
Duty of a first instance body to refer to laws, regulations or legal principles
Duty to inform the other party
Authorisation by appearance or authorisation by acquiescence

1. **The FIFA Dispute Resolution Chamber (DRC) is not considered to fulfil the same requirements in its decision-making as may be the case with state courts in some countries, as the FIFA DRC is a mere first instance body on a sports federation level. Although there are several minimal requirements to be met, such as the rights of defence as provided for in Article 6 of the European Convention on Human Rights, and although advisable, it is not required for the FIFA DRC to refer in its decisions to any laws, regulations or legal principles to support its findings.**

2. **Upon initiation of contract negotiations, there is a duty to inform the other party – at least to some extent – about facts which could be of decisive importance to that party. This duty arises from Articles 2 and 3 of the Swiss Civil Code (SCC). With specific regard to commercial registry entries, not consulting the commercial registry cannot be held against a person acting in good faith, provided that it was the other party who gave rise to the belief that the power to represent was organised differently than stated in the commercial registry.**

3. **Under Swiss law, authorisation may not only have legal effect in case there is an express authorisation by the represented person to the representative. Rather, acts of a representative may also be legally binding for the represented person by virtue of authorisation by appearance or authorisation by acquiescence. Based on these generally-accepted legal concepts, it is possible that authorisation takes effect – in contrast to an express authorisation – also tacitly or even against the represented person's will. An authorisation by appearance exists if, on one hand, the person being represented has no knowledge that another person is acting as his or her representative but should have been aware of the representative's actions if he or she had paid due attention and, on the other hand, the representative may in good faith consider the behaviour of the person represented as an authorisation. In case the person represented knows, in turn, that he or she is being represented without or against his or her will but nevertheless does not intervene against such unsolicited representation, an authorisation by acquiescence exists. Authorisation by appearance and authorisation**

by acquiescence may both also apply in a case where a representative is expressly empowered to represent another person but only collectively together with another person. The rules on the protection of third parties' good faith also apply in cases where a collective representative acts alone rather than – in accordance with the actual subjective scope of the authorisation – together with others.

I. PARTIES

1. MKS Cracovia SSA (the "Appellant" or "Cracovia") is a professional football club with its registered office in Krakow, Poland. The Appellant is currently competing in the Polish first national division and is a member of the Polish Football Association, which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. Mr Miroslav Covilo (the "First Respondent" or the "Player") is a professional football player with Bosnian nationality.

3. FC Lugano SA (the "Second Respondent" or "Lugano") is a professional football club with its registered office in Lugano, Switzerland. The Second Respondent is currently competing in the Swiss first national division and is a member of the Swiss Football Association, which in turn is affiliated to FIFA.

4. Together the Appellant and the Respondents are referred to as the "Parties".

II. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced during these proceedings. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its Award only to the submissions and evidence he considers necessary to explain his reasoning.

6. On 12 August 2014, Cracovia and the Player concluded a professional employment contract (the "Employment Contract") valid as from 12 August 2014 until 30 June 2016, on the basis of which the Player was entitled to a monthly gross base remuneration of EUR 7,700.

7. On 30 April 2015, Cracovia and the Player concluded a first annex to the Employment Contract which provided that *"[t]his agreement shall be concluded for a specific period of time: August 12, 2014 till June 30, 2018"*, and on the basis of which the monthly gross basic remuneration of the Player was increased to EUR 10,700, and with an additional gross remuneration of EUR 24,000 to be paid no later than 8 May 2015.

8. On 30 June 2016, Cracovia and the Player concluded a second annex to the Employment Contract which provided *"[t]his agreement shall be concluded for a specific period of time: July 1st, 2016 till June 30, 2020"* and on the basis of which the First Respondent was entitled to an additional gross remuneration of EUR 50,000 to be paid no later than 31 August 2016.

9. On 25 July 2018, Cracovia sent a letter to the Player releasing him from the *"obligations to participate in trainings, camps and league matches of the 1st senior team of Cracovia from July 25th 2018 to August 6th 2018"*.

10. On 30 July 2018, Cracovia authorised the Player in writing to *"start contract's negotiations with FC Lugano and proceed with medical tests from 30.07.2018"*.

11. On 8 August 2018, the Player sent a termination notice to Cracovia.

12. On 9 August 2018, the Player and Lugano concluded an employment agreement valid as from 9 August 2018 until 30 June 2020, on the basis of which the Player was entitled to a gross sign-on fee of CHF 100,000 as well as to an annual gross salary of CHF 140,000 for the 2018/2019 season and CHF 240,000 for the 2019/2020 season.

13. On 27 August 2018, the Single Judge of the FIFA Players' Status Committee passed a decision which authorised the Swiss Football Association to provisionally register the Player for Lugano with immediate effect.

14. On 28 August 2018, Cracovia concluded an employment contract with the football player Janusz Gol valid as from 29 August 2018 until 30 June 2020, on the basis of which Mr Gol was entitled to a monthly gross remuneration of EUR 25,000.

15. On 14 November 2018, Cracovia filed a claim in front of FIFA against the Player and Lugano, whereby it requested that the Player and Lugano be held jointly and severally liable to pay the amount of EUR 664,000 as compensation for unilateral termination and breach of contract.

16. On 5 December 2019, the FIFA Dispute Resolution Chamber (the "FIFA DRC") passed the following decision (the "Appealed Decision"):

"The claim of the Claimant, MKS Cracovia, is rejected".

17. On 11 May 2020, the grounds of the Appealed Decision were notified to the Parties, stating as follows:

- In accordance with Article 26 paras 1 and2 of the FIFA Regulations on the Status and Transfer of Players (the "FIFA RSTP"), the June 2018 edition of the FIFA RSTP is applicable;

- The pivotal issue in this dispute, considering the diverging position of the parties, was to determine as to whether the clubs had indeed validly agreed upon the term of the player's transfer and the second issue is whether the player had a just cause to terminate the contract with the Claimant on 8 August 2018;

- It appeared that the Claimant had accepted the final terms offered by the Second Respondent, after having requested amendments as to the payment dates of the transfer fee. In this respect, the e-mail of the Claimant to the Second Respondent on 31 July 2018 stating, inter alia, that *"we are able to accept following but under condition that we do not make any amendments to final version of the transfer agreement that we sent (except payment dates)",* can be considered as the acceptance of the Second Respondent's offer. Subsequently, the Claimant changed its mind, but only after the Second Respondent proceeded to send the final transfer agreement;

- The Player was informed by the Second Respondent that the clubs had agreed on the terms of the transfer. After the Claimant requested further conditions for the transfer to go through on 3 August 2018, the Player sent several emails to the Claimant trying to settle the matter at hand in an amicable way, until he finally decided to terminate the contract.

- Therefore, the DRC concluded that the clubs had indeed agreed on the terms of the transfer, and consequently, the player could rely in good faith that the transfer agreement was concluded on 31 July 2018 as a result of which he terminated the contract with just cause on 8 August 2018.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

18. On 1 June 2020, pursuant to Article R47 and R48 of the 2019 edition of the CAS Code of Sports-related Arbitration (the "CAS Code"), the Appellant filed a Statement of Appeal with the CAS directed against the Respondents with respect to the Appealed Decision. In its Statement of Appeal, the Appellant requested that the case be submitted to a Panel of three arbitrators and nominated Mr Efraim Barak, Attorney-at-law in Tel Aviv, Israel, as an arbitrator.

19. On 15 June 2020, pursuant to Article R51 of the CAS Code, the Appellant filed its Appeal Brief with the CAS Court Office.

20. On the same day, the CAS Court Office informed FIFA about the appeal that was however not directed to FIFA, and invited FIFA to file an application to intervene in case it intended to participate as a party in the present arbitration pursuant to Article R41.3 of the CAS Code.

21. On 24 June 2020, the Respondents jointly nominated Ms Raphaëlle Favre Schnyder, Attorney-at-law in Zurich, Switzerland, as an arbitrator in this matter.

22. On 25 June 2020, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings.

23. On 26 June 2020, the Respondents informed the CAS Court Office that they would not pay their share of the advance of costs and further requested that, in accordance with Article R55 para. 3 of the CAS Code, the time limit for the Respondents to file their Answer be suspended and be fixed after the payment by the Appellant of its share of the advance of costs.

24. On 6 July 2020, the CAS Court Office informed the parties that, upon request of the Respondents and pursuant to Article R55 para. 3, the time limit for the Respondents to file their Answer was set aside and that a new time limit shall be fixed upon the Appellant's payment of its share of the advance of costs.

25. On 22 July 2020, the CAS Court Office confirmed the receipt of the Appellant's share of the advance of costs and requested the Respondents to file their Answer within 20 days from the receipt of such letter, pursuant to Article R55 of the CAS Code.

26. On 25 August 2020, the Respondents filed their respective Answers with the CAS Court Office. Furthermore, the Second Respondent requested that exhibit 32 filed by the Appellant be excluded from the case file.

27. On 26 August 2020, the CAS Court Office requested the Parties to state whether or not they preferred a hearing to be held in this matter or for the Panel to issue an award based solely on the Parties' written submissions.

28. On 1 September 2020, the CAS Court Office, on behalf of the President of the Panel, requested the Appellant to provide an English translation of exhibit 32 filed with its Appeal Brief.

29. On 2 September 2020, the Second Respondent informed the CAS Court Office that it did not request a hearing to be held in this matter as it considered the Panel well-informed to issue an award based solely on the Parties' written submissions. On same day, the First Respondent informed the CAS Court Office that, after reconsidering his initial request to hold a hearing, he was ready to waive such request *"if the CAS considers such a hearing unnecessary"*.

30. The Appellant did not state its preference regarding the holding of a hearing within the prescribed deadline.

31. On 8 September 2020, the Appellant filed the English translation of its exhibit 32 filed with its Appeal Brief.

32. On 22 October 2020, the CAS Court Office informed the Parties the Panel deemed itself sufficiently well-informed to decide this case based solely on the Parties' written submissions, without the need to hold a hearing.

33. On 23 October, 28 October and 5 November 2020, the Second Respondent, the Appellant and the First Respondent respectively returned their signed Order of Procedure to the CAS Court Office.

IV. SUBMISSIONS OF THE PARTIES

A. The Appellant

34. The Appellant's submissions, in essence, may be summarised as follows:

- The Appealed Decision was passed with the vital infringement of Art. 14.4 lit. f and g of the FIFA Rules Governing the Procedures of the Player's Status Committee and the Dispute Resolution Chamber (the "FIFA Procedural Rules"), as the Appealed Decision does not contain the reasons of the findings nor the outcome of the evaluation of evidence, in particular as regards whether Cracovia and Lugano had validly agreed upon the terms of the Player's transfer and whether the Player had just cause to terminate the Employment Contract. The Appealed Decision is unlawful as it does not refer to any legal principles that apply to the maters in dispute.

- The negotiations between the clubs were not concluded with the signing of a transfer agreement. Only draft agreements were exchanged, but finally the Appellant informed the Second Respondent that it did not agree for the transfer anymore, and, therefore, the Appellant never signed a final and binding transfer agreement.

- In order for the legal transactions between the companies from different countries, certain rules common to the said parties have to be obeyed. It is also well established in the legal systems of the countries in the continental Europe that when a person claims to act on behalf of a legal entity, such person should be able to prove its authorisation to conduct legal actions with binding, direct effect to that legal entity.

- It is also presumed that (i) when there is a public register in which contracting companies may check who is allowed to represent a party to the agreement, it is forbidden to argue that the other contracting party acted in the faith to the apparent authority of a person claiming to have such authority; (ii) legal entities are considered as professionals acting with due diligence, and it is their right and obligation to check public registers in order to establish the proper representation of the other contracting party; (iii) it is especially expected from the professionals who conclude agreements with an international element to duly check if the other contracting party is registered in the public register in their country and who is allowed to conduct legal actions on behalf of said company according to that register.

- The exchange of draft agreements and the negotiations between the clubs were led by Mr Tomasz Baldys, for the account of the Appellant; however, this is not the person who had authority to sign a transfer agreement, which was also clear from the public register and the actual legal representatives for the Appellant mentioned in the drafts.

- In connection with international contracts, which terms are negotiated and drafted for the specific deal, parties are deemed sophisticated and are expected to perform their due diligence, including public register check, rather than relying on apparent authority (see Decision of the Swiss Federal Tribunal (SFT) 4P.137/2002 of 4 July 2003). According to Article 38, paras 1 and 2 of the Swiss Code of Obligations (SCO) where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless he ratifies the contract. The other party has the right to request that the represented party ratify the contract within a reasonable time, failing which he is no longer bound by it.

- In the present case, the FIFA DRC established that the person who – under the principles of law – was not allowed to conclude an agreement (and in fact was not intending to – as it was to be signed by the board of directors of the Appellant provided that the negotiations with FC Lugano were successful – and they were not) concluded it anyway with binding effect to the Appellant. While this constitutes some judgement, it is arbitrary and has nothing to do with lawfulness. Therefore it has to be set aside.

- Lugano's *"reckless behaviour"* demonstrates that it was willing to induce the Player to commit a breach of his contract with Cracovia. The Respondents should be held jointly and severally liable to pay compensation to the Appellant for breach of contract in accordance with Article 17 of the FIFA RSTP. Such compensation should amount to EUR 664,000, namely EUR 314,000 as compensation for the replacement of the Player by Janusz Gol; EUR 50,000 as a return of the sign-off remuneration for prolongation of the Employment Contract; and EUR 300,000 as an equivalent of the transfer fee due to the Appellant case the Player is transferred from Lugano to another club.

35. The Appellant submitted in its Appeal Brief the following prayers for relief:

"[…] to set aside the decision of the FIFA's Dispute Resolution Chamber dated 05-09-2019 (ref. no. 18-02410/wit) and in particular to:

1) determine that the contract (hereinafter also: the Contract) concluded between the Player Miroslav Covilo and Appellant MKS Cracovia SSA dated 12-08-2014 amended by Annex no. 1 dated 30-04-2015 and Annex no. 2 dated 30-06-2016 was terminated by the Player without just cause;

2) the Player Miroslav Covilo and Respondent 2 – FC Lugano SA are responsible for the unilateral termination of the contract;

3) sentence the Respondents: Miroslav Covilo and FC Lugano SA to pay the Appellant MKS Cracovia SSA – jointly and severally the amount pursued before the FIFA's Dispute Resolution Chamber i.e. the amount of 664.000 (six hundred sixty four thousand) EUR which consists of:

a. the amount of 314.000 (three hundred fourteen thousand) EUR as compensation for replacement of the Player by a new player (Janusz Gol)

b. the amount of 50.000 (fifty thousand) EUR as a return of the sign-off remuneration for prolongation of the contract concluded between the Appellant and the Player resulting from Annex no. 2 to the contract;

c. the amount of 300.000 (three hundred thousand) EUR as an equivalent of the transfer fee which will be due to the Appellant in the event of transfer of the Player to another football club

along with the interest in the rate of 5% per annum on the total amount of compensation (664.000 – six hundred sixty four thousand EUR) as of 14-09-2018 until the date of effective payment

4) sentence the Respondents: Miroslav Covilo and FC Lugano SA to jointly and severally:

a. bear all of the costs of the proceedings;

b. pay the Appellant MKS Cracovia SSA the legal fee and other expenses incurred by MKS Cracovia SSA".

B. The First Respondent

36. The First Respondent's submissions, in essence, may be summarised as follows:

- The Appellant's argumentation about the purported lack of authorization of Mr Tomasz Baldys is legally flawed in several regards.

- Firstly, Mr Baldys has been expressly authorized to represent the Appellant in the negotiations with the Second Respondent and to conclude a binding transfer agreement concerning the Player with Lugano. The general principle of agency, or legal representation, in Swiss law is laid down in Article 32 para. 1 SCO. According to that provision, the rights and obligations arising from a contract made by an agent in the name of another person accrue to the person represented, and not to the agent. Authorization for the representation of another person may be express or implied (Article 1 para. 2 SCO). Moreover, according to Article 33 para. 2 SCO, where such authority is conferred by means of a transaction, its scope is determined by that transaction.

- Moreover, in the context of commercial entities, individuals may bindingly act for an enterprise based on a registered power of attorney (Articles 458 et seq. SCO) and on commercial agency (Article 465 SCO). Consequently, any person duly authorized to act for an entity may legitimately represent it, irrespective of whether that person is effectively entered in the Commercial Register or not. The first element to determine whether an individual acted with authorization is the office the relevant individual holds for the entity he or she represents. In particular, the competences, duties and responsibilities need to be considered: if an individual is assigned a specific area of business to deal with and take responsibility for, it is assumed that the principal also bestows that individual with the necessary authorizations to fulfil the related tasks (Article 396 para. 2 SCO).

- Mr Baldys is the sports director of the Appellant. He acted in this capacity in the case at hand. Communication between the two clubs always went through Mr Baldys, and it did so from the very beginning. It was also Mr Baldys who granted the permission to start negotiations with the Player. Indeed, one of the primary duties of a sports director is to negotiate and conclude transfer agreements with players and their clubs. It is notorious that sports directors regularly possess the necessary authorizations from their clubs to conclude such contracts.

- Another pivotal element is the behaviour of the person acting as representative. In this connection, it is examined whether that person made reservations as to necessary approval by another person or body and/or communicated on behalf of the entity itself or of a plurality of people within that entity (in particular by using plural form in communications), or only in his or her own name. From the language in Mr Baldys's

emails, the Second Respondent never had a reason to assume that he would not be acting with the necessary authorization from the Appellant. Since Mr Baldys did never indicate otherwise that he would not have been properly authorized neither, the Second Respondent even had less reason to suspect that any necessary authorization would be missing.

- Secondly, the Appellant is bound by the actions of Mr Baldys based on authorization by appearance and authorization by acquiescence. Based on the provisions governing authorization, under Swiss law, authorization may not only have legal effect in case there is an express authorization by the represented person to the representative. Rather, acts of a representative may also be legally binding for the represented person by virtue of authorization by appearance or authorization by acquiescence (SFT 141 III 289 c. 4.1; 120 II 197 c. 2; Decision of the SFT 4A_710/2014 of 3 July 2015, c. 4.1). Based on these generally accepted legal concepts, it is possible that authorization takes effect – in contrast to an express authorization – also tacitly or even against the represented person's will. According to the jurisprudence of the SFT it is in particular justified to apply the concept of authorization by appearance and authorization by acquiescence in commercial transactions: There, it shall be prevented that one party bears the risk of untransparent or overly complex organization of the other. As a legal allocation of risk, in cases where the represented entity should have been aware of the actions of its representative and could have prevented them, the represented entity shall bear the risk of lack of an express authorization (SFT 120 II 197 c. 2b/bb; Decision of the SFT 5C.244/2002 of 20 January 2003, c. 3.2.2). If the Appellant's board had indeed not agreed to the transfer, it could easily have issued a corresponding instruction to Mr Baldys, which it did not. By not doing so, Mr Baldys obtained at least an authorization by acquiescence from the Appellant to act on its behalf regarding the transfer of the Player.

- Thirdly, if CAS should hold that Mr Baldys could not represent the Appellant, Mr Baldys would become personally liable to the Player and to the Second Respondent. It would be evident that Mr Baldys would have acted as a so-called false procurator (representative without an authorization). This would mean that he would become liable to the Player and to the Second Respondent for any damage caused to them (Article 39 SCO). In this case, the Player would immediately turn to him and claim from him the damage suffered such as legal expenses, reputational damage, loss of income, etc.

- The longstanding and well-established jurisprudence of the FIFA DRC indicates that only a breach or misconduct, which is of a certain severity, justifies the termination of a contract. ln other words, only when there are objective criteria which do not reasonably permit to expect a continuation of the employment relationship between the parties, a contract may be terminated prematurely. A premature termination of an employment contract can only ever be an ultima ratio measure. Both the FIFA DRC and the CAS regularly assess the question of when there is a valid reason for terminating a contract under Swiss law, in particular by referring to literature and case law on Article 337 SCO. The concept of "just cause" in Article 337 para. 1 SCO – coinciding with the just cause pursuant to Article 14 FIFA RSTP – is an undefined legal concept which the judge always concretizes in individual cases at his discretion (SFT 130 III 32; SFT 127 III 155).

- In the Player's view, therefore, the facts at hand illustrate that the conditions for dismissal in *casu* were met, since the behaviour of the Appellant severely and irreparably disturbed the relationship of trust between the Appellant and the Player. The termination by the Player was therefore lawful with just cause. With regard to the amount of damage alleged by the Appellant, it should then be noted that the transfer compensation negotiated between the clubs amounted to EUR 50'000, which is why the Appellant cannot simply claim the amount of EUR 300'000 under this heading, but is held liable for the amount of EUR 50'000.

37. The First Respondent submitted in its Answer the following prayers for relief:

"1. The Appeal by MKS Cracovia SSA shall be dismissed.

2. Alternatively, the Appeal by MKS shall [be] partially upheld and the Respondents shall pay the Appellant an amount not higher than EUR 50,000 without any interests accrued.

3. The Appellant shall bear the arbitration costs and the Panel shall grant the Respondents a contribution towards their legal fees according to Article R64.5 CAS Code".

C. The Second Respondent

38. The Second Respondent's submissions, in essence, may be summarised as follows:

- The two clubs effectively concluded a Transfer Agreement for the Player, which, as FIFA recognised, implies the consent by the Appellant to the Player to terminate their employment relationship. Therefore, as again accepted by FIFA, the Player was able to sign for the Second Respondent.

- Later on, the Appellant violated the Transfer Agreement by illegitimately withdrawing its acceptance and preventing the Second Respondent to complete the administrative procedure of FIFA TMS for the issuance of the relevant ITC and transfer of the Player's registration. Its abusive conduct cannot be protected.

- On a subsidiary basis, by acting in an inconsistent manner during the entire negotiations and by – on a parallel basis – infringing in several ways the Player's rights, the Appellant left the Player with no other choice than to terminate his Contract with (further) just cause to the authorization previously granted by the same Appellant.

- Therefore, neither the Player nor the Second Respondent shall be held liable to pay any compensation to the Appellant – as FIFA correctly held in the FIFA Decision – but, nonetheless, the amount of compensation asked by the Appellant is miscalculated and excessive.

- Before FIFA, the Appellant firmly denied having entered into a transfer agreement of the Player with the Second Respondent, while it never raised any purported lack of powers of Mr Baldys to represent the Club in conducting and finalizing the relevant negotiations.

Now, before CAS, the Appellant suddenly changed its position on this topic and correctly concurred with the Second Respondent that a transfer agreement existed although it – incorrectly – claimed that Mr Baldys was not authorized by the Appellant to conclude it.

- The Second Respondent reiterates that the Player's transfer agreement was concluded under Articles 1 and 9 SCO, according to which a contract is concluded once the acceptance (which must be then complete and unconditioned) is received by the offeror. After having sent its acceptance, the offeree may prevent the conclusion of a contract only if the withdrawal of the acceptance is received by the offeror prior to or at the same time of the acceptance itself. In addition, an agreement is concluded only if the parties have, reciprocally and by mutual assent, expressed their common intent on all essential points.

- As regards the alleged violation by FIFA of its Procedural Rules, FIFA perfectly summarized all the facts of the case, formulated the two main legal questions at stake, even acknowledging the diverging positions of the Parties in this regard, answered them by accepting the Respondents' position and issued a consistent judgment. In any case, it is well-established CAS case law that purported procedural defects in the lower instances can be cured through the *de novo* hearing before CAS (see CAS 2015/A/4162, paras. 70 et seq., CAS 2014/A/3848 paras. 53 et seq., CAS 2013/A/3256 paras. 261 et seq.).

- Under Swiss law, misrepresentation and its effects are regulated under Articles 33 and 38 SCO. The general rule under Article 38 SCO recalled by the Appellant is mitigated by the provisions under Article 33 SCO. Indeed, according to Swiss doctrine and jurisprudence, in the absence of a formal legal requirement, representative powers may be granted either expressly or by means of conclusive acts. Powers granted by means of conclusive acts are often referred to as cases of tolerated power of attorney and apparent power of attorney. In the case of tolerated powers of attorney, the principal knows that the agent is acting on its behalf vis-a-vis a third party, whereas in the case of apparent powers of the attorney the principal does not know but should have known if he was paying due attention. If representative power was granted either explicitly or by means of conclusive acts at internal level, it is not necessary to consider the good faith of the third party and the contract (the Player's Transfer Agreement in this case) binds the principal (the Appellant) to the third party (the Second Respondent). Conversely, if representative power was not granted either explicitly or by means of conclusive acts at internal level, in order for the contract to bind the principal to the third party, it is instead necessary that the third party was in good faith. The Second Respondent considers that Mr Baldys, in his capacity of the Appellant's Sporting Manager, enjoyed both a tolerated power of attorney as well as an apparent power of attorney within the Appellant.

39. The Second Respondent submitted in its Answer the following prayers for relief:

"I. The appeal filed by MKS Cracovia SSA is dismissed;

II. The FIFA Decision is upheld and confirmed;

III. MKS Cracovia SSA shall bear all the costs of this arbitration procedure;

IV. MKS Cracovia SSA shall compensate FC Lugano SA for the legal and other costs incurred in connection with this arbitration procedure in an amount to be determined at the discretion of the Panel, but not less than CHF 20,000".

V. JURISDICTION

40. The jurisdiction of CAS, which is not disputed by the Parties, derives from Article 58 (1) of the FIFA Statutes (2019 edition) as it determines that *"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 receipt of the decision in question".*

41. The jurisdiction of CAS further derives from Article R47 of the CAS Code and was confirmed by the Orders of Procedure signed by the Parties.

42. It follows that CAS has jurisdiction to decide on the present dispute.

VI. ADMISSIBILITY

43. The Appellant filed its Statement of Appeal within the deadline of 21 days from the receipt of the Appealed Decision as set by Article 58 (1) of the FIFA Statutes. The Statement of Appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee of CHF 1,000.

44. The admissibility of the appeal is not disputed by the Respondents.

45. Consequently, it follows that the appeal is admissible.

VII. APPLICABLE LAW

46. Article R58 of the CAS 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 that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

47. The Panel observes that the Appellant did not make any submissions on the applicable laws and regulations; however, in its Appeal Brief, it relies on Swiss law and the FIFA Regulations. The Respondents argue that the FIFA Regulations and, subsidiarily, Swiss law are applicable to the dispute.

48. The Panel notes that, as the Appealed Decision is a FIFA Decision, Article 57 (2) of the FIFA Statutes applies, which reads as follows: *"The provisions of the CAS Code of Sports-related Arbitration*

shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".

49. Therefore, the Panel shall apply primarily the various FIFA Regulations and, additionally, Swiss law.

VIII. MERITS

A. The main issues

50. The main issues in this case to be decided by the Panel are:

i. Does the Appealed Decision have to be set aside due to a violation of the FIFA Procedural Rules or due to the lack of referral to a legal principle?

ii. If not, did Appellant and the Second Respondent conclude a valid transfer agreement in relation to the definitive transfer of the Player or did the Player terminate his employment agreement with the Appellant without just cause?

iii. Are the Respondents jointly and severally liable to pay any compensation to the Appellant?

B. The Appealed Decision

51. The Appellant primarily argues that the Appealed Decision should be set aside due to the fact that the FIFA DRC violated Articles 14.4 lit. f and g of the FIFA Procedural Rules. According to the Appellant, the reasoning of the Appealed Decision is very vague and the Appealed Decision does not provide at all the outcome of the evaluation of evidence, and, therefore, it is almost impossible to say with certainty which statements of the Parties are established as facts by the FIFA DRC. The Appellant further argues that the Appealed Decision is unlawful as it does not refer to any legal principles that apply to the matters in dispute.

52. The Panel observes that Articles 14.4 lit. f and g of the FIFA Procedural Rules read as follows:

"4. Written decisions shall contain at least the following: […]

f) the reasons for the findings;

g) the outcome of the evaluation of evidence".

53. The Panel further observes that the Appealed Decision reads under chapter II. 'Considerations of the Dispute Resolution Chamber', point 4 as follows:

"The competence of the Chamber and the applicable regulations having been established, the DRC entered into the substance of the matter. In this respect, the members of the Chamber started by acknowledging all the

abovementioned facts as well as the arguments and the documentation submitted by the parties. However, the Chamber emphasised that in the following considerations it will refer only to the facts, arguments and documentary evidence, which he considered pertinent for the assessment of the matter at hand".

54. Furthermore, when analysing the Appealed Decision, the Panel observes that the Appealed Decision contains the reasons, although not extensive, for the findings of the FIFA DRC, as well as the evaluation of evidence, since the FIFA DRC refers to several e-mails and documents that were filed as exhibits by the Parties. These evidential documents were considered by the FIFA DRC as relevant and material in assessing the matter and reaching the Decision.

55. Therefore, the Panel finds that the Appealed Decision does not violate Articles 14.4 lit. f and g of the FIFA Procedural Rules.

56. Further, the Appellant argues that the Appealed Decision is unlawful as it does not refer to any legal principles that apply to the matters in dispute.

57. The Panel observes that the Appealed Decision does indeed not refer to any legal principle or any applicable laws or regulations on which its decision is based. Nevertheless, the Panel also observes that Article 14.4 of the FIFA Procedural Rules reads as follows:

"The motivated decisions shall contain at least the following: a) the date of the decision (for decisions taken by way of circular, the date of completion of the circular process); b) the names of the parties and any representatives; c) the names of the members participating in the decision taken by the decision-making body; d) the claims and/or motions submitted by the parties; e) a brief description of the case; f) the reasons for the findings; g) the outcome of the evaluation of evidence; h) the findings of the decision".

58. The Panel observes that the Appealed Decision contains all the elements as provided for in Article 14.4 of the FIFA Procedural Rules. Moreover, the FIFA DRC is not considered to fulfil the same requirements in its decision-making as may be the case with state courts in some countries, as the FIFA DRC is a mere first instance body on a sports federation level. Although there are several minimal requirements to be met, such as the rights of defence as provided for in Article 6 ECHR, it is not required for the FIFA DRC to refer in its decisions to any laws, regulations or legal principles to support its findings.

59. The Panel notes that in Chapter II. para. 3 of the decision, the FIFA DRC explained that the applicable regulations governing the substance of the matter are the FIFA RSTP in its 2018 edition. However, these regulations as such does not establish the legal framework to decide whether a transfer agreement was indeed concluded or not. Indeed, and without derogating from the reasons explained in para. 69 *supra*, it would have been expected that the FIFA DRC, considering its role and duties, would explain, even shortly, the legal concept that based on the proven facts supports the finding that a transfer agreement was concluded.

60. Yet, the Panel wishes to point out that the facts and the law are examined *de novo* by the CAS in accordance with the power bestowed on the Panel by article R57 of the CAS Code. The Panel is therefore not limited to the facts and legal arguments of the previous instance. In

relation to issues regarding the procedure at the lower instance, it is well-established in CAS case law that procedural defects in the lower instances can be cured through the *de novo* hearing before CAS (see e.g. CAS 2013/A/3256; CAS 2014/A/3848; CAS 2015/A/4162; CAS 2016/A/4704).

61. On the basis of the foregoing and on the CAS Panel's power to examine the case *de novo,* and considering the assessment of the fact as will be presented in Chapter C *infra,* the Panel finds that the Appealed Decision is not unlawful and does not have to be set aside.

C. The Transfer Agreement

62. The Appellant subsidiarily argues that the Parties did not conclude a valid transfer agreement, and that, therefore, the Player terminated his employment contract with the Appellant without just cause. According to the Appellant, the Parties never formally signed a final and binding transfer agreement, as the Appellant finally did not agree with the transfer anymore. Moreover, the Appellant argues that the person conducting the transfer negotiations with the Respondents, Mr Tomasz Baldys, was not legally authorised to sign a transfer agreement in the name of the Appellant.

63. The Respondents, however, argue that, although the Appellant did not formally sign the Transfer Agreement in the end, the Parties had agreed and accepted the definitive transfer of the Player for an amount of EUR 50,000, which makes the Transfer Agreement binding, even if it was not signed by the Appellant. Furthermore, the Appellant's sportive director, Mr Baldys, negotiated for the Appellant from the beginning to the end, on the basis of which the Respondents were allowed to believe in good faith that Mr Baldys was authorised to conduct these negotiations and to sign the agreement on behalf of the Appellant.

64. The Panel observes that it is not disputed between the Parties that the Appellant and the Second Respondent entered into negotiations in relation to the permanent transfer of the Player.

65. In this regard, the Panel further observes that it is not disputed between the Parties that the Appellant released the Player on 25 July 2018 until 6 August 2018 from its obligations with the Appellant and authorised the Player on 30 July 2018 to travel to the Second Respondent to negotiate the terms of his possible new employment contract and to undertake the medical exams. The Panel particularly notes that said letter was signed by the vice-president of the board of the Appellant only, Mr Jakub Tabisz, despite the fact that pursuant to the excerpt from the commercial registry, any statement or documents must be made or signed on behalf of the company by two members of the management board.

66. The Panel also notes that several drafts of the Transfer Agreement were exchanged between the Appellant (represented by Mr Tomasz Baldys) and the Second Respondent (represented by Mr Luca Baldo), including the following relevant e-mails:

- 30 July 2018, 18h55, from Mr Baldys to Mr Baldo:

"[…] please find our final version of the agreement enclosed that we are ready to sign. We cannot accept long payment date. We are looking to receive money until August 4th without any deduction. […]".

- 31 July 2018, 10h49, from Mr Baldo to Mr Baldys:

  "[…] please find enclosed the Transfer Agreement amended. […]".

- 31 July 2018, 13h12, from Mr Baldo to Mr Baldys:

  "[…] Hereunder an alternative proposal concerning terms of payments:

  1st instalment: CHF 30.000 not later than 31.10.2018 2nd instalment: CHF 20.000 not later than 31.12.2018 […]".

- 31 July 2018, 16h38, from Mr Baldys to Mr Baldo:

  "[…] we are able to accept conditions mentioned below (of course in EUR not CHF, it was pointed in the agreement, we have never discussed about CHF) that the first instalments will be paid in august. As I mentioned Giovanni on the phone we need to pay 10.000 EUR of tax to polish tax authorities from this transfer fee right away.

  If you deduct 10.000 EUR from these instalments (for the purpose of 1st instalment), payment dates of 2nd and 3rd instalment can stay as you proposed.

  I would like to also clarify if you accept our final version of the agreement. […]".

- 31 July 2018, 16h54, from Mr Baldo to Mr Baldys:

  "[…] we are glad that you accepted, but let me understand well and please confirm me the following terms of payment:

  - 1st instalment: EUR 10.000 not later than 31.08.2018;
  - 2nd instalment: EUR 20.000 not later than 31.10.2018;
  - 3rd instalment: EUR 20.000 not later than 31.12.2018.

  Is that correct?

  In case of positive answer, I look forward to receiving the final draft of the Transfer Agreement.

  Forgive me for CHF: it was a mistype. […]".

- 31 July 2018, 20h31, from Mr Baldys to Mr Baldo:

  "[…] we are able to accept following but under condition that we do not make any amendments to final version of the transfer agreement that we sent (except payment dates). […]".

- 31 July 2018, 21h26, from Mr Baldys to Mr Baldo:

"[…] Hereby I inform you that we are weary of these negotiations and we do not agree for this transfer anymore. […]".

67. On the basis of these e-mail correspondence between the Appellant and the Second Respondent, the Panel finds that a valid and binding oral agreement between the Parties was concluded, as there was a clear and mutual understanding regarding the transfer of the Player, on the transfer fee of EUR 50,000 in total, and finally, on the payment conditions of the transfer fee.

68. The mere fact that the agreement was not consequently signed in writing by the Appellant does not mean that no agreement was entered into. On the contrary, the agreement between the clubs is clear from the correspondence, where the offer including all essential elements of the transfer of the Second Respondent was finally accepted in full by the Appellant by its e-mail of 31 July 2020 at 20h31. The fact that the Appellant one hour later informed the Second Respondent by its e-mail of 31 July 2020 at 21h26 that it did not agree with the transfer anymore proves the existence of the agreement, as the words *"we do not agree […] anymore"* show an acknowledgement of the Appellant that there was an agreement before, which cannot unliterally be withdrawn as if it never existed.

69. The Panel also observes that the Appellant denied the existence of a transfer agreement before FIFA DRC, on the basis that the transfer was finally not concluded due to a lack of signature from the Appellant; however, before CAS, the Appellant seems to acknowledge the existence of the Transfer Agreement, but tries to convince the Panel that the Transfer Agreement was not enforceable as it was concluded by an unauthorised person, being Mr Tomasz Baldys, who did not have the power to sign such agreement in name and for the account of the Appellant.

70. In this regard, the Panel observes that the Appellant conducted its negotiations from start to end through Mr Tomasz Baldys, its sportive director, who always used his official e-mail address of the Appellant. The Panel further observes that from the drafts of the transfer agreement exchanged between the clubs, it seems that the transfer agreement was drafted by Mr Jakub Tabisz, being the vice-president of the Appellant, which shows that Mr Baldys was not acting alone. Moreover, in his e-mails, Mr Baldys always addressed the Second Respondent with the word "we" instead of "I", thus clearly always representing the Appellant in its communication to the Second Respondent.

71. In addition, according to legal doctrine, the Panel notes that upon initiation of contract negotiations, there is a duty to inform the other party – at least to some extent – about facts which could be of decisive importance to that party (ECKERT M., Basel Commentary on the SCO, vol. II, 5th edition, art. 933 no. 7). This duty arises from Articles 2 and 3 of the Swiss Civil Code (SCC; SFT 106 II 346 c. 4). With specific regard to commercial registry entries, not consulting the commercial registry cannot be held against a person acting in good faith, provided that it was the other party who gave rise to the belief that the power to represent was organised differently than stated in the commercial registry (ECKERT, loc. cit).

72. Mr Baldys clearly never gave any indication, or made any reservation, that he would not be entitled to represent the Appellant and/or that approval by the Appellant's board or individuals entered into the commercial registry would be needed.

73. Under Swiss law, the principles of agency/authorisation/representation are laid down in Articles 32 – 40 SCO. In this regard, the Panel considers the following provisions to be relevant:

- Article 32 SCO (Agency / I. With authorisation / 1. In general / a. Effect of agency):

  "1. The rights and obligations arising from a contract made by an agent in the name of another person accrue to the person represented, and not to the agent.

  2. Where the agent did not make himself known as such when making the contract, the rights and obligations arising therefrom accrue directly to the person represented only if the other party must have inferred the agency relationship from the circumstances or did not care with whom the contract was made.

  3. Where this is not the case, the claim must be assigned or the debt assumed in accordance with the principles governing such measures".

- Article 33 SCO (Agency / I. With authorisation / 1. In general / b. Scope of authority):

  "1. Where authority to act on behalf of another stems from relationships established under public law, it is governed by the public law provisions of the Confederation or the cantons.

  2. Where such authority is conferred by means of the transaction itself, its scope is determined by that transaction.

  3. Where a principal grants such authority to a third party and informs the latter thereof, the scope of the authority conferred on the third party is determined according to wording of the communication made to him".

- Article 38 SCO (Agency / II. Without authority / 1. Ratification)

  "1. Where a person without authority enters into a contract on behalf of a third party, rights and obligations do not accrue to the latter unless he ratifies the contract.

  2. The other party has the right to request that the represented party ratify the contract within a reasonable time, failing which he is no longer bound by it".

(underlining by the Panel)

74. Based on the provisions governing authorization, under Swiss law, authorisation may not only have legal effect in case there is an express authorisation by the represented person to the representative. Rather, acts of a representative may also be legally binding for the represented person by virtue of authorisation by appearance or authorisation by acquiescence (SFT 141

III 289 c. 4.1; 120 II 197 c. 2; Decision of the SFT 4A_710/2014 of 3 July 2015, c. 4.1). Based on these generally-accepted legal concepts, it is possible that authorisation takes effect – in contrast to an express authorisation – also tacitly or even against the represented person's will.

75. An authorisation by appearance exists if, on one hand, the person being represented has no knowledge that another person is acting as his or her representative but should have been aware of the representative's actions if he or she had paid due attention and, on the other hand, the representative may in good faith consider the behaviour of the person represented as an authorisation (SFT 141 III 289 c. 4.1 and c. 4.4.2; Decision of the SFT 4A_710/2014 of 3 July 2015, c. 4.1; MÜLLER R., Haftung für Unterschriften im Namen einer Gesellschaft, in: KUNZ P. et al. [ed.], Entwicklungen im Gesellschaftsrecht V, 2010, pp. 175 et seqq., pp. 182 and 196 et seq.). In case the person represented knows, in turn, that he or she is being represented without or against his or her will but nevertheless does not intervene against such unsolicited representation, an authorisation by acquiescence exists (SFT 141 III 289 c. 4.1; Decision of the SFT 5A_500/2010 of 12 October 2010, c. 6.2.2; GAUCH/SCHLUEP/SCHMID/REY/EMMENEGGER, Schweizerisches Obligationenrecht Allgemeiner Teil, 10th edition, N 1409 et seqq.; MÜLLER, loc. cit., p. 182; WATTER R., Basel Commentary on the SCO, Volume I, 6th edition, art. 33 no. 16).

76. Authorisation by appearance and authorisation by acquiescence may both also apply in a case where a representative is expressly empowered to represent another person but only collectively together with another person. The rules on the protection of third parties' good faith also apply in cases where a collective representative acts alone rather than – in accordance with the actual subjective scope of the authorisation – together with others. In other words, Article 33 para. 3 SCO does not only refer to the material but also to the subjective scope of the authorisation (GAUCH/SCHLUEP/SCHMID/REY/EMMENEGGER, loc. cit., N 1434).

77. According to the jurisprudence of the SFT it is in particular justified to apply the concept of authorisation by appearance and authorisation by acquiescence in commercial transactions: there, it shall be prevented that one party bears the risk of untransparent or overly complex organisation of the other. As a legal allocation of risk, in cases where the represented entity should have been aware of the actions of its representative and could have prevented them, the represented entity shall bear the risk of lack of an express authorisation (SFT 120 II 197 c. 2b/bb; Decision of the SFT 5C.244/2002 of 20 January 2003, c. 3.2.2).

78. Authorisation by acquiescence is defined as the non-intervention of the represented party against a representation known to him or her but against his or her will. Accordingly, the only decisive factor is whether in the specific case the represented person tolerates the actions of the representative; what happens before or after this is irrelevant. Therefore, there needs to be one such acquiescence which relates to the concrete case. Conversely, a single acquiescence on the part of the represented person is sufficient if it relates to this very case. In this case, Mr Baldys had no reason to assume that the Appellant disagreed to his acting as the club's representative in the transfer negotiations, and the conclusion of the transfer agreement, concerning the Player. Also, the board of the Appellant was aware at all times of the negotiations conducted by Mr Baldys (see in particular Mr Baldys' use of the "we" form and Mr Tabisz's drafting of the transfer agreement) but never intervened. If the Appellant's board

had indeed not agreed to the transfer, it could easily have issued a corresponding instruction to Mr Baldys which it did not. By not doing so, Mr Baldys obtained at least an authorisation by acquiescence from the Appellant to act on its behalf regarding the transfer of the Player.

79. Also, as evidenced by the release letter, the Appellant itself did not sign all documents in accordance with the requirements set forth in the commercial registry; thus, relying upon such requirement for the signing of the Transfer Agreement is equal to a *"venire contra factum proprium"* with is contrary to the principle of good faith of Article 2 SCC.

80. On the basis of all of the above, the Panel finds that the Second Respondent could in good faith assume that Mr Baldys was authorised to enter into the Transfer Agreement. By confirming the agreement of the Appellant with the last draft of the Transfer Agreement, a binding agreement between the Parties came into force, which could not unilaterally be withdrawn by the Appellant.

81. It follows that the Appellant and the Second Respondent concluded a valid transfer agreement in relation to the definitive transfer of the Player and that the Player accordingly did not terminate his employment agreement with the Appellant without just cause.

D. Compensation

82. Taking into account the fact that the Panel found that the Player did not terminate his employment agreement with the Appellant without just cause, the Appellant's claim for compensation on the basis of Article 17 FIFA RSTP is rejected.

83. Nevertheless, as it was established that the Parties concluded a valid Transfer Agreement in relation to the definitive transfer of the Player on the basis of which the Second Respondent had to pay an amount of EUR 50,000 to the Appellant, the Panel finds that the Second Respondent still owes the amount of EUR 50,000 to the Appellant.

84. Moreover, in accordance with Articles 104 and 105 SCO, an interest rate of 5% is due as of 14 November 2018, being the date when the Appellant filed its claim before FIFA, as requested by the Appellant in its prayers for relief.

E. Conclusion

85. On the basis of the foregoing, the Panel finds that:

i. the Appealed Decision does not have to be set aside due to a violation of the FIFA Procedural Rules or due to the lack of referral to a legal principle;

ii. the Appellant and the Second Respondent concluded a valid transfer agreement in relation to the definitive transfer of the Player, and, therefore, the Player did not terminate his employment agreement with the Appellant without just cause;

iii. the Second Respondent is, on the basis of the Transfer Agreement, liable to pay to the Appellant compensation in the amount of the transfer fee of EUR 50,000, with an interest of 5% per annum as of 14 November 2018 until the date of effective and complete payment.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by MKS Cracovia SSA against the decision rendered by the FIFA Dispute Resolution Chamber on 5 December 2019 is partially upheld.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 5 December 2019 is amended as follows:

   FC Lugano SA is ordered to pay a transfer fee in the amount of EUR 50,000 (fifty thousand Euros) to MKS Cracovia SSA, in return for the definitive transfer of the player Miroslav Covilo, with an interest of 5% per annum as of 14 November 2018 until the day of full payment.

3. (…).

4. (…).

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