



**Arbitration CAS 2011/A/2436 Associação Académica de Coimbra – OAF v. Suwon Samsung Bluewings FC, award of 25 May 2012**

Panel: Mr Dirk-Reiner Martens (Germany), President; Mr Efraim Barak (Israel); Mr Michael Beloff QC (United Kingdom)

*Football*

*Transfer*

*Decision of the federation*

*Interpretation of the words “final and binding”*

*Starting time of the 21-days time limit for appeal*

*Waiver of the right to appeal*

1. On a formal level, if the findings of the decision carry the heading “Decision”, were passed by an organ of the federation and were signed by the federation’s Deputy Secretary General, they clearly bear all the requirements of a “decision” within the meaning of Article R47 of the Code. The fact that the decision is not motivated (i.e. reasoned) cannot, as such, affect its status as a “decision”.
2. The interpretation of the statutes and rules of a sport association has to be objective and always has to start with the wording of the rule which falls to be interpreted. The qualification of a decision as “final and binding” cannot be understood as an exception to Article 63 (1) of the FIFA Statutes so as to render an appeal inadmissible. Article 63(1) of the FIFA statutes itself stipulates that only “final decisions” issued by a FIFA body can be subject to an appeal, so as to establish the finality of a decision as a prerequisite for an appeal according to Article 63(1) of the FIFA statutes rather than an exclusion of its admissibility. Similarly, Article 63 (7) of the FIFA Statutes regulates the start date for an appeal against “internally final and binding doping related” decisions. The same reasoning applies to the words “final and binding” in combination as does to the words in isolation.
3. Article 15(1) of the Rules governing the procedures of the PSC and the DRC by stipulating that a decision becomes final and binding although no grounds for it have been notified to the parties, serves to start the running of the time period for appeal according to Article 63 (1) of the FIFA Statutes.
4. Contrary to the corresponding provision of the Swiss Code of Civil Procedure, that expressly provides that a party is deemed to waive its right to appeal if it does not request the reasons for a decision, Article 15(1) of the Rules governing the procedures of the PSC and the DRC does not express or contemplate such a consequence. If FIFA had intended to provide in Article 15(1) a result similar to that provided for in the corresponding provision of the Swiss Code of Civil Procedure, it would have had to use clear and precise language to achieve such a draconian consequence.

Associação Académica de Coimbra (“Coimbra” or “Appellant”) is a football club with its registered office in Coimbra, Portugal, and is a member of the Portuguese League for Professional Football (LPFP – Liga Portuguesa de Futebol Profissional) which itself is affiliated to the Portuguese Football Federation (FPF – Federação Portuguesa de Futebol) which in turn is a member of FIFA. FIFA is the world governing body for the sport of football and is registered in Zurich, Switzerland.

Suwon Samsung Bluewings FC (“Suwon” or “Respondent”) is a football club with its registered office in Suwon City, Republic of Korea and is a member of the Korea Professional Football League (K-League). The latter is affiliated to the Korea Football Association which in turn is a member of FIFA.

M. (the “Player”) is a Brazilian football player. Since the season 2003/04 the Player was registered with Suwon.

On 22 January 2005 the Appellant and the Respondent signed an agreement regarding the Player’s transfer from Suwon to Coimbra (the “Transfer Agreement”). The relevant parts of the Transfer Agreement read as follows:

- “1. *Samsung [Respondent] agrees to transfer the player [M.] (hereinafter called “Player”) to Académica [Appellant] under the following conditions.*
2. *Académica agrees to pay Samsung a total amount of USD 1.8 million (NET).*  
*The payment is set as following:*
  - *within 7 days after signed the contract: USD 500,000\$ (NET)*
  - *31 December, 2005: USD 500,000\$ (NET)*
  - *30 June, 2006: USD 400,000\$ (NET)*
  - *30 June, 2007: USD 400,000\$ (NET)*
3. *If Académica transfers the Player to another club before 31 December, 2006, Académica must pay rest of transfer money in lump to Samsung within 15 days.*
4. *Académica cannot transfer the Player to another club under:*
  - *USD 1,800,000 (NET) during season 2005/06;*
  - *USD 1,200,000 (NET) during season 2006/07;*
  - *USD 600,000 (NET) during season 2007/08,**and Académica also must pay 25% from the amount of total transfer money whenever Académica transfers the player to another club.*
5. *In case the Player suffers a lengthy injury or illness certified under medical report from Académica medical department, Académica will be allowed to promote the sale of the Player for a lower amount of those set in clause 4”.*

The transfer fee provided for in Section 2 of the Transfer Agreement has been paid to Suwon in full.

On 15 January 2006 Coimbra entered into two agreements with Sport Lisboa e Benfica, Futebol SAD (“Benfica”). Copies of these agreements have been provided by Coimbra but were partly or completely illegible because, according to Coimbra, the originals were damaged during an office move.

The first of these 15 January 2006 agreements relates to the loan of the Player to Benfica (the “Benfica Loan Agreement”). The copy of this agreement provided by Coimbra was completely illegible but a legible copy was found in the FIFA File made available to the Panel and the parties three days before the hearing. It reads in relevant part:

*“[Coimbra] cede temporariamente à 1ª [Benfica], que aceita, o jogador (...), desde 15 de Janeiro de 2006 até final de época 2005/06.*

*Artigo 2º – A cedência é gratuita”.*

Translation:

*“[Coimbra] transfers temporarily to the 1ª [Benfica], which accepts the player (...), as from 15 January 2006 until the season 2005/06.*

*Article 2 – The transfer is gratuitous”.*

The second 15 January 2006 agreement is entitled “*Contrato Promessa de Cedência Definitivo Direitos Desportivos*” (the “Definite Agreement”) and provides for the definite transfer of the Player to Benfica. To the extent legible (in this instance no copy was found in the FIFA File) it states in relevant part:

1. *Nesta data as 1ª e 2ª Outorgantes [Benfica and Coimbra] celebraram um contrato de cedência temporária do futebolista profissional [M.], até ao final da época 2005/06;*
2. *Pelo presente instrumento a 2ª Outorgante [Coimbra] promete ceder definitivamente, à 1ª [Benfica], o (illegible) ... promete comprar, os direitos desportivos que para si resultam da qualidade de en (illegible) ... patronal do futebolista profissional [M.].*
3. *A venda será feita pe (illegible) ..... no valor de 2.660.000 (dois milhões seiscientos a sessenta mil) Euros am dezanove prestações mensais, Iguais e sucessivas de 140,000 (cento e quarenta mil) Euros cada uma, vencendo-se a primeira no final do mês de Agosto de 2006 e as restantes no final dos meses subsequentes.*
- ....
6. *O contrato definitivo será celebrado após 30 de Junho de 2006, no prazo de cinco dias úteis a contar de interpeação para o efeito a fazer pela 1ª a 2ª Outorgante (illegible) ....*

Translation:

1. *On the present date, the 1ª and 2ª Grantors [Benfica and Coimbra] concluded a temporary transfer agreement for the professional football player [M.] until the end of the season 2005/06;*

2. *By means of this agreement the 2<sup>nd</sup> Grantor [Coimbra] hereby promises to transfer definitively to the 1<sup>st</sup> [Benfica], the (illegible) ... hereby promises to purchase the sportive rights derived from it in the quality of (illegible) ... employer of the of the professional football player [M].*
3. *The sale will be concluded (illegible) ..... for the value of 2'660'000 (two million six hundred and sixty thousand) Euros in nineteen monthly, equal and successive instalments of 140'000 (one hundred and forty thousand) Euros each, being the first instalment due in the end of August 2006 and the remaining instalments in the end of the subsequent months.*
- ....
6. *The definitive agreement will be signed after 30 June 2006, within a time limit of five business days as from the request of the 1<sup>st</sup> and 2<sup>nd</sup> Grantors to make (illegible) ....*

An amount of EUR 840,000 has been paid by Benfica to Coimbra at an unknown date (the FIFA File does not specify the date of the payment but the Decision awards interest as of 10 February 2006 which would indicate that this is the date of payment). Coimbra claims this payment to have been for the loan of the Player only.

In July 2006 the Player transferred to Benfica in accordance with the Definite Agreement.

Following the Player's transfer to Benfica Suwon encountered difficulties in collecting the fees due to it under the Transfer Agreement. Eventually, on 12 March 2007 Suwon asked FIFA "to take appropriate action that [Coimbra] strictly fulfill their duty of the contract between us".

On 24 July 2008 Coimbra paid to Suwon an amount of USD 300,000, i.e. 25% of the minimum transfer fee provided for in the Transfer Agreement for a transfer of the Player by Coimbra to another club during the season 2006/07. Coimbra originally claimed that this was all it owed under the Transfer Agreement but subsequently – and clearly correctly – conceded that it owed to Suwon 25% of whatever transfer fee was agreed, in accordance with clause 4 of the Transfer. Suwon accepts in its answer that USD 300,000 equalled EUR 191,235 at the relevant point in time.

Following Suwon's complaint to FIFA extensive correspondence ensued between the parties and FIFA.

On 5 April 2011 the Single Judge of the FIFA Players' Status Committee (the "FIFA PSC") rendered a decision without reasons (the "Decision") in accordance with Article 15 of the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber (the "PSC – DRC Procedural Rules").

The operative part of the Decision reads as follows:

1. *The claim of the Claimant, Club Suwon Samsung Bluewings FC, is accepted.*
2. *The Respondent, Club Associação Académica de Coimbra FC, has to pay to the Claimant, Club Suwon Samsung Bluewings FC, within 30 days as from the date of notification of this decision, the following amounts:*

- 2.1 EUR 18,765 in connection with the temporary transfer of the player [M.] to the Club Sport Lisboa e Benfica, as well as 5% interest per year on the said amount as from 10 February 2006;
- 2.2 EUR 665,000 in connection with the definitive transfer of the player [M.] to the Club Sport Lisboa e Benfica, as well as 5% interest per year on the same amount as from 18 August 2006.
3. The Claimant, Club Suwon Samsung Bluewings FC, is directed to inform the Respondent, Club Associação Académica de Coimbra FC, directly and immediately of the account number to which the remittance is to be made and to notify the Players' Status Committee of every payment received.
4. If the aforementioned sums are not paid within the aforementioned deadline, the present matter shall be submitted, upon request, to the FIFA's Disciplinary Committee for consideration and a formal decision".

The Decision further states the following:

**"Note relating to the findings of the decision** (art. 15 of the Rules governing the procedures of the Players' Status Committee and the Dispute Resolution Chamber):

*A request for the grounds of the decision must be sent, in writing, to the FIFA general secretariat **within 10 days** of receipt of notification of the findings of the decision. Failure to do so within the stated deadline will result in the decision becoming final and binding".*

Coimbra did not request the grounds for the Decision within the specified ten day time limit.

On 9 May 2011 Coimbra filed a Statement of Appeal with CAS against the Decision with the following prayer for relief:

*"The appealed decision to be cancelled in its entirety".*

On 18 May 2011 Coimbra submitted its Appeal Brief requesting the CAS to:

1. Establish that it is not liable to pay to Respondent any amount connected with the Player's loan to Benfica;
2. Establish that it is liable to pay to the Respondent the maximum amount of EUR 475.000,- in connection to the 25% over the Player's definitive transfer fee to Benfica, once deducted the already paid amount of USD 300.000,00/ EUR 190.000,00;
3. Establish that the Appellant is only liable to pay to the Respondent default interest at the rate of 5% p.a. over the amount mentioned in the previous point, as follows:
  - Default interest over EUR 20.000,00 as from 31 January 2007;
  - Default interest over EUR 35.000,00 as from 28 February 2007;
  - Default interest over EUR 35.000,00 as from 31 March 2007;
  - Default interest over EUR 35.000,00 as from 30 April 2007;
  - Default interest over EUR 35.000,00 as from 31 May 2007;
  - Default interest over EUR 35.000,00 as from 30 June 2007;
  - Default interest over EUR 35.000,00 as from 31 July 2007;

- *Default interest over EUR 35.000,00 as from 31 August 2007;*
  - *Default interest over EUR 35.000,00 as from 30 September 2007;*
  - *Default interest over EUR 35.000,00 as from 31 October 2007;*
  - *Default interest over EUR 35.000,00 as from 30 November 2007;*
  - *Default interest over EUR 35.000,00 as from 31 December 2007;*
  - *Default interest over EUR 35.000,00 as from 31 January 2008;*
  - *Default interest over EUR 35.000,00 as from 28 February 2008;*
4. *Establish that the costs of the present arbitration shall be entirely borne by the Respondent;*
  5. *Establish that the Respondent is liable to bear all the legal expenses incurred by the Appellant in a total amount still to be determined”.*

On 3 June 2011 Coimbra informed the CAS Court Office that the parties were currently in negotiations and requested, subject to confirmation by Suwon, an immediate suspension of the procedure for a period of 30 days.

By letter dated 4 June 2011 Suwon agreed to a stay of the proceedings for a maximum period of 30 days.

On 6 June 2011 the CAS Court Office stayed the proceedings for thirty days and suspended all deadlines.

On 7 July 2011 the CAS Court Office informed the parties that the suspension of the proceedings had ended on 6 July 2011 and that the procedure resumed as of 7 July 2011. The CAS Court Office informed Suwon that within 20 days of receipt of this letter it should submit to CAS the statement of defense, any defense of lack of jurisdiction and any exhibits or specifications of other evidence in accordance with Article R55 of the Code of sports-related Arbitration (the “Code”).

On 26 July 2011 Suwon submitted its answer to CAS, requesting the Panel

- “ *to rule that the Appellant has no right of appeal to CAS against the Appealed Decision and that the appeal is therefore inadmissible.*
- *Subsidiary and only in the event that CAS holds that the appeal is admissible, to rule that the appeal of the Appellant against the Appealed Decision is dismissed.*
- *In any event, to rule that*
  1. *The Appellant should bear the entirety of the arbitration costs for these appeal proceedings; and*
  2. *The Appellant bears substantially all of the Respondent’s legal costs”.*

On 12 September 2011 the CAS Court Office informed the parties that the Panel had decided to request Coimbra to produce by 19 September 2011 copies of the Benfica Loan Agreement and the Definite Agreement.

By letter dated 19 September 2011 Coimbra provided copies of the requested agreements which were for the most part illegible.

On 20 September 2011 the CAS Court Office requested Coimbra to send legible copies of the agreements submitted on 19 September 2011 as soon as possible.

On 5 October 2011 the CAS informed Coimbra that it had not received more legible copies of the requested agreements and therefore invited Coimbra to submit such legible copies by 11 October 2011 at the latest.

On 12 October 2011 the CAS Court Office informed the parties that Coimbra still had not submitted legible copies of the requested agreements. The CAS Court Office granted Coimbra a final deadline until 19 October 2011 to submit such documents.

On 26 October 2011 the CAS Court Office notified the parties that Coimbra had not provided legible copies of the enclosures annexed to its correspondence dated 19 September 2011. Therefore, the Panel informed the parties that it had decided pursuant to Article R57 of the CAS Code to hold a hearing in the present case on Monday 9 January 2012 unless the CAS Court Office heard otherwise from the parties by 2 November 2011.

On 28 October 2011 Suwon requested the Panel to consider to address the issue of admissibility in a preliminary award on the basis of the written submissions to date.

On 3 November 2011 the CAS Court Office informed the parties that the Panel had decided to bifurcate the proceedings and to decide on the admissibility of the Appeal in a separate award in accordance with Article 188 of the Swiss Federal Act on Private International Law (the “PIL Act”). In the same letter the parties were granted a deadline until 14 November 2011 to file additional submissions on the issue of the admissibility of the Appeal.

On 11 November 2011 Suwon made additional submissions regarding the admissibility of the Appeal.

On 17 November 2011 the CAS Court Office informed the parties that Coimbra had not filed any further submissions on the issue of admissibility of the Appeal and that further communication from the Panel would follow in due course.

On 20 December 2011 the CAS Court Office informed the parties that the Panel considered the present Appeal to be admissible pursuant to Article 15 (1) of the DRC – PSC Procedural Rules and that the grounds for such decision will be included in the final award. In the same letter the Panel advised the parties that in the present case, given the absence of the reasons for the appealed Decision, the Panel might have to limit its scope of review to one of the following options: either (i) to dismiss the Appeal, or (ii) to annul the Decision and to send the case back to FIFA, pursuant to Article R57 of the CAS Code.

On 6 January 2012, as a result of a renewed request by CAS the Panel received the FIFA File.

On 9 January 2012 a hearing (the “Hearing”) was held in Lausanne. At the Hearing the Panel advised the parties that as a result of its receipt of the FIFA File it was able to make a final determination in this matter. At the end of the Hearing, after having made submissions in support of their respective prayers for relief, the Parties confirmed that they had no objections to raise regarding the composition of the Panel or their right to be heard.

## LAW

### Jurisdiction of the CAS

1. The competence of CAS results from Article R47 (1) of the Code.
2. The aforementioned provision contains three conditions which must be met in order for CAS to have jurisdiction (cf. CAS 2008/A/1705 and CAS 2004/A/748):
  - a. There must be a “decision” of a federation, association or another sports-related body;
  - b. The parties must have agreed to the competence of the CAS; and
  - c. The (internal) legal remedies available must have been exhausted prior to appealing to CAS.

#### *A. Decision by a federation*

3. Although the Decision was issued without grounds, it clearly bears all the formal and substantive requirements of a “decision” within the meaning of Article R47 of the Code and the aforementioned CAS jurisprudences.
4. On a formal level, the findings of the Decision carry the heading “Decision”, were passed by an organ of FIFA (the FIFA PSC) and were signed by FIFA’s Deputy Secretary General. The fact that the Decision is not motivated (i.e. reasoned) cannot, as such, affect its status as a “decision” (cf. CAS 2008/A/1705, CAS 2008/A/ 1548 and CAS 2004/A/748).

#### *B. Consent to arbitrate*

5. According to Article R47 of the Code there is consent to arbitrate if the statutes or regulations of the body which has issued the appealed decision, provide for a right to appeal to CAS. The FIFA Statutes do so in Articles 62 (1) and 63 (1). In addition, the parties have acknowledged

the competence of CAS to deal with this dispute both in their written submissions and in the Hearing on 9 January 2012.

C. *Exhaustion of legal remedies*

6. The Decision passed by the FIFA PSC cannot be appealed before any other internal body of FIFA. The act of requesting the reasons of the Decision cannot be qualified as an “internal remedy” within the meaning of Article R47 of the Code (CAS 2008/A/1708).
7. Hence, the Panel finds that the requirements of Article R47 of the Code are fulfilled and that therefore the Panel has jurisdiction to decide the case at hand.

**Applicable Law**

8. At the Hearing on 9 January 2012 the parties have agreed that, subject to the primacy of applicable FIFA Regulations, Swiss Law shall apply complementarily.

**Admissibility**

9. According to Article R49 of the Code an appeal has to be lodged within a certain time limit with specific reference to the statutes and regulations of the federation whose decision is being appealed. The FIFA rules contain a deadline to file an appeal in Article 63 (1) of the FIFA Statutes, which reads as follows:

*“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.*

10. According to Suwon, such 21 day deadline in Article 63 (1) of the FIFA Statutes is not applicable in the present case because Coimbra failed to request the grounds for the Decision. Suwon’s contention is based mainly on Article 15 (1) of the DRC – PSC Procedural Rules which stipulates the following:

*“The Players’ Status Committee, the DRC, the single judge and the DRC judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision becoming final and binding”* (emphasis added).

11. In the Panel’s view, the qualification of a decision as “*final and binding*” cannot be understood as an exception to Article 63 (1) of the FIFA Statutes so as to render an appeal inadmissible.

12. This conclusion derives from an interpretation of the relevant FIFA rules, in particular Article 15 of the DRC – PSC Procedural Rules pursuant to the following analysis.
- (i) The interpretation of the statutes and rules of a sport association has to be objective and always has to start with the wording of the rule which falls to be interpreted.
  - (ii) In the Panel’s view, as a matter of principle the qualification of a decision as “*final and binding*” can mean as a matter of language either that it has that character within the organisation, a body of whose decision it is, or both within and outside that organisation.
  - (iii) The Panel must therefore further interpret Article 15 of the DRC – PSC Procedural Rules in its regulatory context.
  - (iv) Article 63(1) of the FIFA statutes itself stipulates that only “*final decisions*” issued by a FIFA body can be subject to an appeal, so as to establish the finality of a decision as a prerequisite for an appeal according to Article 63(1) of the FIFA statutes rather than an exclusion of its admissibility. Similarly, Article 63 (7) of the FIFA Statutes regulates the start date for an appeal against “*internally final and binding doping related*” decisions.
  - (v) The same reasoning applies to the words “*final and binding*” in combination as does to the words in isolation.
13. Suwon contends that Article 15.2 DRC – PSC Procedural Rules confirms its opinion that appeals against FIFA’s “*final and binding*” decisions are inadmissible by stipulating the following:
- “2. If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision”.*
14. In the Panel’s view, such rule only defines the start date of the 21-day time limit contemplated by Article 63 (1) of the FIFA Statutes by stipulating that it begins upon the notification of the grounds. An identical rule can be found in Article 14 (2) of the DRC – PSC Procedural Rules:
- “2. Decisions shall be communicated in writing. In urgent cases, the findings of the decision may be communicated first. In such a case, with the exception of article 15 below, the grounds of a decision shall be communicated within 20 days of notification of the findings of the decision. The time limit to lodge an appeal begins upon communication of the grounds of the decision to the parties”.*
15. The Panel finds that Article 15(1) DRC – PSC Procedural Rules by stipulating that a decision becomes final and binding although no grounds for it have been notified to the parties, serves to start the running of the time period for appeal according to Article 63 (1) of the FIFA Statutes.
16. The Panel agrees with the panel’s reasoning in CAS 2008/A/1708 which found that
- “(T)he grounds of the decision should not be considered as a pre-requisite for the appeal, because the CAS has the power to decide ex-novo and the appellant may (for any reason) consider it more beneficial to have the CAS review the case ex-novo without knowing the reasons and arguments behind the decision. If the grounds or*

*reasons for a decision are not considered as a pre-requisite for filing an appeal to the CAS, why should the appellant be limited to the 10 days deadline? And what would happen if the appellant decides to appeal to CAS before the 10 days deadline fixed under article 15 of the Rules Governing the FIFA Procedures lapses, and without also having requested for the grounds?*

*The Panel does not see, in light of article 63(1) of the FIFA Statutes, any reason to consider the appeal inadmissible in a case involving the scenarios described hereinabove”.*

17. The Panel does not share Suwon’s view that Article 239 of the Swiss Code of Civil Procedure (SCCP) justifies a different interpretation of Article 15 (1) DRC – PSC Procedural Rules. Article 239 SCCP provides that a party is deemed to have waived his right of appeal if he fails to request the reasons for a decision within a 10-day deadline.
18. Firstly, the Panel notes that the scope of an appeal according to Articles 308 et seq. SCCP is significantly different than an appeal to CAS according to Article R47 of the Code.
19. Article 310 SCCP defines the scope of an appeal as follows:

*“Grounds for appeal are:*

  - a. *incorrect application of the law;*
  - b. *incorrect establishment of the facts”.*
20. According to Article 310 SCCP appeals can only be based on a violation of the law and/or a wrongful determination of the facts by the first instance. Therefore, an appeal according to Articles 308 et seq. SCCP must be based on the grounds of the appealed decision. Thus, in the Panel’s view it makes sense for Article 239 SCCP to stipulate that a party is deemed to waive its right for an appeal if it does not request the grounds for a first instance decision since in the absence of such grounds the appeal court would be unable to determine whether there is a basis for the appeal according to Article 310 SCCP.
21. In contrast, according to Article R57 of the Code the Panel has *“full power to review the facts and the law”*. As repeatedly stated in CAS jurisprudence, this means that the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case in which it is not confined to merely deciding whether the body that issued the appealed ruling was correct or not.
22. Accordingly, it is the function of this Panel to make its independent determination as to whether the parties’ contentions are inherently correct rather than simply to assess the correctness of the first instance decision (see CAS 2007/A/1394, para. 21).
23. The Panel therefore finds that the *procedural principle* stipulated in Article 239 SCCP was not adopted by the Code.
24. Secondly, Article 239 SCCP expressly provides that a party is deemed to waive its right to appeal if it does not request the reasons for a decision. However, Article 15 (1) DRC – PSC

Procedural Rules does not express or contemplate such a consequence (see above). The Panel is of the opinion that if FIFA had intended to provide in Article 15 (1) DRC – PSC Procedural Rules a result similar to that provided for in Article 239 SCCP, it would have had to use clear and precise language to achieve such a draconian consequence.

25. This legal principle is also set out in Article 192 (1) PIL Act, which stipulates that parties:  
*“may, by express statement in the arbitration agreement or by a subsequent written agreement, waive fully the appeal of the arbitral awards”.*
26. Weaving these considerations together, the Panel finds that Article 15 (1) DRC – PSC Procedural Rules does not stipulate that Coimbra either waived its right to appeal or missed the time limit to appeal to CAS simply because it did not request the grounds for the Decision.
27. The Panel notes that in CAS 2011/A/2439 which, according to Suwon, confirms its position, the Sole Arbitrator came to a different conclusion with respect to the admissibility of an appeal against an unreasoned decision.
28. However, in that latter case the Sole Arbitrator analyzed Article 116 (1) of the FIFA Disciplinary Code (the “FDC”) and not Article 15 (1) DRC – PSC Procedural Rules. The wording of the Article 116 (1) FDC is different from the wording of Article 15 (1) DRC – PSC Procedural Rules, by stating that the failure to request the grounds for a decision:  
*“will result in the enforcement of the decision”.*
29. In the light of such different wording the Panel sees no conflict between its interpretation of Article 15 (1) DRC – PSC Procedural Rules and the interpretation by the Sole Arbitrator in CAS 2011/A/2439.
30. The Appeal filed on 9 May 2011 against the Decision notified to Coimbra on 18 April 2011 is admissible according to Articles 63 (1) of the FIFA Statutes (Edition 2010) and Article R47 of the Code.
31. The Panel recognizes the force of a conclusion contrary to that which it has adopted that it may well be that those who drafted the relevant rules intended that there be no appeal even to CAS after expiry of a 10 day deadline, and does not suggest that such a deadline could not properly be imposed.
32. The Panel notes that it is of course a matter for FIFA as to whether to amend the rules so as to put the issue beyond scope of argument.

## Merits

33. According to Article R57 of the Code the Panel has “*full power to review the facts and the law*”. As repeatedly stated in CAS jurisprudence, this means that the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case.
  34. Coimbra is asking this Panel to set aside the Decision. While recognizing that it still has to pay EUR 475,000 to Suwon, it contends that it owes nothing in respect of the EUR 840,000 “loan fee” and that default interest is only due as of the point in time when the individual instalments from Benfica as per the Definite Agreement became due and were paid.
  35. Suwon is asking this Panel to dismiss the appeal because in its opinion the Decision correctly determined that Coimbra owes 25% of the total fee received by Coimbra from Benfica for the loan/transfer of the Player, i.e. the EUR 2,260,000 officially declared as transfer fee under the Definite Agreement and the EUR 840,000 “loan” fee.
  36. The Panel must thus address the following two main issues:
    - (a) Was the payment of EUR 840,000 by Benfica to Coimbra made as a fee for the loan of the Player and, if so, was the loan a “transfer” of the Player within the meaning of Clause 4 of the Transfer Agreement?
    - (b) For purposes of determining the start date for default interest, did the transfer fee payable to Suwon under Clause 4 of the Transfer Agreement only become due when the respective instalments have actually been received by Coimbra from Benfica under the Definite Agreement?
- A. Were the EUR 840,000 paid for the loan?*
37. Coimbra argues that no fee is due to Suwon in respect of the payment of EUR 840,000 which Coimbra claims has been made in exchange for the loan. In Coimbra’s opinion, a loan cannot be considered as a “transfer” and thus does not trigger the 25% fee provided for in the Transfer Agreement in respect of a “transfer”.
  38. The Panel can leave the question undecided whether and under what circumstances a fee paid for a loan of a player has to be considered as a transfer fee. It would observe only that considerations of substance rather than form would determine such issue. It can abstain from resolution of that issue because the 15 January 2006 loan agreement between Coimbra, Benfica and the Player expressly and unequivocally provides that the loan is “*gratuita*”, i.e. free of charge. Coimbra’s statement to the contrary in its appeal of 18 May 2011 (section 5) and in the Hearing is not corroborated by any evidence. In fact, the Benfica Loan Agreement, clear on its face, could only have been amended, if at all, by a subsequent agreement, be it written or oral (in the latter case contrary to the FIFA rule requiring that loan agreements be made in writing, Article 10 of the FIFA Player’s Status Regulations). When confronted with

these facts at the Hearing, counsel for Coimbra did not even contend, let alone proffer any evidence, that there was such an amendment.

39. The Panel thus determines that the EUR 840,000 payment was not made by Benfica as a separate compensation for the Player's loan to Benfica and it follows inexorably that the EUR 840,000 was part of the transfer fee payable by Benfica to Coimbra in respect of the Player's move to Benfica. Since the initial loan of the Player to Benfica was "gratuita", the said sum can only form part of the compensation paid for the transfer of the Player to Benfica.
40. Consequently, the Panel finds that Coimbra owed 25 % of the total fee collected by Coimbra for the assignment of the Player's playing services to Benfica. As an amount of USD 300,000 has been paid by Coimbra on 24 July 2008 (i.e. EUR 191,235 at the time of payment, as has been agreed by Suwon) the total amount outstanding to Suwon is EUR 875,000 ./.. EUR 191,235, i.e. EUR 683,765.
- B. *Did the fee due to Suwon under clause 4 of the Transfer Agreement become due in a one-off lump sum upon conclusion of the Definite Agreement or only when Coimbra received the instalments as per the Definite Agreement?*
41. The Panel notes that the decisive clause in the Transfer Agreement for answering this question reads as follows:  
*"Académica also must pay 25% from the amount of total transfer money whenever Académica transfers the player to another club".*
42. In the Panel's view such wording does not provide an unequivocal answer to the above question:
43. On the one hand, the words *"total transfer money [must be paid] whenever Académica transfers the Player to another club"* favours Suwon's interpretation according to which the commission falls due at the point in time when the Player "transfers", irrespective of the dates of payment of the instalments. A similar result would be reached applying Article 75 of the Swiss Code of Obligations which provides the following:  
*"If neither the contract nor the nature of the legal relationship determines the time of performance, performance may be effected and claimed immediately".*
44. On the other hand, reasonable economic considerations would support a different interpretation:
45. When analysing the uncontested facts and the parties' submissions, and prior to awareness of the express stipulation in the Benfica Loan Agreement that the loan would be free of charge, the Panel also considered the likely economic intentions of the parties when agreeing on Suwon's share in proceeds generated by Coimbra from a move of the Player to another club. Suwon most likely would want to have a share of any revenue of Coimbra should Coimbra

assign the Player's playing services to another club (this consideration would also have supported the conclusion Suwon was to have benefitted also from a loan of the Player to Benfica). But similar considerations would lead to the conclusion that the 25 % fee to Suwon would only become due and payable if and when Coimbra actually collected its transfer fee from Benfica for it is hard to imagine that Coimbra was prepared (and able) not only to take the (insolvency) risk of having to pay very substantial amounts of money to Suwon while it (Coimbra) had not collected from Benfica the funds which gave rise to Suwon's share. Moreover, it is far from certain that a club of Coimbra's status would have been able to finance a payment of 25 % of the total "official" transfer fee of EUR 2,640,000.

46. Having weighed those two rival interpretations the Panel finds that the parties' intentions were (and thus their agreement was) to give Suwon its right to the 25% commission only if and when the instalments were paid.
47. Consequently, the Panel finds that Suwon's claims for the commission became due coincidental with each instalment payment made by Benfica. The dates of receipt of the instalments are set out in Coimbra's appeal brief and remained uncontested. Both parties have based their calculation of interest on a rate of 5 % which is the statutory default interest rate under Swiss law (Article 104 of the Swiss Code of Obligations).
48. The FIFA File indicates that Benfica's first payment of EUR 840,000 was made on 10 February 2006. According to the Panel's findings set out above, on the same date the Respondent's claim for commission against the Appellant in the amount of EUR 210,000 (25% of EUR 840,000) became due. As an amount of USD 300,000 has been paid by Coimbra on 24 July 2008 (i.e. EUR 191,235 at the time of payment, as has been agreed by Suwon) there remains a claim of the Respondent in the amount of EUR 18,765 (EUR 210,000 ./ EUR 191,235) regarding this first instalment.
49. Consequently, the Respondent is entitled to interest on EUR 18,765 as from 10 February 2006.
50. The Panel further finds that in respect of the Respondent's remaining claim for EUR 665,000 (EUR 683,765 ./ EUR 18,765) the respective claim for interest started with each of the nineteen instalments paid by Benfica (which remained uncontested) on the last day of every month between 31 August 2006 and 28 February 2008.
51. The Panel is of the opinion that it has to award the Respondent the abovementioned interests corresponding to the dates of the instalment payments although this was not explicitly requested by the Respondent. The Respondent requested the Panel to dismiss the Appeal and to award him interest on EUR 18,765 as from 10 February 2006 and on EUR 665,000 as from 18 August 2006. The Panel finds that this request includes the request for interest calculated as from the dates of the instalments paid after 18 August 2006.

**The Court of Arbitration for Sport rules:**

1. The Appeal filed on 9 May 2011 by the Associação Académica de Coimbra – OAF is partially upheld.
  2. The Appellant Associação Académica de Coimbra – OAF shall pay to the Respondent Suwon Samsung Bluewings FC an amount of EUR 683,765.00.
  3. The Appellant Associação Académica de Coimbra – OAF has to pay to the Respondent Suwon Samsung Bluewings FC 5 % interest as follows:
    - on EUR 18,765.00 as from 10 February 2006;
    - on EUR 35,000.00 as from 31 August 2006;
    - on EUR 35,000.00 as from 30 September 2006;
    - on EUR 35,000.00 as from 31 October 2006;
    - on EUR 35,000.00 as from 30 November 2006;
    - on EUR 35,000.00 as from 31 December 2006;
    - on EUR 35,000.00 as from 31 January 2007;
    - on EUR 35,000.00 as from 28 February 2007;
    - on EUR 35,000.00 as from 31 March 2007;
    - on EUR 35,000.00 as from 30 April 2007;
    - on EUR 35,000.00 as from 31 May 2007;
    - on EUR 35,000.00 as from 30 June 2007;
    - on EUR 35,000.00 as from 31 July 2007;
    - on EUR 35,000.00 as from 31 August 2007;
    - on EUR 35,000.00 as from 30 September 2007;
    - on EUR 35,000.00 as from 31 October 2007;
    - on EUR 35,000.00 as from 30 November 2007;
    - on EUR 35,000.00 as from 31 December 2007;
    - on EUR 35,000.00 as from 31 January 2008;
    - on EUR 35,000.00 as from 28 February 2008.
- (...)
6. All other requests or motions are dismissed.