Arbitration CAS 2015/A/3896 Elias Mendes Trindade v. Club Atlético de Madrid, award of 10 December 2015

Panel: Mr Fabio Iudica (Italy), President; Mr João Nogueira da Rocha (Portugal); Mr José María Cruz (Spain)

Football
Contractual dispute regarding outstanding salaries
Determination of the applicable law
CAS' competence to review FIFA's decision of incompetence without FIFA being called as respondent
Standing to be sued
Arbitrability of a dispute

1. **A choice of law made by the parties to a contract can be tacit and/or indirect, for instance by reference to the rules of an arbitral institution. As a matter of principle, in agreeing to arbitrate a dispute according to the CAS Code, the parties submit to its conflict-of-law rules. Even if an employment contract contains a direct choice-of-law clause referring to a national law, such a direct choice-of-law shall not prevail over the indirect choice made by the parties by reference to the conflict-of-law rules contained in the CAS Code, since the choice-of-law clause is limited to the law applicable to the employment contract while the CAS Code contains the rules applicable to the dispute submitted to CAS arbitration. Pursuant to art. R58 of the CAS Code, the regulations of the sports organization that issued the appealed decision are applicable to the dispute irrespective of what law the parties have agreed upon and the parties cannot derogate from this provision if they want their dispute to be decided by the CAS.**

2. **Based on art. 66 of the FIFA Statutes and art. R57 of the CAS Code, CAS panels are accorded an unrestricted right to examine not only the procedural aspects of an appealed decision but also to review and evaluate all facts and legal issues involved in a dispute (principle of a *de novo* review of a case). In cases where FIFA merely acted as the legal body rendering the lower-instance decision (referred to as "horizontal disputes"), FIFA has the opportunity to participate in CAS proceedings but is not a necessary party, nor has an appellant the burden to summon FIFA as a respondent.**

3. **An individual or an entity has standing to be sued if it is personally obliged by the disputed right(s) at stake. Where FIFA imposes disciplinary sanctions or in all other cases concerning a membership-related decision, FIFA would have standing to be sued as the association which passed the appealed decision. On the contrary, FIFA has no standing to be sued where it is only involved in a dispute between two parties merely as the adjudicating body having issued the appealed decision and the parties cannot bring an actual claim against FIFA. Criticism directly brought against FIFA with regard to a decision rendered by its dispute resolution bodies are insufficient for that purpose. The**

circumstance that FIFA may have a general, abstract interest that its members behave in accordance with the FIFA rules does not suffice to constitute any "interest at stake" for the purpose of conferring FIFA the standing to be sued.

4. **According to art. 177 para. 1 of the Swiss Private International Law Act (PILA), which is applicable to CAS arbitration by virtue of art 176 PILA, any dispute of financial interest may be subject to arbitration. Since art. 177 PILA has not adopted a conflict rule in order to avoid the difficulties in determining the applicable law in the matter, as long as CAS panels apply this provision, the arbitrability of a dispute cannot be questioned simply because it would be a pure internal matter viewed from the law of another state. The possibility to deny arbitrability of a dispute based on a foreign provision which provides for the mandatory jurisdiction of state courts has only been taken into consideration within the scope of public policy, which is considered to be the only restriction to arbitrability. In this context, CAS panels have to examine whether there are reasons of public policy imposing the application of a foreign law prohibiting recourse to arbitration for employment-related disputes.**

I. INTRODUCTION

1. This appeal is brought by Mr Elias Mendes Trindade against the decision rendered by the Dispute Resolution Chamber of the Fédération Internationale de Football Association (hereinafter also referred to as "FIFA DRC") on 16 October 2014 regarding an employment-related dispute between him and Club Atlético de Madrid (hereinafter also referred to as the "Appealed Decision").

II. THE PARTIES

2. Mr Elias Mendes Trindade is a Brazilian professional football player, born on 16 May 1985 (hereinafter also referred to as the "Player" or the "Appellant").

3. Club Atlético de Madrid (hereinafter also referred to as the "Club" or the "Respondent") is a professional football club based in Madrid, Spain, competing in the first division of the Spanish Football League, affiliated with the RFEF (*Real Federación Española de Fútbol*) which in turn is affiliated with FIFA.

III. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions, and relevant documentation produced. Additional facts and allegations may be set out, where relevant, in connection with the further legal discussion. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in

the present proceedings, it refers in the Award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On 21 December 2010, the Player and the Club signed an employment contract (hereinafter referred to as the "Employment Contract") and relevant annex (hereinafter referred to as the "Annex"), both valid from the date of signature until 30 June 2015.

6. According to clause III of the Annex, the Respondent undertook to pay the following salaries to the Player:

   - EUR 800,000 net for the remaining time of the 2010/2011 season;

   - EUR 1,600,000 net for each following season of duration of the Contract.

7. Pursuant to clause 6 of the Employment Contract, all matters not specifically regulated in the Employment Contract *"shall be governed according to the provisions of Decree 1006/1985 of June 26, once it regulates the special employment relation of the Professional Players, Collective Agreement in effect and other rules applicable"*. Likewise, clause X of the Annex establishes that *"In matters not provided for in this Agreement, it should be considered the provisions of R.D. 1006/1985, of June 26, which regulates the employment relationship of professional athletes, collective agreement in effect and other applicable rules"*.

8. Pursuant to art. 19 of the Royal Decree 1006/1985, any dispute between professional players and clubs arising from the employment relationship shall be subject to the jurisdiction of the national labour courts: *"Los conflictos que surjan entre los deportistas profesionales y sus clubes o entidades desportivas, como consecuencia del contrato de trabajo seran competencia de la Jurisdiccion Laboral"*.

9. Under clause VII of the Annex, the Parties agreed that the Player *"expressly accepts the provisions of the current Labor Regulations, the Workers' Statute, Collective Agreement, A.F.E. – L.N.F.P. and disciplinary Rules of this last"*.

10. By the end of August 2011, the Employment Contract was amicably terminated between the parties.

11. On 3 October 2012, the Player lodged a claim before the FIFA DRC against the Club requesting payment in the amount of EUR 469,297.76 corresponding to outstanding salaries for the seasons 2010/2011 and 2011/2012, until 25 August 2011.

12. In its position before the FIFA DRC, the Club maintained that, even admitting that an amount of EUR 322,726.26 (*in lieu* of EUR 469,297.76 claimed by the Player, due to the applicable reductions) was in theory still due to the Player as outstanding salaries, the Player's claim would be time-barred in accordance with Spanish law since his first claim was made on 12 September 2012 (*i.e.* when the one year limitation period had already elapsed) and, in any event, the FIFA DRC would not be the competent body to adjudicate the present case in light of the exclusive jurisdiction of Spanish labour courts, in accordance with the regulations applicable to the Employment Contract.

13. In his reply, the Player insisted on the competence of FIFA DRC over the present dispute, based on art. 22 lit. b) of the FIFA Regulations on the Status and Transfers of Players (the "FIFA Regulations"), and confirmed his claim in the amount of EUR 469,297.76.

14. On 16 October 2014, the FIFA DRC rendered the Appealed Decision by which the Player's claim was considered inadmissible due to the lack of jurisdiction of FIFA, in favour of the exclusive competence of Spanish labour courts.

15. The Appealed Decision, with grounds, was served to the Parties on 9 January 2015.

IV. SUMMARY OF THE APPEALED DECISION

16. The grounds of the Appealed Decision can be summarized as follows:

- The issue concerning the jurisdiction of FIFA over the dispute between the Parties was crucial and final to decide the present case in the first instance.

- In this context, the FIFA DRC firstly stated that, pursuant to art. 24 para. 1, in combination with art. 22 lit. b) of the FIFA Regulations, it would, in principle, be the competent body to decide on the present litigation involving a Brazilian player and a Spanish club regarding an employment-related dispute.

- However, the chamber acknowledged that the Club contested the competence of the FIFA DRC to deal with the present case alleging the exclusive competence of the Spanish labour courts principally based on art. 19 of the Royal Decree 1006/1985 referred to in the Employment Contract, regulating the labour relation of professional athletes which reads as follows: *"Any conflicts arising between a professional athlete and their club or sport entity, as a consequence of their employment contract, will fall under the jurisdiction of the labour justice"*.

- In this regard, the FIFA DRC noted that by referring to art. 19 of the Royal Decree 1006/1985 under clause 6 of the Employment Contract and under clause X of the Annex, the Parties had voluntarily agreed upon the exclusive competence of the Spanish labour courts to deal with any employment-related dispute arising between them, as an exception to FIFA's jurisdiction under art. 22 lit. b) of the FIFA Regulations.

- Moreover, the FIFA DRC pointed out that art. 22 of the FIFA Regulations does not prohibit players and clubs to refer any employment-related dispute possibly arisen between them to national ordinary courts.

- In view of the above-mentioned arguments, the FIFA DRC concluded that *"in the present case, the parties, when signing the contract and its annex on 21 December 2010, had voluntarily and beforehand agreed upon the content and the applicability of art. 6 of the contract and art. X of the annex, and accepted the exclusive jurisdiction of the Spanish labour courts to decide upon any employment-related dispute arisen between them, in accordance with art. 19 of the Royal Decree 1006/1985"*.

V. SUMMARY OF THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 28 January 2015, the Player filed an appeal before the Court of Arbitration for Sport (hereinafter the "CAS") against the Appealed Decision by submitting a statement of appeal according to art. R47 and R48 of the Code of Sports-related Arbitration, Edition 2013 (hereinafter referred to as the "CAS Code"), serving as appeal brief pursuant to art. R51 of the CAS Code.

18. The appeal was not directed at FIFA.

19. By fax letter of the CAS Court Office dated 2 February 2015, FIFA was invited to inform the CAS whether it intended to participate as a party in the present arbitration proceedings pursuant to art. R41.3 of the CAS Code.

20. In his statement of appeal, the Appellant nominated Mr Ricardo de Buen as an arbitrator, who was subsequently replaced with Mr João Nogueira da Rocha following the first nominee's disclosure on his Declaration of Independence and Impartiality, informing that he was *"the lawyer of the Mexican partners of the school of Atletico de Madrid in Mexico"*, challenge by the Respondent and resignation in order not to delay the proceedings.

21. By communication to the CAS Court Office dated 13 February 2015, the Respondent nominated Mr José María Cruz as an arbitrator and requested that the time limit to file its answer be fixed after the payment by the Appellant of his share of advance of costs in accordance with art. R64.2 of the CAS Code.

22. On 19 February 2015, the Appellant filed a petition for challenge against the nomination of Mr Cruz according to art. R34 of the CAS Code.

23. On 7 April 2015, the Respondent filed its answer.

24. By a decision rendered on 10 April 2015, the ICAS Board dismissed the Appellant's petition for challenge against the nomination of Mr José María Cruz.

25. By fax letter dated 8 April 2015, the Parties were invited to inform the CAS Court Office whether they preferred a hearing to be held on the present case or for the Panel to issue an award based solely on their written submissions.

26. On 9 April 2015, the Appellant informed the CAS Court Office that he agreed to an award being rendered on the basis of the written submissions while the Respondent expressed its preference for a hearing to be held in the present proceedings.

27. By fax communication on 15 April 2015, FIFA informed the CAS Court Office that it renounced its right to request its possible intervention in the present arbitration proceedings but nevertheless clarified that *"by the fact that Mr Elias Mendes Trindade (the Appellant) has not designated FIFA as a respondent to the present procedure, whereas one of his main contention is related to an*

alleged competence of FIFA's decision-making body to pass a decision in connection with the matter having opposed the parties of the reference, any question related to the alleged competence of the relevant FIFA's deciding body to pass a decision on the substance of such dispute may not be taken into consideration by the CAS and the specific Panel. From a formal point of view, the competence-related aspect does not fall within the discretion of any deciding body anymore. A different interpretation would per se constitute a violation of FIFA's right to be heard. In other words, the jurisdiction aspects of the challenged decision must be considered as having become final and binding in the meantime. Consequently, also a decision of the CAS annulling the challenged decision based on considerations about FIFA's competence would be affected by the formal error of a violation of FIFA's right to be heard, and would therefore, at the least, not be binding for FIFA".

28. On 28 April 2015, the CAS Court Office informed the Parties that the Panel appointed to decide the present case was constituted as follows:

    President: Mr Fabio Iudica, attorney-at-law in Milan, Italy.

    Arbitrators: Mr João Nogueira da Rocha, attorney-at-law in Lisbon, Portugal;

    Mr José María Cruz, attorney-at-law in Sevilla, Spain.

29. On 9 June 2015, the Parties were invited by the CAS Court Office on behalf of the Panel to file their respective positions on the issue of the jurisdiction of FIFA to rule on the present dispute.

30. On 15 and 19 June 2015 respectively, the Appellant and the Respondent filed their respective submissions on the issue of the jurisdiction of FIFA.

31. On 22 June 2015, the Parties were granted a further deadline of 5 days to file their respective replies to the other party's written submission on the issue of the competence of FIFA.

32. On 24 and 29 June 2015 respectively, the Appellant and the Respondent filed their comments on the other party's submissions on the issue of the jurisdiction of FIFA.

33. On 30 June 2015, the CAS Court Office informed the parties that the Panel had decided to hold a hearing in the present matter.

34. On 9 July 2015, the CAS Court Office forwarded the Order of Procedure to the Parties.

35. The Order of Procedure was returned signed by the Respondent to the CAS Court Office on 9 July 2015 and by the Appellant on 14 July 2015.

36. On 22 September 2015, a hearing took place at the CAS headquarters in Lausanne.

37. The following persons attended the hearing: for the Appellant, Mr Felipe Legrazie Ezabella, lawyer; for the Respondent, Mr Juan de Dios Crespo Pérez, counsel.

38. The Parties were granted the opportunity to present their oral arguments and answer the questions posed by the Panel. At the conclusion of the hearing, the Parties explicitly agreed that

their right to be heard and to be treated equally in these arbitration proceedings had been fully observed. The Parties were also satisfied that due process had been fully observed.

VI. SUBMISSIONS OF THE PARTIES

39. The following outline is a summary of the main positions of the Appellant and the Respondent which the Panel considers relevant to the decision of the present dispute and does not comprise each and every contention put forward by the Parties. The Panel, however, has carefully considered all the submissions made by the Appellant and the Respondent, even if no explicit reference has been made in what follows. The Parties' written submissions, documentary evidence and the content of the Appealed Decision were all taken into consideration.

A. The Appellant's submissions and requests for relief

40. The Appellant made a number of submissions in his statement of appeal (serving as appeal brief) and in his further written pleadings on the issue of the jurisdiction of FIFA as requested by the Panel. These can be summarized as follows.

41. According to the Appellant's position, the Appealed Decision violates the terms of art. 22 lit. b) of the FIFA Regulations since the Employment Contract does not contain any clause establishing exclusive jurisdiction of the Spanish labour courts.

42. The Player relies on art. 22 lit. b) of the FIFA Regulations as conferring jurisdiction on the FIFA DRC on the present dispute.

43. In this regard, the Appellant argues that the wording *"without prejudice to the right of any player to seek redress before a civil court for employment-related dispute"* which precedes the list of the cases where the FIFA DRC has jurisdiction pursuant to the said art. 22 of the FIFA Regulations, *"means that the parties can choose whether they want to seek redress before a labour court or in the court of FIFA"*.

44. Moreover, according to FIFA's doctrine, the FIFA DRC is not competent to hear employment-related disputes between a club and a player, as is the present case, only if there is an independent arbitration tribunal, with equal representation of players and clubs which is established at national level, which is not the case in the present matter.

45. In addition, the Appellant objects that: a) contrary to the allegations of the Respondent, clause 6 of the Employment Contract and clause X of the Annex do not concern jurisdiction or competence but only the law applicable to the merits; b) the final part of both clauses specifically mentions *"other applicable rules"*, thus implicitly recognizing the application of the FIFA Regulations; c) in any case, there is no wording in the relevant Royal Decree suggesting that the jurisdiction of the Spanish labour courts would be mandatory (if applicable); d) the Club, as affiliated with the RFEF, which in turn is affiliated with FIFA, shall be bound to the FIFA Regulations and decisions of the FIFA deciding bodies, as well as to the jurisprudence of the CAS, all establishing that the choice of jurisdiction by the parties should be made by a clear reference in the employment contract, which is not the case in the present matter.

46. Finally, according to the Appellant, the spirit of FIFA to create uniform regulations for similar cases would be frustrated if all the applicable rules of any single country had to be applied and therefore the FIFA Regulations shall prevail over local laws.

47. In his further written submission filed on 15 June 2015 on the issue of FIFA's jurisdiction, the Player corroborated his previous arguments and concluded that there is no contractual clause in the Employment Contract establishing exclusive jurisdiction of the Spanish labour courts to decide the present dispute.

48. In the following reply to the Respondent's written submission on the same issue, the Appellant maintained that since FIFA's jurisdiction and the jurisdiction of the national courts are alternative to one another, the Player had the right to choose to refer the dispute to the FIFA DRC, as it is set forth under art. 22 of the FIFA Regulations.

49. The Appellant's requests for relief were submitted in his statement of appeal and are the following:

> *"First of all, the Appellant requires that the decision is fully reformed to conclude that FIFA and CAS are competent to decide on the present litigation AND, as the case already contains all the evidences, arguments and elements of merit about the amount in dispute and since the Respondent has not paid the proper amount due to the Appellant (Art. R57 – CAS CODE – Panel's power), based on the above mentioned facts and evidences that support it, this CAS is kindly requested to determine that the Respondent* ***CLUB ATLETICO DE MADRID*** *has to pay to the Appellant* ***Elias Mendes Trindade*** *the total net amount of 469,297.76 € (four hundred, sixty-nine thousand, two hundred ninety-seven and seventy six cents euros) plus interest over the amount due.*
>
> *Finally, it also requires that the Respondent should be ordered to bear all arbitration costs, refunding what had already been paid by the Appellant".*

B. The Respondent's submissions and requests for relief

50. The position of the Respondent is summarized in its answer and in its further submissions on the issue of FIFA's jurisdiction as requested by the Panel. These can be summarized as follows.

51. The Respondent maintains that the FIFA DRC was not the competent body to decide over the present dispute since Spanish legislation for the professional players establishes the exclusive competence of the Spanish labour courts over employment-related disputes between players and clubs.

52. In this respect, according to the Respondent's argument, the reference contained in the Employment Contract to art. 19 of the Royal Decree 1006/1985 is not only a voluntary submission or acceptance of the jurisdiction of the Spanish courts, as it was established in the Appealed Decision, but a *"mandatory consequence according to the Spanish Law of the exclusive jurisdiction of the Labour courts over employment disputes".*

53. In this sense, the FIFA Commentary on art. 22 of the FIFA Regulations establishes that *"[s]ince the legislation of many countries provides for the compulsory jurisdiction of ordinary courts for employment-related disputes, players and clubs are entitled to seek redress before a civil court as an exception to the above-mentioned statutory principles"*.

54. Therefore, it is to be noted that when a compulsory jurisdiction exists, the sporting bodies are not competent, as is the present case, since Spanish law stipulates a compulsory jurisdiction in favour of Labour courts for employment-related disputes.

55. The Respondent also avers that, according to the applicable Spanish law, the Parties cannot freely dispose of the rights deriving from their employment relationship, this being the reason why employment-related disputes are not subject to arbitration. In fact, arbitration over labour disputes is only permitted as a system for the resolution of collective employment conflicts, but not for individual disputes, as it is established by the jurisprudence quoted by the Club.

56. With regard to the law applicable to the present case, the Respondent affirms that, in accordance with clause 6 of the Employment Contract and clause X of the Annex, the Parties made reference to the Royal Decree 1006/1985 which governs the special labour relation of the professional athletes; the Collective Agreement and other applicable rules, thus, ultimately, Spanish law.

57. Due to the exclusive jurisdiction of the Spanish labour courts to decide over individual employment-related disputes, as is the present case, the Respondent refuses to discuss about the merits of the case; however it stressed the fact that the Player's claim would be time-barred, according to the applicable art. 59 of the Spanish Workers' Statute, which, in its relevant part, reads as follows: *"Legal action based on the work contract with no special term indicated shall expire a year after its termination (…). If the suit is filed to demand economic receivables or the fulfilment of single-term obligations that cannot take place after the contract is extinguished, the term of one year shall be counted from the day on which the suit may be filed"*.

58. In its further comments filed on 19 June 2015 on the issue of FIFA's jurisdiction, the Respondent emphasized the fact that in case of compulsory jurisdiction of ordinary state courts, as in the present case, the Parties are bound by the law to the choice of *forum*: *"So, it is evident that when a compulsory jurisdiction exists, the sporting bodies ARE NOT COMPETENT. This is the case at stake. As a consequence, as we will explain hereafter, not only the parties agreed to submit to the Spanish labour court, but, in fact, they had no choice since Spanish Law stipulates a compulsory jurisdiction of Labour Courts for employment-related disputes"*. And again: *"although the parties would have not agreed to submit any employment-related disputes to the Spanish labour courts, the Spanish Law, which stipulates a compulsory jurisdiction of Labour Courts for employment-related disputes, would apply"*.

59. In the following reply to the Appellant's written submission on the issue of FIFA's jurisdiction, the Respondent specifically argued that: a) with respect to the Appellant's reference to the minimum procedural standards required by FIFA under art. 22, lit. b) of the FIFA Regulations for a national arbitration tribunal to be competent instead of the FIFA DRC, the relevant provision only applies to (national) arbitration bodies and not to state ordinary courts, as in the present case, and b) any reference to *"other applicable rules"* contained in clause 6 of the

Employment Contract and clause X of the Annex is made with respect to other sources of law in Spanish legislation with regard to employment relationship and does not imply the application of the FIFA Regulations.

60. The Respondent's requests for relief were submitted in its answer and are the following:

"To the Court of Arbitration for Sport, we respectfully request:

1. *To dismiss the Player's Appeal in full;*

2. *Alternatively, in the hypothetical event that CAS considers FIFA competent to hear from this dispute, to refer the case back to FIFA in order to render a decision;*

3. *Even more alternatively, in case that CAS considers FIFA competent to hear from this dispute and that the Panel is empowered to adjudicate on the merits without a previous decision of FIFA, to dismiss the Appeal in full;*

4. *To fix a sum of 20,000 CHF to be paid by the Appellant to the Respondent, to help the payment of its legal fees and other costs;*

5. *To condemn the Appellant to the payment of the whole CAS administration costs and the Arbitrator fees".*

VII. CAS JURISDICTION

61. Pursuant to art. R47 of the CAS Code (Edition 2013: *"An Appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body"*).

62. The Appellant relies on art. R47 of the CAS Code and on art. 67, para. 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".*

63. The Respondent has raised no objection to the jurisdiction of CAS.

64. Moreover, the signature of the Order of Procedure by the Parties confirmed that the jurisdiction of the CAS in the present case was not disputed. Finally, CAS jurisdiction was further confirmed by the Parties at the hearing. Accordingly, the Panel is satisfied that it has jurisdiction to hear the present case.

65. Under art. R57 of the CAS Code, the Panel has the full power to review the facts and the law and may issue a new decision which replaces the decision appealed or annul the challenged decision and/or refer the case back to the previous instance.

VIII. ADMISSIBILITY OF THE APPEAL

66. Art. R49 of the CAS Code provides as follows: *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late".*

67. The Panel notes that the Appealed Decision was notified to the Parties on 9 January 2015. Considering that the Appellant filed his Statement of Appeal on 28 January 2015, *i.e.* within the prescribed deadline of 21 days from notification, the Panel is satisfied that the present appeal was timely filed and is therefore admissible.

IX. APPLICABLE LAW

68. Chapter 12 of the PILA which governs international arbitration applies to the present arbitration proceedings pursuant to art. 176 PILA, since Switzerland is the seat of this arbitral tribunal and due to the fact that none of the parties has its domicile nor its usual residence in Switzerland, nor has the parties excluded the application of the said Chapter of PILA.

69. Art. 187 para. 1 of the PILA provides – *inter alia* – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PILA (CAS 2014/A/3850, para. 48).

70. According to the legal doctrine, the choice of law made by the parties can be tacit and/or indirect, by reference to the rules of an arbitral institution. As a matter of principle, in agreeing to arbitrate a dispute according to the CAS Code, the parties submit to the conflict-of-law rules contained therein, in particular to art. R58 of the CAS Code (see CAS 2014/A/3850, para. 49; CAS 2008/A/1705, para. 9; CAS 2008/A/1639, para. 21). Although the Employment Contract contains a direct choice-of-law clause referring to the Spanish Royal Decree 1006/1985 which regulates the employment relationship of professional athletes, the relevant collective agreement and the Workers' Statute, the Panel believes that such a direct choice-of-law shall not prevail over the indirect choice made by the Parties by reference to the conflict-of-law rules contained in the CAS Code, since the choice-of-law clause contained in the Employment Contract does not refer to the applicable law to the dispute. Instead, the choice-of-law clause is limited to the law applicable to the Employment Contract while the CAS Code contains the rules applicable to the dispute submitted to CAS arbitration by the Parties.

71. Pursuant to art. R58 of the CAS Code, in an appeal arbitration procedure before the CAS, the *"Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

72. It follows from this provision that the *"applicable regulations"*, *i.e.* the statutes and regulations of the sports organisation that issued the decision are applicable to the dispute irrespective of what law the Parties have agreed upon. In the Panel's view the Parties cannot derogate from this provision if they want their dispute to be decided by the CAS. To conclude, therefore, this Panel finds that art. R58 of the CAS Code takes precedent over a direct choice-of-law clause contained in the Employment Contract.

73. Art. 66 para. 2 of the FIFA Statutes provides that in proceedings before the CAS, *"the CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law"*. The Panel, thus, will apply the rules and regulations of FIFA and – on a subsidiary basis – Swiss law insofar as matters at dispute are relating to the application or interpretation of the FIFA regulations or to the question who is the appropriate entity to defend or appeal the FIFA decision (standing to sue, standing to be sued). Beyond that, the Panel in light of art. R58 of the Code (*"and the rules of law chosen by the parties"*) will respect the choice of law by the parties in the Employment Contract. Thus, with respect to all other legal questions pertaining to the Employment Contract, the Panel will apply Spanish law.

74. With regard to the applicability *ratione temporis* of the relevant FIFA Regulations, the Panel holds that the present case is governed by the 2010 Edition of the FIFA Regulations, given that the Player lodged his claim with FIFA on 3 October 2012.

X. MERITS OF THE APPEAL – LEGAL ANALYSIS

75. The central issue of the present appeal relates to the alleged lack of FIFA's jurisdiction in the first instance to hear the employment-related dispute between the Parties resulting from the Employment Contract.

76. In the Appealed Decision, the FIFA DRC declined to adjudicate on the present case in favour of the exclusive jurisdiction of the Spanish labour courts, in accordance with the provisions set forth under the Employment Contract and declared that the Player's claim before FIFA was therefore inadmissible.

77. The Appellant contests the Appealed Decision, insisting on FIFA's jurisdiction over the present case, based on the provision of art. 24 in combination with the provision of art. 22, lit. b) of the FIFA Regulations, assuming that, notwithstanding the supposed formal choice of forum in the Employment Contract, there is no contractual clause establishing exclusive jurisdiction in favour of the Spanish labour courts, or, at least, there is no valid choice in favour of the Spanish courts, and, therefore, he was still free to refer the dispute to the FIFA DRC.

78. On the contrary, the Respondent agrees with the conclusion of the Appealed Decision since not only clause 6 of the Employment Contract and clause X of the Annex both establish an agreement of the Parties on the exclusive jurisdiction of the Spanish labour courts, but Spanish law, which is applicable to the present dispute, also stipulates the compulsory jurisdiction of state labour courts in employment- related disputes, as is the present case.

79. In order to settle the present dispute, the Panel shall therefore firstly decide whether the FIFA DRC was or was not competent to deal with the present dispute, with the consequence that in the first case, the Appealed Decision shall be upheld, while, in the second scenario, according to art. R57 of the CAS Code, the Panel may set aside the Appealed Decision and issue a new decision or refer the case back to FIFA.

80. In this context, the Panel observes that by communication to the CAS Court Office on 15 April 2015, despite renouncing to intervene in the present arbitration proceedings, FIFA has firmly objected the power of the CAS to address the issue relating to the FIFA's jurisdiction over the present case, based on the fact that the Appellant has not designated FIFA as a "respondent" in the present arbitration, which allegedly implies that the question of jurisdiction in the present case has become final and binding:

> *"In this respect, despite renouncing to intervene in the present matter, we hereby would like to clarify that, by the fact that Mr Elias Mendes Trindade (the Appellant) has not designated FIFA as a respondent to the present procedure, whereas one of his main contention is related to an alleged competence of FIFA's decision-making body to pass a decision in connection with the matter having opposed the parties of the reference, any question related to the alleged competence of the relevant FIFA's deciding body to pass a decision on the substance of such dispute may not be taken into consideration by the CAS and the specific Panel. From a formal point of view, the competence-related aspect does not fall within the discretion of any deciding body anymore. A different interpretation would per se constitute a violation of FIFA's right to be heard. In other words, the jurisdiction aspects of the challenged decision must be considered as having become final and binding in the meantime. Consequently, also a decision of the CAS annulling the challenged decision based on considerations about FIFA's competence would be affected by the formal error of a violation of FIFA's right to be heard, and would therefore, at least, not be binding for FIFA".*

81. In view of the foregoing FIFA's position, the first issue to be addressed is whether the Panel is or is not competent to review the jurisdiction of the FIFA DRC and, secondly, if the Appellant's failure to summon FIFA as a respondent may have precluded CAS from adjudicating the issue of FIFA's jurisdiction.

82. As a first consideration, the Panel reminds that in its Statutes, FIFA has widely and freely decided to accept CAS arbitration and has agreed on the application of the CAS Code as it results from the content of art. 66 of the FIFA Statutes: *"1. FIFA recognizes the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve dispute between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials, intermediaries, and licensed match agents. 2. The provisions of the CAS Code of Sports-related arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA, and additionally, Swiss law".*

83. As a consequence of the above, FIFA has *inter alia* agreed to be subject to the provisions of art. R57 of the CAS Code according to which the Panel enjoys full power to *"review the facts and the law"* of the case submitted to CAS arbitration.

84. Therefore the Panel believes that FIFA is bound to the principle of a *de novo* review of the case.

85. In this respect, the Panel observes that according to CAS doctrine and case law *"to the extent that the decisions rendered by the jurisdictional instances of sports federations do not constitute <arbitral awards> but merely internal decisions of associations, the full review of the case by a CAS Panel accompanied by the healing effect of procedural irregularities is essential in order to guarantee the parties' access to justice and a full review by an independent arbitral tribunal"* (see MAVROMATI/PELLAUX *"Article R57 of the CAS Code: a Purely Procedural Provision?"*, International Sports Law Review 2 (2013), p. 40).

86. The Panel abides with the CAS jurisprudence as in the case CAS 2008/A/1700 & 1710, establishing that *"[u]nder article R57 of the CAS Code, the Panel's scope of review is fundamentally unrestricted (…). The CAS Code contemplates a full hearing de novo of the original matter and grants the CAS Panel the authority to render a new decision superseding that rendered by the previous instance. The "full power" granted the deciding Panel under the CAS Code precludes any notion that the Panel must abide by restrictions on evidence which may or may not have been adduced in previous proceedings before a national or international disciplinary tribunal. National or international sports organizations may freely decide to accept or not to accept the arbitral jurisdiction of the CAS; however, when they do accept the CAS's jurisdiction they necessarily accept the application of the basic principles of the CAS Code, including the principle of a de novo review of the case. The CAS must, therefore, be accorded the unrestricted right to examine not only the procedural aspects of an appealed decision, but also, and above all, to review and evaluate all facts and legal issues involved in the dispute"*.

87. In respect of the foregoing, the Panel shall now consider whether the fact that FIFA did not become a party to the present arbitration proceedings, due to the Appellant's failure to summon FIFA as a second respondent, may affect the CAS full power of review based on art. R57 of the CAS Code, in the sense that the Panel would not be entitled to adjudicate the issue of the FIFA DRC jurisdiction to hear the present dispute in the first instance, as alleged by FIFA in its communication to the CAS Court Office on 15 April 2015, mentioned above.

88. The Panel firstly emphasizes that, contrary to FIFA's contention, no violations of FIFA's right to be heard might indeed arise in connection with the point at issue, since FIFA was expressly offered the possibility to intervene in the present arbitration proceedings and freely declined it.

89. With regard to the allegation that FIFA should have been summoned by the Appellant as a necessary party in the present proceedings (in order for the Panel to adjudicate the issue of FIFA's jurisdiction), the Panel agrees with CAS consistent jurisprudence according to which in cases where FIFA merely acts as the legal body rendering the lower-instance decision, *i.e.* in cases which do not involve FIFA's disciplinary powers (so-called "horizontal disputes"), as in the present case, FIFA has the opportunity to participate in the CAS proceedings but is not a necessary party, nor the Appellant has the burden to summon FIFA as a respondent (see CAS 2008/A/1705; CAS 2008/A/1708; CAS 2010/A/2289).

90. In this respect, the Panel notes that neither the FIFA Statutes nor any other FIFA Regulations contain any specific rule defining the standing to be sued.

91. In these circumstances, CAS panels have consistently addressed the issue whether FIFA has standing to be sued in a certain CAS proceedings by referring to the meaning given to the term *"standing to be sued"* by Swiss law, affirming that an individual or an entity has standing to be sued *"if it is personally obliged by the "disputed rights" at stake"* (see CAS 2006/A/1206). In other words, a

party has standing to be sued and may thus be summoned before the CAS only if it has some stake in the dispute because something is sought against it (see CAS 2014/A/3690; CAS 2008/A/1517; CAS 2006/A/1189; CAS 2006/A/1192).

92. Within this framework, CAS jurisprudence is unanimous in stating that in cases where FIFA imposes disciplinary sanctions (for example on a player or a club) or in all other cases where the matter concerns a membership related decision, FIFA would have capacity to be sued, according to art. 75 of the Swiss Civil Code, as the association which passed the opposed decision[1].

93. On the contrary, according to the well-established CAS jurisprudence, FIFA has no standing to be sued where it is only involved in the dispute between two parties (such as a player and a club as in the present case) merely as the adjudicating body having issued the appealed decision and the parties cannot bring an actual claim against FIFA. In this respect, it has been pointed out that criticism directly brought against FIFA with regard to the decisions rendered by FIFA dispute resolution bodies are not sufficient for that purpose (see CAS 2005/A/835 & CAS 2005/A/942). Conversely, the circumstance that FIFA may have a general, abstract interest that its members behave in accordance with the applicable FIFA rules (which may, in theory, justify FIFA's intervention in a CAS proceedings according to art. R41.4 of the CAS Code), does not suffice to constitute any *"interest at stake"* for the purpose of conferring FIFA the capacity to be sued (see CAS 2014/A/3690).

94. Since the present case deals with a contractual dispute of an employment-related nature between a player and a club, and does not involve any disciplinary power of FIFA, nor any issue concerning FIFA's relationship with one of its member, the Panel believes that it does not fall within the framework of art. 75 of the Swiss Civil Code, nor that the Appellant has any actual claim to bring against FIFA, nor that FIFA has any interest at stake in the present dispute in the sense specified above.

95. As a consequence of all the foregoing, the Panel reaches the conclusion that, even if the Appellant did not summon FIFA as a respondent in the present arbitration proceedings, FIFA's objection is not appropriate since FIFA has no capacity to be sued in the present arbitration proceedings and the Panel is empowered to adjudicate the issue of the FIFA DRC's jurisdiction for the reasons mentioned above, under the provisions of art. R57 of the CAS Code.

96. At this point, the following issue to be addressed is whether the FIFA DRC was or not competent to deal with the present dispute in the first instance.

97. Art. 22 of the FIFA Regulations, which is applicable to the merits of the present case, provides the following:

> *"Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: (…)*

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1 Art. 75 of the Swiss Civil Code reads as follows *"every member of an association is entitled by law to apply to the court to avoid any decision passed by the association without his assent, which are contrary to law or the constitution of the association, provided the application is made within one month from the day on which he became cognizant of such resolution"*.

b) employment-related disputes between a club and a player of an international dimension, unless an independent arbitration tribunal guaranteeing fair proceedings and respecting the principle of equal representation of players and clubs has been established at national level within the framework of an association and/or collective bargaining agreement".

98. In accordance with the provisions of the above mentioned rule, the Panel observes that in employment-related disputes having an international dimension, as in the present case, FIFA's jurisdiction is not exclusive, since players and clubs are allowed to refer the case to ordinary state courts. Therefore, in these cases, the parties are at liberty to insert in their employment contract a choice-of-forum clause giving jurisdiction to ordinary courts.

99. In this context, the Panel notes that the Employment Contract, under clause 6, and the Annex, under clause X, contain a reference to Spanish legislation as the law governing the relationship between the parties with regard to matters not provided for in the Employment Contract, and namely to the Royal Decree 1006/1985, which, under art. 19 establishes that *"[a]ny conflicts arising between a professional athlete and their club or sport entity, as a consequence of their employment contract, will fall under the jurisdiction of the labour justice".*

100. In this regard, the Respondent relies on clause 6 of the Employment Contract and on clause X of the Annex, and above all, on the applicable Spanish law, as conferring exclusive jurisdiction on the Spanish courts. On the contrary, the Appellant rejects it, basically assuming that the Employment Contract does not contain any valid choice of forum in favor of the Spanish courts or, even supposing that the Employment Contract contains a reference to the Spanish court for employment related disputes between the Parties, such a competence would not be compulsory and therefore, consistent with the specific wording of art. 22 of the FIFA Regulations (*"without prejudice to the right of any player to seek redress before a civil court for employment-related dispute"),* the Player would still have the choice to submit the relevant dispute to the FIFA DRC.

101. In consideration of all the foregoing, the Panel believes that, in accordance with the right reserved for the Parties under art. 22 of the applicable FIFA Regulations to seek redress before a civil court in employment-related disputes, the Employment Contract, by reference to the Spanish Royal Decree 1006/1985, contains the Parties' choice of forum in favour of the Spanish labour courts. In this respect, the Panel believes that by signing the Employment Contract and the Annex, both containing reference to the above mentioned Royal Decree 1006/1985, the Player has accepted the jurisdiction of Spanish courts as an exception to FIFA's jurisdiction, over any dispute possibly arising from his relationship with the Club.

102. With regard to the Appellant's argument that such a choice of forum would not be valid since the conditions of the clear reference to the competent deciding body and the minimum standards of independency, fair proceedings and equal representations required under art. 22, lit. b) of the FIFA Regulations in the Employment Contract are not met in the case at stake, the Panel remarks that the relevant requirements expressly refers to *"national arbitration tribunal"*, and not to ordinary courts, as an alternative to the jurisdiction of the FIFA DRC.

103. Therefore the Panel believes that the choice of forum made by the Parties in the Employment Contract by reference to the Royal Decree 1006/1985 is valid and binding and that therefore,

the Player had agreed beforehand to the competence of the Spanish labour courts to rule over the present dispute.

104. The Panel also takes note of the Respondent's allegation that Spanish labour courts would in any case be competent instead of FIFA's deciding bodies not only as a result of the Parties' choice in the Employment Contract, but above all, as a mere consequence of the fact that Spanish law prohibits recourse to arbitration for employment-related disputes.

105. The Panel is not persuaded by the Respondent's relevant argument for the following reasons.

106. According to art. 177, para. 1 PILA, which is applicable to CAS arbitration by virtue of art 176 PILA[2], any dispute of financial interest may be subject of an arbitration. According to CAS doctrine (see STERNHEIMER W. *"Arbitrage ordinaires pouvant être soumis au Tribunal Arbitral du Sport"*, CAS Bulletin 1/2012, 2/2012; MAVROMATI/REEB, Commentary, The Code of the Court of Arbitration for Sport, Cases and Materials, R27), since art. 177 PILA has not adopted a conflict rule in order to avoid the difficulties in determining the applicable law in the matter, as long as CAS panels apply this provision, the arbitrability of a dispute cannot be questioned simply because it would be a pure internal matter viewed from the law of another state. The possibility to deny arbitrability of a dispute based on a foreign provision which provides for the mandatory jurisdiction of state courts has only been taken into consideration within the scope of public policy, which is considered to be the only restriction to arbitrability. In this context, the CAS panels have to examine whether there are reasons of public policy imposing the application of a foreign law prohibiting recourse to arbitration for employment-related disputes.

107. In consideration of the above, the Panel believes in the specific case at stake that the fact that Spanish law prohibits arbitration for the specific type of dispute at hand, does not result in a violation of a legal principle belonging to public policy, nor has the Respondent proven otherwise.

108. In view of the above, the Panel shares the opinion of the FIFA DRC in the Appealed Decision that the same DRC was not competent to deal with the present dispute, in favour of the exclusive jurisdiction of the Spanish labour courts in accordance with the choice of forum contained in the Employment Contract and consistent with clause 6 of the Employment Contract and clause X of the Annex which the Player has voluntarily accepted by signing the Employment Contract and the Annex.

109. In consideration of the final findings above, the Panel shall not address any other issue and all other motions or prayers for relief are dismissed.

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2 Art. 176, para. 1 of PILA Act establishes that *"The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is in Switzerland and if, at the time of the conclusion of the arbitration agreement, at least one of the parties had neither its domicile nor its habitual residence in Switzerland".*

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Mr Elias Mendes Trindade on 28 January 2015 concerning the decision rendered by the FIFA Dispute Resolution Chamber on 16 October 2014 is dismissed.

2. The decision rendered by the FIFA Dispute Resolution Chamber on 16 October 2014, is confirmed.

3. (…).

4. (…).

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