Arbitration CAS 2015/A/3910 Ana Kuže v. Tianjin TEDA FC, award of 20 November 2015

Panel: Prof. Ulrich Haas (Germany), President; Prof. Lukas Handschin (Switzerland); Mr Olivier Carrard (Switzerland)

Football
Termination of a contract of employment between a club and a coach without just cause
Validity of an arbitration agreement in favour of several alternative arbitral tribunals
Validity of an arbitration agreement and exclusion of the jurisdiction of State courts
Broad interpretation of an arbitration agreement included in an employment contract
Scope of the arbitration agreement ratio personae
Standing to be sued, FIFA Regulations and Swiss law
FIFA decisions as resolutions of an association (Vereinsbeschluss)
Standing to appeal and legal interest in the matter being appealed
Panel's discretion to issue a new decision or to send the matter back to the previous instance

1. **Under Swiss law, it is admissible to agree on several alternative arbitral tribunals. In such case, the arbitral tribunal seized first by one of the parties is competent to decide the dispute.**

2. **According to the jurisprudence of the Swiss Federal Tribunal, an arbitration agreement is valid if the parties submit *"one or more existing or defined future differences between them to arbitration in accordance with a directly or indirectly defined legal order, thereby excluding the original jurisdiction of State courts"*.**

3. **An arbitration clause included in an employment contract that provides *"in case of litigation of the contract"* must be interpreted broadly. It includes not only disputes relating to the conclusion, the validity and the termination of the contract, but also all disputes arising from the contract. Such type of clauses fulfil the requirement of certainty and determinability in respect to the arbitrable disputes. Thus, a claim for damages is also covered by such arbitration agreement.**

4. **In general, the arbitration agreement is like any other contract, it can only produce its effects between the contracting parties as those who are bound by it as a result of their participation in its conclusion.**

5. **The question of standing to be sued is a matter related to the merits. This follows from the jurisprudence of the SFT. The FIFA rules and regulations do not specify against whom the appeal must be directed. It does not follow from the wording in Art. 66 et seq. of the FIFA Statutes that FIFA allows for cases to be resolved by CAS irrespective of the parties' standing to sue or to be sued. There is no specific provision in the FIFA regulations and the question whether or not a respondent has standing to be sued must be derived from the subsidiarily applicable Swiss law.**

6. A FIFA decision is qualified as a resolution of an association (Vereinsbeschluss), if it was issued – *inter alia* – based on the rules and regulations of FIFA, and if it concerns the association life (*"Vereinsleben"*) of FIFA. This is indicative of a resolution of an association, since resolutions – along with statutes and regulations – are the only (legal) measures known to an association to regulate and rearrange legal relationships linked to the association life. However, it does not follow automatically from such qualification as resolution of an association that any appeal against it must be directed against FIFA. Art. 75 CC is – contrary to the legal situation in relation to public limited companies – silent on who is the appropriate defendant of a *"Vereinsbeschluss"*. The provision is primarily designed for appeals against resolutions of the general assembly of the association.

7. In analysing whether an appellant has standing to appeal, the CAS panel must determine whether the appellant has shown that it has sufficient legal interest in the matter being appealed. Indeed, only an aggrieved party, having something at stake and, thus, a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against a decision. It is only where a party does *"not have a cause of action or legal interest ('intérêt à agir') to act against the Appealed Decision [that such party] would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing ('pas intérêt, pas d'action')"*.

8. It is within the CAS panel's discretion (based on Art. R57 par. 1, 2nd sentence of the CAS Code) whether to issue a new decision substituting the appealed decision or to send the matter back to the previous instance. In the majority of cases, the CAS issues a new decision (instead of remanding the case back to the previous instance). Reasons of procedural economy speak in favour of such alternative. However, CAS jurisprudence also shows that there are exceptions to this rule and that there are in fact cases in which CAS has referred the matter back to the previous instance.

I. THE PARTIES

1. The Appellant, Ms Ana Kuže (hereinafter referred to as the "Appellant"), born on 14 July 1950, is the sole legal heir of the deceased Josip Kuže. The latter was a professional football coach and died on 16 June 2013 (hereinafter referred to as the "Coach").

2. The Respondent, Tianjin TEDA FC (hereinafter referred to as the "Club" or "Respondent") is a professional football club, affiliated with the Chinese Football Association (hereinafter referred to as the "CFA") which in turn is affiliated with the Fédération Internationale de Football Association (hereinafter referred to as "FIFA").

3. The Appellant and the Respondent are jointly referred to as the "Parties".

II. THE RELEVANT FACTS

4. Below is a summary of the main relevant facts and allegations based on the Parties' written submissions and adduced evidence. Additional facts and allegations may be set out, where relevant, in connection with the discussion of law and merits that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence it considers necessary to explain its reasoning.

5. On an unknown date, the Coach and the Club signed a two-year employment contract, valid from 1 January 2012 until 31 December 2013 (hereinafter referred to as the "Employment Contract"). According to the Employment Contract the Respondent engaged the Coach as *"head coach"* of its professional team.

6. The Employment Contract provided that the Coach was entitled to receive a basic salary of USD 500'000 per year as well as bonuses *("the amount of Match Bonus shall be 100% of the amount of 11 starting players of the Match, and shall be paid monthly")*.

7. Furthermore, Art. 5 of the Employment Contract stipulated that *"if the party B [e.g. the Coach] had any of the following behaviors, party A [e.g. the Club] can terminate the contract with Party B unilaterally without any financial compensation (including the bonus for league ranking):*

    1. *Violation of Chinese Laws, sanctioned or punished by the judicial administration.*

    2. *Neglecting his duty, failure of fulfilling his duties.*

    3. *Unable to perform the contractual duties due to health reason.*

    4. *Severe violation of Contract stipulations or other administrative regulations of Party A; or violation of competition desciplines.*

    5. *Severe unprofessional or unsporting behavior, damaging the interest or the reputation of party A, seriously punished by the CFA China Football Association or FIFA.*

    6. *The Team coached by Party B gets no more than 1 point in a consecutive 4 official league matches, Party A has the right to terminate the Party B's contract.*

    7. *The team's position is out of the Top 6 positions in CSL teams ranking after 15 rounds of matches played according to league schedule.*

    8. *At the end of CSL 2012 Season, the first team fails to reach top 3 positions in the League, and fails to win the FA Cup 2012 Champion.*

    9. *Winning the Champion of 2012 FA Cup, but ranks out of top 10 positions in the CSL at the end of game season".*

8. Furthermore, the Employment Contract provided that *"if any of the two parties breach the contract unilaterally, he should pay to the other party 50% of the salary amount of remaining period of the Contract as compensation. The case related to article 5 of this Contract is excluded"*.

9. Under the heading *"Arbitration"* the Employment Contract provides as follows:

> *"In the implement of the contract both parties should try to resolve the occurred disputes and conflicts through friendly negotiation. In case of litigation of the Contract, the case shall be submitted to CFA or FIFA for arbitration"*.

10. Under the heading *"Jurisdiction"* the Employment Contract specifies as follows:

> *"The contract shall be governed and construed by the Laws of China"*.

11. On 20 May 2012, the football game between the Respondent and Liaoning Hongyun took place. According to the match reports submitted by the match commissioner and the referees, the Coach violated disciplinary regulations. The Appellant denies that any violation of disciplinary provisions has occurred. The Club following this (alleged) incident initiated disciplinary proceedings against the Coach before the CFA.

12. On 22 May 2012, the CFA rendered a disciplinary decision (hereinafter referred to as the "Disciplinary Decision") against the Coach establishing the following offences:

> *"1. Entering the Field of Play without permission and blaming and accusing against the Referee;*
>
> *2. Waving cash money to the Referees and use of insulting and offensive language to the Referees;*
>
> *3. Improper comments in the Post-game Press Conference, which caused negative public influence"*.

13. In application of Art. 36, 44, 52 and 78 of the CFA Disciplinary Code and Punishment Measures, the CFA imposed the following sanctions against the Coach:

> *"1. Mr. KUZE is prohibited to Enter the Game Venue (Stadium) in Chinese Football Association Super League Leg 12;*
>
> *2. Mr. KUZE is prohibited to Enter the Team Bench in Chinese Football Association Leg 13 – Leg 18 (Six Games);*
>
> *3. Fine at the amount of RMB 38'000"*.

14. By letter dated on 28 May 2012 (hereinafter referred to as the "Termination Letter"), the Club advised the Coach that the latter has been severely punished by the CFA and that he had severely damaged the Clubs' reputation. In view of these circumstances, the Club informed the Coach that it had decided *"to terminate the Employment Contract of Coach with Mr. Josip Kuze"*.

15. On 24 July 2012, the Coach's counsel filed an appeal with the CFA against the Disciplinary Decision. The Coach submitted that the Disciplinary Decision violated his material and procedural rights. The CFA neither informed him of the disciplinary proceedings nor did the CFA give him a chance to participate and defend his rights in the proceedings. He only found out that the CFA had conducted disciplinary proceedings against him once the Club issued the Termination Letter. Finally, the Coach declined all the accusations made in the Disciplinary Decision. The CFA never reacted to the appeal sent by the Coach.

16. Also on 24 July 2012, the Coach's counsel informed the Club that the Coach was willing to give the Respondent a chance to resolve the present matter amicably. He offered the Club two possibilities: either the Club revokes the Termination Letter or it pays compensation in the amount of USD 1'041'000. Furthermore, the Coach advised the Club that in case the Club did not react to his proposal until 31 July 2012, he would lodge a claim with FIFA.

17. The Club did not react to the Coach's proposal to settle the matter amicably.

18. By letter dated 25 March 2013, the Coach filed a claim against the Respondent before FIFA basing his claim on the fact that the Club had terminated the Employment Contract unilaterally without just cause and thus failed to respect its contractual obligations.

19. On 16 June 2013, the Coach passed away due to an illness.

20. On 21 June 2013, the Appellant's counsel informed FIFA that the Coach had passed away and requested that *"this procedure be put on hold (stayed) until the heirs of Mr. Kuže have taken over the procedure pursuant to the estate probate"*.

21. By letter dated on 11 July 2013, FIFA responded to the Appellant's counsel's letter that it will put the present matter on hold and invited the counsel to provide FIFA as soon as possible with an update in this regard.

22. On 17 January 2014, the Municipal Civil Court in Zagreb appointed Ana Kuže as the sole legal heir of Josip Kuže.

23. On 16 April 2014, the Appellant informed FIFA that Ana Kuže had been appointed as the sole legal heir of the Coach and therefore requested FIFA to continue the proceedings. Furthermore, the Appellant requested FIFA to grant an extension of the deadline to pay the advance of costs.

24. By letter dated 8 May 2014, FIFA referred the Appellant to the content of Art. 6 par. 1 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber 2008 edition (hereinafter referred to as the "Procedural Rules"). According thereto, parties before FIFA bodies must be qualified as either of the following: member associations of FIFA, clubs, players, coaches or licensed match and players' agents. FIFA thus advised the

Appellant that it did not *"appear to be competent to hear claims of individuals who do not belong to one of the above-mentioned parties"*.

25. By letter dated 14 May 2014, the Appellant requested FIFA to reconsider its position. The Appellant explained that the party in the case was still the Coach or more precisely that the matter in dispute concerned the Coach's rights deriving from the Employment Contract. The Appellant explained that she *"is only executing her right to take over and see through that the rights arising from the above mentioned contract should be decided upon"*. Furthermore, the Appellant submitted that the right of a legal successor to step in and take over any type of legal or administrative proceedings initiated by the deceased was well established in international law.

26. By letter dated 28 May 2014, FIFA referred the Appellant to Art. 17 of the Procedural Rules. According thereto, the Appellant was requested to pay the advance of costs in order for the proceedings to continue. FIFA set a time limit until 17 June 2014 for the Appellant to pay such advance of costs.

27. On 5 June 2014, the Appellant sent proof of the payment of the advance of costs in the amount of CHF 5'000.

28. On 17 June 2014, FIFA wrote a letter to the CFA in which it invited the Club to provide its position in response to the claim of the Appellant by no later than 8 July 2014.

29. By letter dated 15 July 2014, FIFA determined that the Club had failed to submit its position. In the same letter, FIFA informed the Appellant and the Club that the investigation phase had been concluded and that the case was now submitted to the competent body to issue a formal decision.

30. By letter dated 22 July 2014, the Respondent apologized for its late answer. The Respondent submitted that – because of communication problems with the CFA – it had failed to realise that a legal procedure was under way against it. Furthermore, the Respondent requested FIFA to grant a brief deadline for it to submit a formal answer.

31. On 25 July 2014, the Appellant requested FIFA to reject the Respondent's request.

32. By letter dated 8 September 2014, FIFA declined to grant an additional deadline to the Respondent to file an answer and advised the Parties that the present case was submitted to the competent body for a formal decision.

33. On 23 September 2014, the Single Judge of the FIFA Players' Status Committee rejected the claim of Ana Kuže on the ground that the claim was inadmissible (hereinafter referred to as the "Appealed Decision").

34. On 13 January 2015, the Single Judge of the FIFA Players' Status Committee issued the grounds of the Appealed Decision. The latter indicated that only the parties listed in Art. 6 par. 1 of the Procedural Rules are entitled to act in front of FIFA bodies and that *"it is*

undisputable that the Claimant was not included on this list". Furthermore, the Appealed Decision reads as follows:

> *"In this context, the Single Judge was eager to emphasize that the decision-making bodies of FIFA have a very strict framework limited by its own regulations and that it may not act outside the limitations established by said regulations.*
>
> *On account of all of the above, the Single Judge held that, considering that the legal heir of the late coach, i.e. the Claimant, is not a party indicated in art. 6 par. 1 of the Procedural Rules, he is not in a position to deal with the present dispute".*

35. The Appealed Decision contains a note at the end of the decision advising the parties of the possibility of an appeal to the Court of Arbitration for Sport (hereinafter referred to as "CAS") according to Art. 67 par. 1 of the FIFA Statutes 2014 edition.

III. THE PROCEEDINGS BEFORE THE CAS

36. The proceedings before the CAS can be summarised in their main parts as follows:

37. On 3 February 2015, the Appellant filed her Statement of Appeal with the CAS against the Appealed Decision pursuant to Art. R48 of the Code of Sports-related Arbitration 2013 edition (hereinafter referred to as the "CAS Code"). The Appellant requested that a single arbitrator be appointed by the CAS to decide the dispute. However, in case a Panel of three arbitrators were to be appointed, the Appellant wished to nominate Prof. Dr. Lukas Handschin as arbitrator in the present case.

38. By letter dated 9 February 2015, the CAS Court Office confirmed receipt of the "Statement of Appeal" filed by the Appellant and invited the Respondent to inform the CAS Court Office, within five days of receipt of that letter whether it agreed to the appointment of a sole arbitrator.

39. On the same date, the CAS Court Office informed FIFA of the Appeal filed by the Appellant against the Respondent. The letter reads – inter alia – as follows:

> *"The appeal is not directed at FIFA. If FIFA intends to participate as a party in the arbitration, pursuant to Articles R54 and R41.3 of the [CAS Code], it shall file with the CAS an application to this effect […]. If FIFA does not become a party to this arbitration, it will nevertheless receive a copy of the final award or any decision terminating the procedure".*

40. On 12 February 2015, the Appellant filed her Appeal Brief pursuant to Art. R51 of the CAS Code.

41. On the same day, the Respondent informed the CAS Court Office that it had received the letter of the CAS Court Office dated 9 February 2015 on 11 February 2015 and requested an extension of the deadline to comment on the constitution of the Panel.

42. Still on same date, the CAS Court Office confirmed that the deadline for the Respondent to comment whether it agreed to the appointment of a sole arbitrator was extended until 16 February 2015.

43. On 13 February 2015, the CAS Court Office invited the Respondent to submit its Answer within twenty days, pursuant to Art. R55 of the CAS Code.

44. On 16 February 2015, the Respondent informed the CAS Court Office that it preferred the matter to be submitted to a Panel instead of a sole arbitrator and nominated Mr Olivier Carrard.

45. By letter dated 17 February 2015, in view of the Parties' disagreement on the number of arbitrators, the CAS Court Office informed the Parties that the President of the CAS Appeals Arbitration Division had decided to submit the present dispute to a Panel of three arbitrators, in accordance with Art. R50 of the CAS Code.

46. By letter dated 26 February 2015, the Respondent requested that *"[…] the CAS […] grant the Respondent with the possibility of paying its share of the advance costs after the Appellant has paid its share"* and that *"[…] the CAS […] pursuant to Article R55 of the CAS Code [fixes] the deadline to submit its Answer […] after the Appellant fulfills the payment of its share of advance costs"*.

47. On 27 February 2015, the CAS Court Office informed the Parties that the deadline for the Respondent to file its Answer will be fixed once the Appellant has paid her share of the advance of costs. Furthermore, the CAS Court Office confirmed that the Respondent's deadline to pay its share of the advance of costs was suspended until the Appellant's payment of her share of the advance of costs.

48. On 9 March 2015, the Appellant completed and returned the Legal Aid Application Form to the CAS Court Office, requesting assistance for CAS arbitration costs and for her own costs, costs of witnesses, experts and interpreters.

49. On 17 March 2015, the President of the International Council of Arbitration for Sport ruled that the Appellant's request for assistance for CAS arbitration costs was granted. However, the request for assistance for her own costs, costs of witnesses, experts and interpreters was denied.

50. On the same date, the CAS Court Office granted the Respondent a deadline of twenty days to submit its Answer.

51. By letter dated 1 April 2015, the CAS Court Office informed the Parties on behalf of the President of the CAS Appeals Arbitration Division that the Panel had been constituted as follows: Prof Ulrich Haas, President of the Panel; Prof Lukas Handschin and Mr Olivier Carrard, arbitrators.

52. By letter dated 2 April 2015, the Respondent advised that the deadline to submit its Answer will expire on Monday, 6 April 2015, which is an official national holiday in China. Therefore, the Respondent requested CAS to confirm that the final date to submit its Answer was 7 April 2015.

53. On the same date, the CAS Court Office confirmed that pursuant to Art. R32 of the CAS Code the time limit expires at the end of the first subsequent business day if the last day of the time limit was an official holiday or a non-business day in the country where the notification had to be made.

54. On 7 April 2015, the Respondent filed its Answer in which it contested the jurisdiction of CAS. Furthermore, the Club requested the Panel to hold the hearing in the present matter at the CAS Alternative Hearing Centre in Shanghai.

55. By letter dated 9 April 2015, in accordance with Art. R55 of the CAS Code, the CAS Court Office granted the Appellant a deadline of ten days to file her comments on the Respondent's objection to the jurisdiction of CAS. Furthermore, the CAS Court Office noted that the Parties should not be authorized to supplement or amend their requests or their argument, not to produce new exhibits, nor to specify further evidence on which they intended to rely, after the submission of the Appeal Brief and of the Answer, pursuant to Art. R56 of the CAS Code. Finally, the CAS Court Office invited the Appellant to disclose, together with her comments on the jurisdiction of CAS, whether she preferred a hearing to be held in that matter. The Appellant was also invited to state whether she would agree that such hearing took place at the CAS Alternative Hearing Centre in Shanghai.

56. On 20 April 2015, FIFA renounced its right to intervene in the present proceedings. Furthermore, FIFA advised *"that Ms Ana Kuže (the Appellant) has not designated FIFA as a respondent to the present procedure, whereas one of her 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"*. In addition FIFA advised that *"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"*.

57. By letter dated 22 April 2015, the Appellant informed the CAS Court Office that a hearing was not necessary. In case the Panel would deem otherwise the Appellant requested that the hearing be held at the CAS headquarters in Lausanne. Furthermore, the Appellant filed a complete Reply to the Respondent's Answer to the Appeal Brief.

58. On 4 May 2015, the CAS Court Office granted the Appellant a deadline until 8 May 2015 to comment on FIFA's letter dated 20 April 2015. Within the same deadline, the Respondent was invited to state whether it agreed that the Appellant's submission of 22 April 2015 be taken on file.

59. With letter dated 4 May 2015 (and received by the CAS Court Office on 8 May 2015) the Appellant filed her observation regarding the FIFA letter of 20 April 2015.

60. With letter dated 7 May 2015 the Respondent objected to the unsolicited submissions of the Appellant and submitted that *"the Respondent will only accept the Appellant's submissions if the Panel allows the Respondent to submit its second and final answer".*

61. On 12 May 2015, the CAS Court Office informed the Parties that the Panel decided to admit the Appellant's submission of 22 April 2015 on file and granted the Respondent a deadline of ten days to file a reply thereto.

62. With letter dated 22 May 2015, the Respondent replied to the Appellant's submission dated 22 April 2015.

63. On 15 June 2015, the CAS Court Office informed that the Panel had decided, on the basis of the written submissions and on a preliminary basis as agreed by the Parties, that CAS had jurisdiction to hear the present matter and that the Appeal was admissible. Also based on the Parties' written submissions and as a partial matter as agreed by the Parties, the Panel had decided on the merits that the Appellant had standing to sue and the Respondent standing to be sued. Furthermore, the CAS Court Office informed the Parties that the reasons thereto would be included in the final award. Finally, in accordance with Art. R57 of the CAS Code, the Panel had decided to hold a hearing in Lausanne, Switzerland, which should be limited to the remaining issues on the merits.

64. On 6 July 2015, the CAS Court Office informed the Parties that a hearing would be held on 19 August 2015 in Lausanne, Switzerland, and granted the Parties until 14 July 2015 to indicate the names of all persons who would be attending the hearing.

65. On the same date, the CAS Court Office sent the Parties the Order of Procedure to be signed.

66. With letter dated 8 July 2015, the Respondent returned the signed Order of Procedure to the CAS Court Office. However, in the accompanying letter the Respondent stated that it had disputed from the very beginning the jurisdiction of the CAS and that, therefore, the signing of the Order of Procedure could not be construed to mean that it accepts CAS jurisdiction in this matter.

67. On 16 July 2015, the Appellant returned her signed Order of Procedure. Furthermore, the Appellant informed the Panel that she will be represented during the hearing by Ms Laura Manz, Attorney-at-law, Kellerhals Anwälte, Basel, Switzerland.

68. The hearing was held on 19 August 2015 in Lausanne at the premises of the CAS. The hearing was attended for the Appellant by Ms Laura Manz, Attorney-at-law, Kellerhals Anwälte and for the Respondent by Mr Alejandro Pascual and Mr Jiang (Gilbert) Yuan Zhe, both Attorneys-at-law, Boss & Young. No witnesses were heard at the hearing. At the end of the hearing the Parties declared that their right to be heard had been fully respected.

IV. THE PARTIES' RESPECTIVE REQUESTS FOR RELIEF AND BASIC POSITIONS

69. This section of the award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the award nor in the discussion of the claims below.

A. The Appellant

70. In her Statement of Appeal / Appeal Brief, the Appellant submitted the following requests for relief to the CAS:

> *"3.1. Mrs. Ana Kuže, as the sole legal heir of the late Coach Josip Kuže has a legal interest and a standing to both step into the proceedings of her late husband and to appeal the decision of FIFA Players' Status Committee issued on 9 October 2014 [23 September 2014][1] and her stepping into these proceedings and this appeal are therefore admissible.*
>
> *3.2. The decision of FIFA Players' Status Committee of 9 October 2014 [23 September 2014][2] is set aside and replaced by this award.*
>
> *3.3. The Respondent, the Chinese Football Club Tianjin TEDA is herewith ordered to pay to the Claimant the amount of 1'041'000 USD […] within 30 […] days from the date of notification of this award. Eventualiter, the decision of the FIFA Players' Status Committee of 9 October 2014 [23 September 2014][3] shall be annulled and the case shall be referred back to the previous instance with the order to accept the Appellant as a party of the procedure.*
>
> *3.4. If the aforementioned sum is not paid within the aforementioned deadline, an interest rate of 5 % per year will apply as of expiry of the fixed time limit.*
>
> *3.5. The final costs of the proceedings are to be paid by the Respondent, the Chinese Football Club Tianjin TEDA".*

71. The Appellant's submissions in support of her request can be summarised in essence as follows:

(a) In light of Art. 560 of the Swiss Civil Code (hereinafter referred to as "CC") *"the Appellant automatically subrogated into the claim of Mr. Kuze against the Club"*. Therefore, the Appellant *"must be entitled to continue with the procedure before the FIFA [...] and before the CAS"*.

[1] Added for better understanding.
[2] Added for better understanding.
[3] Added for better understanding.

(b) The Appellant further argues that, in respect of legal succession the *"FIFA Regulations are not clear enough",* since the "*issue of the legal heirs and their right to step into the proceedings initiated by their late predecessor is not regulated by the FIFA regulations"*. Therefore, the Appellant submits that *"Swiss law should be applied"*.

(c) In addition, the Appellant is of the opinion that the CAS competence is established not only by the regulations of the CAS and FIFA, but, ultimately, also by the fact that the FIFA Players' Status Committee stated in its Appealed Decision that the latter was appealable before the CAS.

(d) The Appellant further argues that FIFA cannot be a third party or an intervening party in this procedure since FIFA acted as the first instance judicative body. Art. R54 of the CAS Code does not provide the first instance body with an opportunity *"to influence decision of the parties related to this issue"*. Moreover, the Appellant is of the view that *"CAS's awards issued in the appeal procedures […] should be binding to FIFA – otherwise, the very meaning and purpose of the appeal process would be missed"*.

(e) Regarding the merits, the Appellant submits that the termination of the Employment Contract was without just cause. The Appellant rejects the accusations against the Coach relating to his alleged behaviour on the occasion of the football match on 20 May 2012. The Appellant submits that the Coach has no command of the Chinese language. Therefore, he could not verbally attack the referees on the pitch, since the latter were unable to speak or understand English. Moreover, the Coach did not waive money in front of the referees' face. He never carried any money with him to any matches. In addition, the Appellant submits that the Coach's alleged behaviour has not been recorded anywhere. In particular there is no TV footage evidencing the alleged facts. The Appellant finally submits that the Coach did not make improper comments at the press conference.

(f) Furthermore, the Appellant submits that the Coach was not informed of the fact that disciplinary proceedings had been initiated by the CFA against him (relating to the instances of the football game on 20 May 2012) upon request of the Club. Instead, it was the Respondent who participated in the proceedings before the CFA on his behalf. The Appellant submits that the Coach had no knowledge of this, that he was not informed by the Respondent and that the latter had no Power of Attorney to do so and to defend his interests while it was at the origin of such proceedings. Thus, the CFA procedure violated his basic rights of due process. In particular, the Appellant submits that the Coach's right to be heard had been violated. Furthermore, no body informed him how or to whom to appeal the Disciplinary Decision. Furthermore, the Appellant submits that the CFA never sent the Disciplinary Decision to the Coach. In view of all of the above, the Disciplinary Decision of the CFA should be considered as null and void. Thus, it cannot be the legal basis for the termination of the Employment Contract.

(g) Moreover, the Appellant argues that the Club had started negotiations with the new coach ten days before the aforementioned football game. The Club employed the new coach immediately after terminating the Employment Contract. The Appellant concludes that

the Respondent was just looking for an opportunity to issue disciplinary measures against the Coach in order to justify the early (und unjust) termination of the Employment Contract.

(h) Regarding the calculation of the compensation, the Appellant puts forward that the Club already paid the Coach USD 184'000 for the year 2012. Therefore, the Club owes the Coach the amount of USD 316'000 for the year 2012 and the total yearly salary in the amount of USD 500'000 for the year 2013. The Appellant requests, therefore, the payment of the basic salaray for the years 2012 and 2013 in the amount of USD 816'000. In addition, the Appellant requests the payment of bonuses in the total amount of USD 225'000 (USD 15'000 per month).

B. The Respondent

72. In its Answer to the Statement of Appeal, the Respondent requests to rule as follows:

> *"1. Declare that the CAS is not competent to hear the present dispute;*
>
> *2. Alternatively, declare inadmissible and reject in full the appeal submitted by the Appellant;*
>
> *3. Condemn the Appellant to pay all procedural costs derived from the present procedure;*
>
> *4. Condemn the Appellant to pay CHF 10'000 […] as a contribution towards the legal fees incurred by the Respondent".*

73. The Respondent's submissions in support of its request can be summarised in essence as follows:

(a) According to Art. R47 of the CAS Code, a decision is appealable before CAS only under three conditions: (i) there must be a "decision" of a federation, association or another sports-related body and the applicable regulations must declare the CAS as the competent appeal body; (ii) the parties must have agreed to the competence of the CAS and (iii) the internal legal remedies available must have been exhausted.

(b) According to the Respondent, the first condition is not met in the present case, because the matter in dispute is not covered by Art. 66 par. 1 of the FIFA Statutes. The latter provides as follows: *"FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players' agents"*. The present matter is definitively not covered by said provision, since the Appellant is not one of the aforementioned subjects. Therefore, the FIFA Statutes do not provide the CAS with jurisdiction to hear the present dispute.

(c) Moreover, FIFA did not even issue a decision on the merits. It only ruled that it was not competent to hear the dispute.

(d) Furthermore, the Respondent submits that the parties to the Employment Contract never expressly agreed to the competence of the CAS.

(e) According to Art. R48 of the CAS Code, the Appellant shall submit in her Statement of Appeal the name and full address of the Respondent(s). FIFA was not called as a respondent in the CAS proceedings. Therefore, CAS has no power to rule about the competence of FIFA in such regard.

(f) In case CAS considers itself to be competent to hear the present dispute, the Respondent submits that the CAS competence shall be limited to the decision rendered by FIFA. The CAS shall only rule on the issue whether the FIFA Players' Status Committee correctly or incorrectly determined that the claim submitted by the Appellant was inadmissible. If the CAS determines that the FIFA body erred in concluding that the claim was inadmissible, it shall refer the case back to the competent FIFA instance in order to reissue a new decision. A decision from the CAS on the merits of the case would violate the Respondent's right to a double degree of jurisdiction.

(g) Regarding the merits of the case, the Respondent refers to Art. 6 of the Procedural Rules and submits that FIFA is not competent to hear claims from individuals not listed in said article.

(h) Finally, the Respondent submits that it was in any case entitled to terminate the Employment Contract with just cause due to the misconduct committed by the Coach and confirmed by the Disciplinary Decision of the CFA. The Coach left no option to the Club but to terminate the Employment Contract due to the misconduct which harmed not only the Club's reputation but also football in general. The imposed sanction was very severe, thus, evidencing the seriousness of the Coach's misconduct.

(i) Regarding the calculation of the compensation, the Respondent refers to Art. 5 of the Employment Contract which reads as follows: *"If any of the two parties breach the contract unilaterally, he should pay the other party 50% of the salary amount of remaining period of the Contract as compensation"*. The Respondent puts forward that in case the Panel concludes that of the Club terminated the Employment Contract without just cause, the Appellant is only entitled to a compensation in the amount of 50% of the proportional yearly salary until the decease of the Coach (from 28 May 2012 until 16 June 2013: 13,5 months). The compensation only covers the period until the date of the Coach's decease, since it is a common principle in law that, if a party in a contract passes away, the contract shall generate no more obligations between the parties. Furthermore, the Club submits that the bonuses were of an uncertain nature and in no case to be considered as salary. In cases of a termination of the Employment Contract without just cause, bonuses should not be included in the calculation of the compensation. As a result, the compensation that the Respondent may receive should not exceed the amount of USD 281'250.

V. JURISDICTION OF THE CAS

74. In order to have jurisdiction, the arbitral tribunal must assess whether there is a valid arbitration agreement between the parties (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 277). This assessment must be done on the basis of the *lex arbitri* (POUDRET/BESSON, Comparative Law of International Arbitration, 2nd edition, London 2007, No. 112). As Switzerland is the seat of the arbitral tribunal and at least one of the parties involved was not domiciled in Switzerland at the time of the execution of the arbitration agreement, the provisions of the Private International Law Act (hereinafter referred to as the "PILA") apply (Art. 176 par. 1 of the PILA). In accordance with Art. 186 par. 1 of the PILA the CAS has the power and the mandate to decide – *inter alia* – on its own jurisdiction.

A. Is there an Arbitration Agreement?

75. In accordance with Art. 178 par. 2 of the PILA, the arbitration agreement is valid if it is in compliance either with the law chosen by the parties, the law applicable to the merits or Swiss Law. The Panel starts with an examination of the legal situation under Swiss Law.

1. The Principles applicable to the Interpretation of Arbitration Agreements

76. Whether the parties of the Employment Contract have agreed on the competence of the CAS is questionable in the case at hand. Where the content of a contract is disputed, the latter has to be determined by interpretation. This principle also applies to arbitration agreements (see decision of the Swiss Supreme Court – hereinafter: *"SFT"* – 130 III 66 E. 3.2; POUDRET/BESSON, Comparative Law of International Arbitration, 2nd edition, London 2007, No. 304). According thereto, the arbitral tribunal must first determine the real intent of the parties (Art. 18 par. 1 of the Swiss Code of Obligations, CO). If it is not possible to establish such a real and common intent, the agreement is to be construed objectively, according to the so-called principle of mutual trust, namely to identify the sense that the parties could and should give, according to the rules of good faith, to their mutual declarations of intention (see SFT 130 III 66 E. 3.2; BSK-IPRG-GRÄNICHER, 3rd edition, Basel 2013, Art. 178 No. 52a; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. R27 No. 69). The various steps foreseen in Art. 18 par. 1 CO to ascertain the will of the parties are best described in the following decision by the Swiss Federal Tribunal (SFT 127 III 444 E. 1b), which states – *inter alia* – as follows:

> *"Pour déterminer s'il y a eu effectivement accord entre parties, il y a lieu de rechercher, tout d'abord, leur réelle et commune intention (art. 18 al. 1 CO). Il incombe donc au juge d'établir, dans un premier temps, la volonté réelle des parties, le cas échéant empiriquement, sur la base d'indices. S'il ne parvient pas à déterminer cette volonté réelle, ou s'il constate qu'une partie n'a pas compris la volonté réelle manifestée par l'autre, le juge recherchera quel sens les parties pouvaient et devaient donner, selon les règles de la bonne foi, à leurs manifestations de volonté réciproques (application du principe de la confiance). A cet égard, la jurisprudence récente a nuancé le principe selon lequel il y aurait lieu de recourir à des règles d'interprétation uniquement si les termes de l'accord passé entre parties laissent planer un doute ou sont*

peu clairs. On ne peut ériger en principe qu'en présence d'un "texte clair", on doit exclure d'emblée le recours à d'autres moyens d'interprétation. Il ressort de l'art. 18 al. 1 CO que le sens d'un texte, même clair, n'est pas forcément déterminant et que l'interprétation purement littérale est au contraire prohibée. Même si la teneur d'une clause contractuelle paraît claire à première vue, il peut résulter d'autres conditions du contrat, du but poursuivi par les parties ou d'autres circonstances que le texte de ladite clause ne restitue pas exactement le sens de l'accord conclu".

[free translation: "To determine if there was an agreement between the parties one must first seek their true and common intention (art. 18 para.1 CO). The judge must therefore first establish the true will of the parties, empirically as the case may be, based on circumstances. If he cannot establish the true will or he finds that one of the parties did not understand the true will expressed by the other party, the judge will seek the meaning that the parties could and should have given to their respective declarations in accordance with the rules of good faith (application of the principle of trust). In this respect, recent case law has modified the principle according to which the rules of interpretation should apply only if the terms of the agreement between the parties leave room for doubt or are unclear. One cannot state that in the presence of a "clear text" one must exclude all other means of interpretation. It derives from Article 18 para. 1 CO that the meaning of a text, even a clear one, is not necessarily determinative and that the purely literal interpretation is on the contrary prohibited. Even if a contractual clause appears clear at first view, it can result from the conditions of the contract, from the objectives sought by the parties or from other circumstances that the text of such contractual clause does not convey exactly the content of the agreement that was concluded"].

77. Since in the present case the Parties have not submitted what the subjective will of the parties to the Employment contract was at the time of the conclusion of the latter, the Panel must seek the meaning that said parties could and should have given to their respective declarations in accordance with the rules of good faith.

2. Consent in respect of the essentialia negotii of an Arbitration Agreement

78. According to Art. 1 par. 1 and Art. 2 par. 1 CO, an agreement is concluded only if the parties have, reciprocally and by mutual assent, expressed their common intent on all essential points. The points objectively essential (essentialia negotii) for an arbitration agreement are the intent of the parties

- (i) to exclude the jurisdiction of state courts by
- (ii) submitting a determinable dispute to
- (iii) a determinable arbitral tribunal (SFT 129 III 675 E. 2.3; SFT 4A_246/2011, 7 November 2011, E. 2.1 et seq.; BSK-IPRG-GRÄNICHER, 3rd edition, Basel 2013, Art. 178 No. 30; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 286).

a) Consent to exclude State Courts

79. The Panel finds that there are enough elements in the present case to assume that the Coach and the Club wanted to exclude recourse to state courts. In this respect, the Panel notes that the heading of the respective clause in the Employment Contract refers to *"arbitration"*. Thus, this wording is indicative of the parties' will to provide a dispute resolution mechanism that excludes the intervention of state courts. Furthermore, this interpretation is backed by the contents of the clause, in which it is stated that the disputes arising out of the Employment Contract shall be resolved through *"arbitration"*. In addition, the Panel notes that also the interests of the parties to the Employment Contract speak in favour of arbitration. The Employment Contract is international in character opposing a Chinese Club to a Croatian coach. In international sports-related contracts opposing parties from different jurisdictions it is very common for the parties to provide for an arbitration clause. To sum up, therefore, the Panel finds that there is consent of the parties to establish a dispute resolution mechanism for disputes arising out of the Employment Contract outside state courts. This interpretation is not contradicted by the fact that the Employment Contract contains also a *"jurisdiction"* clause. When looking at the latter it is obvious that the intent of the parties to the Employment Contract in respect of said clause was not to determine an appropriate forum to decide disputes arising out of the Employment Contract, but to determine the applicable law to the merits. The provision states that *"the contract shall be governed and construed by the Laws of China"*.

80. The interpretation followed here is also not contradicted by the fact that the *"arbitration"* clause provides that controversies arising out of the Employment Contract are submitted *"to CFA or FIFA for arbitration"*. It is true that the CFA and FIFA bodies – in application of their regulations – do not issue arbitral awards. Insofar the Panel subscribes to the findings in CAS 2012/O/2867, par. 5.8 which read as follows:

> *"The Claimant has correctly pointed out that the FIFA bodies – in application of the FIFA Regulations – do not issue arbitral awards. They (only) assume jurisdictional functions as so-called association tribunals. Decisions by these association tribunals must be distinguished from arbitral awards. The latter are final and binding and are issued on the basis of an arbitration agreement the purpose of which is to exclude, in principle, permanently any recourse to state courts. Proceedings before association tribunals, however, only temporarily exclude recourse to state courts. Once the internal remedies of the association are exhausted, the decision of the association tribunal can be appealed (with full power of review) before state courts (e.g. according to art. 75 Swiss Civil Code – 'CC') or – in case of an arbitration agreement – before an arbitral tribunal"*.

81. However, the Panel holds that this is a case of *"falsa demonstration non nocet"*. According thereto a false denomination of the competent judicial body by the parties does not vitiate the arbitration agreement (as long as the competent arbitral tribunal is determinable). It is clear to the Panel that the parties of the Employment Contract wanted to confer to the CFA or FIFA the task to solve disputes arising from the Employment Contract at the exclusion of state courts.

b) Determinable Arbitral Tribunal

82. According to Swiss law, the designation of an arbitrator or an arbitral institution is not part of the *essentialia negotii* (ARROYO, Arbitration in Switzerland, Biggleswade 2013, Art. 178 No. 18; SFT 4A_246/2011, 7 November 2011, E. 2.1). Under Swiss law, the parties are presumed to choose arbitration as such and not because of the identity of the arbitrator (see Decision of the Cantonal Court of Vaud, reported in *JdT* 1988 III 16, quoted in *ASA Bulletin* 2/2010 p. 403, footnote 33). Hence, the identity of the arbitrator is generally not considered as an essential element of an arbitration agreement. Instead, it suffices that the arbitral tribunal is determinable. Whether the parties to the Employment Contract agreed upon a determinable arbitral tribunal in the case at hand is debatable, since – as previously mentioned – the CFA and FIFA bodies to which the parties have submitted do not assume functions of an arbitral tribunal. However, it follows from an objective interpretation of the Employment Contract that the parties' intent was to confer jurisdiction to the CAS.

83. In this respect the Panel notes that the facts of the case are very similar to the ones in CAS 2010/O/2129. In the latter case, the Panel had to interpret the following "arbitration clause" contained in Art. 4 of the respective agreement: *"The competent instance in case of a dispute concerning this Agreement is the FIFA Commission, or the UEFA Commission, which will have to decide the dispute that could arise between the club and the agent"*. When interpreting the contents of this clause, the Panel reasoned as follows CAS 2010/O/2129 – prel. award, par. 6.13 et seq.):

> *"[…] the Panel considers that the wording of Art. 4 of the Agreement clearly expresses the intention of the parties to exclude the submission of their disputes to the State courts and to chose arbitration instead. First of all, the parties have chosen to designate an institution, namely FIFA or UEFA, to settle their dispute. By providing that a FIFA or a UEFA Commission would be the 'competent instance' in case of a dispute concerning their Agreement, the parties clearly agreed on a body which is: not a State court, not located in one of the parties' countries, familiar with the possible object of the dispute. Considering these elements and even if the Agreement is not clear on several aspects, the Panel is of the opinion that it can be drawn from an objective construction of this Agreement that the parties had a common intent to submit their dispute to arbitration. […]*
>
> *The first and the most important of these element is to be seen in the arbitration clause itself, which provides for the jurisdiction of FIFA or UEFA. It is in the view of the Panel a strong indication that the parties wanted an institution focused on sport, familiar with the disputes related to the transfer of players, but that the anticipated arbitral body was not limited to one single institution that would have been FIFA. Secondly, it is to be stressed that the FIFA Statutes now provide for a general appeal in front of CAS, against the decision issued by the FIFA Commission. […]*
>
> *In that respect, the Panel considers that the parties have clearly chosen to submit their dispute to an arbitration tribunal with a seat in Switzerland. By identifying FIFA or UEFA, the parties mentioned two institutions having their seat in Switzerland. … Going further into the interpretation of the intent of the parties, as expressed by the arbitration clause contained in the Agreement, the Panel is of the opinion that the parties wanted an institution specialized in sports' law or at least fully conversent with the so called lex sportiva especially as regards the rules developed in connection with football disputes. In that respect, it is notorious that CAS has jurisdiction to hear the appeals filed against the FIFA decisions*

rendered as from the year 2003. CAS has thus developed, in connection with this appeal jurisdiction, an important and regular case law concerning the decisions rendered in the world of football, namely as regards the application of the different FIFA Regulations. CAS has also developed and applied principles recognizing the specificity of the disputes arising in the world of sport".

84. The Swiss Federal Tribunal supported the aforementioned decision of CAS in its ruling of 7 November 2011 which reads – inter alia – as follows (SFT 4A_246/2011, 7 November 2011, E. 2.3.3[4]):

"Without breaching federal law the CAS found that the Parties wanted to submit their dispute to an arbitral tribunal sitting in Switzerland, which would know sport law particularly well. The designation of FIFA as well as UEFA suggests that the Parties wanted to have a sport body decide their possible disputes under the transfer contract, which would be familiar with transfers in the business of international football. It must be noticed in particular that the CAS can review FIFA decisions concerning the transfer of players on appeal and the Appellant itself acknowledges that an appeal to the CAS would have been allowed against the decision of the FIFA Committee for the Status of Players if it had accepted jurisdiction in the case at hand. On the basis of these circumstances it must be assumed that the Parties would have submitted the possible disputes arising from their transfer agreement […] to the CAS, which regularly addresses transfers of football players, had they known that the bodies mentioned in article 4 would not have jurisdiction.

[…] the CAS therefore did not break federal law when it found that it had jurisdiction to decide the dispute between the Parties in connection with the transfer of player […]".

85. In light of the above, the Panel finds that also in this case it follows from the wording of the clause in the Employment Contract that the Coach and the Club wanted an institution focussed on sport and familiar with disputes concerning football-related employment relationships. The Panel is of the view that the Coach and the Club when concluding the Employment Contract and agreeing on "FIFA" to resolve the dispute by way of arbitration wanted an institution to resolve the dispute specialized in sport law or at least fully conversant with the so-called *lex sportiva*. The CAS has developed an important and regular case law concerning the application of the different FIFA regulations. Furthermore, it follows from the FIFA Statutes that CAS assumes the role of a "cour suprême mondiale" in football related disputes. In particular the rules provide as follows:

Art. 66
"(1) FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, Clubs, Players, Officials and licensed match agents and players' agents. […]".

Art. 68
"(1) The Confederations, Members and Leagues shall agree to recognise CAS as an independent judicial authority and to ensure that their members, affiliated Players and Officials comply with the decisions passed by CAS. The same obligation shall apply to licensed match and players' agents.

[4] The original decision was translated from German to English by www.swissarbitrationdecisions.com.

> *(2) Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations. Recourse to ordinary courts of law for all types of provisional measures is also prohibited.*
> *(3) The Associations shall insert a clause in their statutes or regulations, stipulating that it is prohibited to take disputes in the Association or disputes affecting Leagues, members of Leagues, Clubs, members of Clubs, Players, Officials and other Association Officials to ordinary courts of law, unless the FIFA regulations or binding legal provisions specifically provide for or stipulate recourse to ordinary courts of law. Instead of recourse to ordinary courts of law, provision shall be made for arbitration".*

86. Thus, the Panel holds that the arbitration agreement in question concluded between the Club and the Coach confers jurisdiction upon the CAS as the competent arbitral tribunal.

87. The arbitration clause in the case at hand not only confers arbitral powers upon FIFA (i.e. CAS) but also – alternatively – upon the "CFA". According to Swiss law, however, it is admissible to agree on several alternative arbitral tribunals (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 290). In such case, the arbitral tribunal seized first by one of the parties is competent to decide the dispute. In this case this equally points to the CAS.

c) Determinable Dispute

88. According to the Swiss Federal Tribunal, an arbitration agreement is valid if the parties submit *"one or more existing or defined future differences between them to arbitration in accordance with a directly or indirectly defined legal order, thereby excluding the original jurisdiction of State courts"* (SFT 130 III 66 E. 3.1).

89. The Employment Contract provides that *"in case of litigation of the Contract, the case shall be submitted to CFA or FIFA for arbitration".* According to the jurisprudence of the Swiss Federal Tribunal, such a clause must be interpreted broadly. It includes not only disputes relating to the conclusion, the validity and the termination of the contract, but also all disputes arising from the contract (SFT 138 III 681 E. 4.4; SFT 4A_210/2008, 29 October 2008, E. 3). Such type of clauses fulfil the requirement of certainty and determinability in respect to the arbitrable disputes (BSK-IPRG-GRÄNICHER, 3rd edition, Basel 2013, Art. 178 No. 34 et seq.). Thus, the claim for damages that forms the matter in dispute is covered by the arbitration agreement.

B. Formal Validity of the Arbitration Agreement and Arbitrability

90. According to Art. 178 par. 1 of the PILA the arbitration agreement shall be valid if it is made in writing, by telegram, telex, tele copier, or any other means of communication that establishes the terms of the agreement by a text.

91. In the case at hand, the arbitration clause is embodied in the Employment Contract that is signed by the Coach and the Club. Thus, the Panel concludes that the formal requirements are met in the case at hand.

92. In accordance with Art. 177 par. 1 of the PILA a dispute is arbitrable if the dispute involves any claims of financial interest. With this open, far-reaching definition of arbitrability, the Swiss legislature wanted to broadly open the access to international arbitration (SFT 118 II 353 E. 3a; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 207). In light of this definition the Swiss Federal Tribunal has held as follows (SFT 118 II 353 E. 3b):

> *"Indeed, are governed by this provision all disputes which have a monetary value for the parties, whether they are part of their assets or liabilities, in other words all claims that represent, at least for one of the parties, an interest which is measurable in monetary terms".*

93. In the present case, the Appellant asserts a damage claim. According to Swiss Law, it is undisputed that damage claims are measurable in monetary terms and therefore arbitrable.

C. The scope of the Arbitration Agreement Ratio Personae

94. The decisive question in the present matter is, whether the scope of the arbitration agreement in the Employment Contract between the Coach and the Club extends to the Appellant.

95. In general, the arbitration agreement is like any other contract, it can only produce its effects between the contracting parties as those who are bound by it as a result of their participation in its conclusion (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 537; GÜNTER, Internationale Schiedsgerichtsbarkeit und Insolvenz, Zur Berücksichtigung von Insolvenzverfahren und ihren Auswirkungen vor internationalen Schiedsgerichten mit Sitz in der Schweiz, Zurich 2011, No. 447; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2nd edition, Zurich 1993, p. 81; SFT 4A_627/2011, 8 March 2012, E. 3.2). Basically, third parties are neither bound by an arbitration agreement, nor can they rely on it. This general rule is subject to a number of exceptions (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 538; GÜNTER, Internationale Schiedsgerichtsbarkeit und Insolvenz, Zur Berücksichtigung von Insolvenzverfahren und ihren Auswirkungen vor internationalen Schiedsgerichten mit Sitz in der Schweiz, Zurich 2011, No. 447).

96. According thereto, third parties are bound by an arbitration agreement if the law chosen by the parties, the law applicable to the merits or Swiss Law provide for such an exception (see Art. 178 par. 1 of the PILA, GÜNTER, *Internationale Schiedsgerichtsbarkeit und Insolvenz, Zur Berücksichtigung von Insolvenzverfahren und ihren Auswirkungen vor internationalen Schiedsgerichten mit Sitz in der Schweiz,* Zurich 2011, No. 449).

97. According to Swiss law, the legal successors of the parties to the arbitration agreement is bound by the latter (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 538; SFT 87 I 53 E. 3b). Thus, an arbitration agreement concluded by a deceased binds his or her heirs (BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 3rd edition, Bern 2015, No. 540; BSK-IPRG-GRÄNICHER, 3rd edition, Basel 2013, Art. 178 No. 76; GÜNTER, *Internationale*

Schiedsgerichtsbarkeit und Insolvenz, Zur Berücksichtigung von Insolvenzverfahren und ihren Auswirkungen vor internationalen Schiedsgerichten mit Sitz in der Schweiz, Zurich 2011, No. 451; RÜEDE/HADENFELDT, *Schweizerisches Schiedsgerichtsrecht*, 2nd edition, Zurich 1993, p. 82; KAUFMANN-KOHLER/RIGOZZI, *Arbitrage international*, Droit et pratique à la lumière de la LDIP, Bern 2013, No. 265). However, no transfer of an arbitration agreement to the heirs occurs if the arbitration agreement relates to strictly personal rights or rights based on an entirely personal relationship of the deceased. In such circumstances the arbitration agreement – just like the respective right it refers to – extinguishes with the occurrence of succession. If, therefore, an arbitration clause relates to the membership in an association, the arbitration agreement, in principle, will not be binding upon the heir, since membership in an association is according to Art. 70 par. 3 CC neither transferable nor heritable (BSK-IPRG-GRÄNICHER, 3rd edition, Basel 2013, Art. 178 No. 75; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 540; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2nd edition, Zurich 1993, p. 82; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, Droit et pratique à la lumière de la LDIP, Bern 2013, No. 265). Thus, the will of the parties at the time of the conclusion of the arbitration agreement must be construed such that the latter expires with the occurrence of succession (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 541).

98. In the present case the arbitration clause relates to rights and obligations arising out of an Employment Contract. These rights and obligations do not simply come to an end with the succession occurring. Instead – according to Swiss law – rights and obligations arising out of such contracts are in principle transferable and heritable with the consequence that also the arbitration clause contained in the Employment Contract persists and binds the legal successor of the Coach (BREITSCHMID/EITEL/FANKHAUSER/GEISER/RUMO-JUNGO, Erbrecht, 2nd edition, Zurich 2012, p. 192 ff.).

VI. ADMISSIBILITY OF THE APPEAL

99. The Appellant has lodged an Appeal against the decision of the FIFA Players' Status Committee issued on 23 September 2014. The Appellant, thus, has filed a proceeding according to the Appeal Arbitration Procedure (Art. R47 et seq. of the CAS Code). In order for such a proceeding to be admissible certain prerequisites must be fulfilled. Art. R47 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement 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".*

A. Appealable Decision

100. Art. R47 of the CAS Code requires that the appeal is directed against a *"decision"* of a federation, association or sports-related body. The Panel has the advantage of several previous CAS decisions, which provide for an analysis of what is involved in the concept of a decision. In CAS 2014/A/3744&3766 the CAS Panel carefully analysed this jurisprudence and summarized it as follows (par. 191):

> *"Therefore, according to CAS jurisprudence, a decision is a communication of a federation, association or sports-related body that is not just of a mere informative nature but also contains, in substance, an actual ruling or resolution which affects in a binding manner the legal situation of the addressee. In other words, it is a communication that contains an animus decidendi, i.e. by its objective content (and irrespective of its form), it conveys to the addressee(s) the will of the sports body to decide on a matter".*

101. This Panel adheres to the above interpretation of the term *"decision"*. It follows from this that the measure at stake here (the Appealed Decision) must be qualified indeed as a decision within the meaning of Art. R47 of the CAS Code. It is not of a mere informative nature, but contains a ruling in substance which consists of denying the Appellant access to the FIFA Players' Status Committee. The qualification followed here is further backed by the fact that FIFA issued a note attached to the Appealed Decision relating to the remedies available against the measure at hand. This note states that *"this decision may be appealed against before the Court of Arbitration for Sport (CAS) […]"*. In view of all of the above, the Appealed Decision must be qualified as a decision within the meaning of Art. R47 of the CAS Code.

B. Exhaustion of Legal Remedies

102. In accordance with Art. R47 of the CAS Code, a party may appeal the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body.

103. In the present case, the Appealed Decision was rendered by the Single Judge of the FIFA Players' Status Committee. Art. 23 par. 3 of the FIFA Regulations for Status and Transfer of Players 2014 edition provides that *"decisions reached by the single judge or the Players' Status Committee may be appealed before the Court of Arbitration for Sport (CAS)".*

104. According to the Employment Contract the parties *"should try to resolve the occurred disputes and conflicts through friendly negotiation. In case of litigation of the Contract, the case shall be submitted to CFA or FIFA for arbitration"*. By letter dated 24 July 2012, the Coach's counsel informed the Club that the Coach was willing to give the Respondent a chance to resolve the present matter amicably. The Club did never react to the Coach's proposal. Due to the fact that the attempt of the Coach to resolve the dispute through friendly negotiation failed, the Coach was entitled to file a claim before FIFA.

105. The Panel, thus, concludes that, in compliance with Art. R47 of the CAS Code, the Appellant exhausted all legal remedies available to her.

C. Timeliness of the Appeal

106. 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 in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties".*

107. In the present case the statutes and regulation of FIFA provide for a specific time limit in the case of an appeal. Art. 67 par. 1 of the FIFA Statutes states 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".*

108. It follows, thus, from a reading of Art. R49 of the CAS Code in conjunction with Art. 67 par. 1 of the FIFA Statutes that the time limit for appeal amounts to 21 days from the date of receipt of the decision appealed against. Art. 15 par. 2 of the FIFA Procedural Rules reads as follows:

> *"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".*

109. The grounds of the Appealed Decision were received by the Appellant on 13 January 2015. The Statement of Appeal against the Appealed Decision was filed on 3 February 2015. Accordingly, the Appeal filed by Mrs Ana Kuže is admissible.

VII. SCOPE OF THE PANEL'S REVIEW - *DE NOVO*

A. *De Novo*

110. The Parties to the present arbitration proceedings do not agree on the scope of review of the Panel. The Appellant considers that the Panel should not have the power to rule *de novo,* but deems that the Panel's scope of review should be limited. The Appellant requests that the Panel should base the decision solely on the documents presented to the FIFA Players' Status Committee during the investigation phase of the case. The Appellant argues that the Club did not respond during the proceedings before the FIFA Players' Status Committee and therefore, it couldn't take advantage of the fact that it didn't participate during the procedure while the

Coach was still alive. In the Appellant's view, the Respondent would be in advantage if the Panel gave the chance to bring new evidences because the Appellant had not the same opportunities. The Coach would be the only person who knew all the details. Her arguments are based on Art. R57 par. 3 of the CAS Code which reads as follows:

> *"The Panel has discretion to exclude evidence presented by the parties if it was available to them or could reasonably have been discovered by them before the challenged decision was rendered".*

111. At the hearing, the Appellant referred to a – relatively – new decision of the SFT in respect of Art. R57 par. 3 of the CAS Code (SFT 4A_246/2014). The Respondent objects to the Appellant's arguments and considers that all of its evidence should be accepted.

112. In order to define the scope of review of the CAS in the present case, reference is made on Art. R57 par. 1 1st sentence of the CAS Code:

> *"The Panel has full power to review the facts and the law".*

113. The Panel notes firstly that the principle of *de novo* review before CAS according to Art. R57 par. 1 1st sentence of the CAS Code is well-established in the case law (MAVROMATI/PELLAUX, Art. R57 of the CAS Code: A Purely Procedural Provision?, in: Sweet & Maxwell's International Sports Law Review 2013, p. 36; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. R57 No. 12). The meaning of this principle is that the Panel will re-hear the matter afresh, as if it had not been previously heard or decided (CAS 2008/A/1718-1724, par. 166; CAS 2008/A/1574, par. 32). In appeals proceedings, the CAS Panel's scope of review is basically unrestricted. The Panel is not bound by the factual or legal findings of, or the evidence adduced before, the previous deciding instances (CAS 2002/A/383, par. 71).

114. The Panel further notes that the restriction in Art. R57 par. 3 of the CAS Code must be applied with caution, so as not to impinge upon the fundamental principle of the *de novo* review by the CAS (RIGOZZI/HASLER/QUINN, The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration, Jusletter 3 June 2013, p. 14; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. R57 No. 43). The restrictions of Art. R57 par. 3 of the CAS Code should only apply in cases where the adducing of pre-existing evidence amounts to abusive or otherwise unacceptable procedural conduct by a party (RIGOZZI/HASLER/QUINN, The 2011, 2012 and 2013 revisions to the Code of Sports-related Arbitration, Jusletter 3 June 2013, p. 14; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. R57 par. 46). The Panel must be able to examine the formal aspects of the Appealed Decisions but also to evaluate – sometimes even *de novo* – all facts and legal issues involved in the dispute (CAS 2009/A/1926 & 1930, par. 18).

115. The Panel observes that all the Parties – including the Appellant – have filed various (new) submissions after the end of the FIFA instance. Furthermore, the Panel finds that there was no abusive conduct of the Respondent which might have given unfair advantages to one or

the other party. The Panel also notes that the Respondent did request to be allowed to file an answer before the FIFA Players' Status Committee, even if late, but that such request was denied in the absence of agreement from the Coach's counsel. Finally, the Panel notes that it does not follow from the decision of the SFT which was presented to the Panel during the hearing that the Panel must exclude evidence which has not been presented before the FIFA instances. Furthermore, the Panel is of the view that the facts underlying the decision of the SFT are not comparable to the case at hand. To conclude, the Panel rejects the Appellant's position that Art. R57 par. 3 of the CAS Code is applicable to the case at hand.

116. In view of all the above and in light of the specific circumstances of the case the Panel's mandate is not limited according to Art. R57 par. 3 of the CAS Code.

B. New Evidence

117. The Respondent in the hearing submitted that the violations of the disciplinary regulations allegedly committed by the Coach could be easily verified through various newspaper articles as well as pictures and videos in the internet. In the view of the Respondent, the Panel could easily access these public sources of information itself. In any case the Respondent offered to refer the Panel also to the respective sites on the internet if need be. The Appellant has objected to any ex officio investigation by the Panel and to the production of new evidence by the Respondent.

118. The fact that this Panel hears the case de novo does not dispense the Parties to observe the procedural time limits provided for in the CAS Code. Reference is made in this respect to Art. R56 par. 1 of the CAS Code which reads as follows:

> *"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement or amend their requests or their argument, to produce new exhibits, or to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".*

119. The Panel firstly observes that proceedings before the CAS are, in principle, conducted in an adversarial manner. It is, thus, for the Parties to submit the facts and the evidence on which they intend to rely. This clearly follows from Art. 51, 55 and 56 of the CAS Code read in conjunction. Furthermore, the Panel notes that the contents of sites on the internet relating to the incidents of the match played on 20 May 2012 cannot be qualified as manifest facts ("gerichtskundige" or "offenkundige Tatsachen") that the Panel can take into consideration ex officio (however always under the condition that the Parties' right to be heard is respected). The Respondent has not adduced any arguments why the Panel – beyond manifest facts – would be under an obligation to investigate the facts of the case *ex officio*. This is all the more true, since the CAS Court Office – on behalf of the Panel – advised the Parties that they will not be authorized to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intended to rely, after the submission of the Appeal Brief and of the Answer thereto. In addition, the Panel notes that the Respondent even failed to provide the new evidence promptly once it was informed that

a hearing would be held to look into the merits of the case. To conclude, therefore, the Panel finds that there are no "exceptional circumstances" within the meaning of Art. 56 of the CAS Code to allow for late submission of evidence in this case. This is even more so as the Appellant has objected to the production of new evidence.

VIII. APPLICABLE LAW

120. Art. 187 par. 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, par. 48).

121. 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. 58 of the CAS Code (see CAS 2014/A/3850, par. 49; CAS 2008/A/1705, par. 9; CAS 2008/A/1639, par. 21). Whether such indirect choice of law can be accepted here, appears questionable, since the Employment Contract contains a direct choice-of-law clause, according to which the *"contract shall be governed and construed by the Laws of China"*.

122. According to the predominant view in the legal literature, an indirect choice of law is – in principle – always superseded by a direct choice of law (see BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 3rd edition, Bern 2015, No. 1393; KAUFMANN-KOHLER/RIGOZZI, Arbitrage International, 2nd edition, Bern 2010, No. 618; see also BSK-IPRG-KARRER, 3rd edition, Basel 2013, Art. 187 No. 123: *"Häufig wird das anwendbare Recht gewählt, gleichzeitig aber auch eine Schiedsordnung. In den meisten Schiedsordnungen steht etwas über das anwendbare Recht […] Die direkte Rechtswahl durch die Parteien muss, da diese spezieller ist, der Rechtswahlbestimmung der gewählten Rechtsordnung vorgehen […]"*). However, this Panel finds that this principle shall not apply here. First of all 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. Furthermore, the reason why the predominant view in the legal literature holds, that a direct choice of law always takes precedent over an indirect choice of law contained in the rules of the arbitral institution is that – generally speaking – the rules of the arbitral institutions do not wish to limit the parties' autonomy in any respect (BSK-IPRG-KARRER, 3rd edition, Basel 2013, Art. 187 No. 123). This, however, is not true in the context of appeals arbitration procedures before the CAS.

123. 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"*.

124. 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.

125. Art. 66 par. 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 regulation of FIFA and – on a subsidiary basis – Swiss law insofar as matters are at dispute 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 *"the laws of China"*.

126. During the hearing, the Panel asked the Parties how to interpret said choice-of-law clause in favour of Chinese law. The Parties – in essence – submitted that the legal issues should be primarily dealt with in accordance to the contractual provisions in the Employment Contract. In case the latter are unclear or contain a lacuna the Panel shall interpret and supplement the Employment Contract based on the "business practice in football". Consequently, according to the Parties, the Panel shall apply the regulations of FIFA and the CFA. In case the lacuna cannot be filled through recourse to the "business practice in football", the Panel shall apply Chinese Law on a subsidiary basis. In the case at hand both Parties have not pointed the Panel to any provisions of Chinese law that would be applicable.

127. However, upon invitation of the Panel, the Respondent has exposed the principles of interpretation according to Chinese law in relation to commercial contracts. The Respondent submitted in that respect that Chines law first and foremost requires the adjudicating body to determine the true and real intent of the parties to the contract. In case the subjective will of the parties cannot be assessed, the contract is to be construed objectively, i.e. according to what a reasonable man would have understood under the given circumstances (most common understanding). The Appellant has not objected to Respondent's legal reasoning.

IX. STANDING TO BE SUED

A. Preliminary Remarks

128. In the case at hand, it appears questionable whether the Respondent has standing to be sued, since the Appealed Decision was issued not by the Respondent, but by FIFA. However, the Appellant has not directed her Appeal against FIFA. Consequently, FIFA noted in its letter to the CAS dated 20 April 2015 as follows:

"In this respect, despite renouncing to intervene in the present matter, we hereby would like to clarify that, by the fact that Ms Ana Kuže (the Appellant) has not designated FIFA as a respondent to the present procedure, whereas one of her 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".

B. Question on the Merits

129. The question of standing to be sued is a matter related to the merits. This follows from the jurisprudence of the SFT. The latter has held in a decision (SFT 128 II 50 E. 2 b) bb)) as follows:

"Sur le plan des principes, il sied de faire clairement la distinction entre la notion de légitimation active ou passive (appelée aussi qualité pour agir ou pour défendre; Aktiv- oder Passivlegitimation), d'une part, et celle de capacité d'être partie (Parteifähigkeit), d'autre part. La légitimation active ou passive dans un procès civil relève du fondement matériel de l'action; elle appartient au sujet (actif ou passif) du droit invoqué en justice et son absence entraîne, non pas l'irrecevabilité de la demande, mais son rejet".

C. FIFA Regulations silent on the Question of Standing to be Sued

130. The FIFA rules and regulations do not specify against whom the appeal must be directed. Contrary to the decision CAS 2007/A/1403 *Real Club Racing de Santander SAD v/ Club Estudiantes de la Plata* (par. 49 et seq.), this Panel holds that this is also true for the FIFA Statutes. In particular, it does not follow from the wording in Art. 66 et seq. of the FIFA Statutes that FIFA allows for cases to be resolved by CAS irrespective of the parties' standing to sue or to be sued. Therefore, the Panel comes to the conclusion that there is no specific provision in the FIFA regulations and that the question whether or not the Respondents have the standing to be sued must be derived from the subsidiarily applicable Swiss law.

D. Jurisprudence of the SFT and of the CAS contradictory

131. At first sight it seems that the question who has standing to be sued in an Appeal Arbitration Procedure has been resolved by the Swiss Federal Tribunal. Reference is made in this respect to the decision SFT 136 III 345. The matter dealt with a decision of a FIFA organ called upon to resolve a dispute between two clubs relating to the payment of training compensation for a player. Such types of disputes (opposing indirect members before the organs of FIFA) are also referred to as "horizontal disputes" (see BERNASCONI/HUBER, Die Anfechtung von Vereinsbeschlüssen: Zur Frage der Gültigkeit statutarischer Fristbestimmungen, SpuRt 2004, p. 268 et seq.). The SFT qualified the decision of the FIFA organ (in that horizontal dispute) as a *"resolution of an association"* (Vereinsbeschluss). Furthermore, the SFT stated that the question who shall be the appropriate parties in an appeal procedure against a *"resolution of an association"* follows from Art. 75 CC. Art. 75 CC provides – according to the SFT – that the appeal must be directed against the association. The decision of the SFT reads in this regards – inter alia – as follows (E. 2.2.1 et seq.):

"Der Umstand, dass die zweite Entscheidung des FIFA-Special Committee […] aufgrund einer Schiedsklausel […] angefochten werden konnte, ändert […] nichts daran, dass es in diesem Verfahren […] um einen Vereinsbeschluss über den von der Beschwerdegegnerin geltend gemachten Anspruch gegen die Beschwerdeführerin auf Zusprechung einer Ausbildungs- und Förderungsentschädigung für den Spieler X ging. Beim Verfahren vor dem TAS, in dem sich die Beschwerdegegnerin gegen die von der FIFA verweigerte Zusprechung der verlangten Entschädigungszahlung wehrt, handelt es sich letztlich um nichts anderes als um eine schiedsgerichtliche Beurteilung der Anfechtung eines von einem schweizerischen Vereins gefassten Beschlusses. […] Die Parteirollen […] ergeben sich folgerichtig aus Art. 75 ZGB, da bei der Anfechtungsklage immer nur der Verein, und nicht etwa ein anderes am Beschluss interessiertes Mitglied passivlegitimiert ist (Riemer, aaO N. 60 zu Art. 75; vgl. BGE 132 III 503 E. 3.1, S. 507). […]".

[free translation[5]: […] the fact that the second decision of the FIFA Special Committee […] could be appealed to the CAS due to the arbitration clause […], does not change anything to the fact that these proceedings once more involved the decision of the association as to the Respondent's claim against the Appellant for the award of training compensation for the player X. […] Ultimately, the proceedings in front of the CAS, in which the Respondent challenged the denial by FIFA of the compensation sought, are nothing else than the arbitral adjudication of the impugnment of a decision of a Swiss association […] The parties […] were logically determined by Art. 75 ZGB which, in an action for impugnment, always gives standing to be sued to the association and not to some other member interested in the decision (Riemer, ad N. 60 at Art. 75 ZGB; see also BGE 132 III 503 E. 3.1 p. 507) […]].

132. At a second glance, however, the legal situation as to the standing to be sued is far from being clear. The Panel notes that the jurisprudence of the SFT in this respect is contradictory. In a recent decision concerning a horizontal dispute resolved by a FIFA organ the SFT did not require that the appeal be directed against FIFA (SFT 140 III 520). The underlying facts of the case were as follows:

"On 17 January 2008, the professional football Club A filed a lawsuit against the player C. and the professional football Club B before the FIFA Dispute Resolution Chamber (CRL) claiming that C and Club B were jointly and severally liable for damages for a breach of contract committed by the player C. In its decision dated 15 June 2011 the CRL upheld the requests of Club A. Following receipt of the decision the player C and the Club B appealed the decision to the CAS. The appeal was directed solely against the Club A".

133. In its decision the SFT stated as follows (SFT 140 III 520 E. 3.2.2):

"Le 17 janvier 2008, le recourant a assigné conjointement le joueur et l'intimé devant la CRL. Par décision du 15 juin 2011, les codéfendeurs ont été condamnés solidairement à lui payer la somme de […] Dans cette procédure de première instance, l'intimé et le joueur ont formé une consorité matérielle simple passive […] Cette indépendance entre les consorts simples persistera au niveau de l'instance de recours: un consort pourra attaquer de manière indépendante la décision qui le concerne sans égard à la renonciation d'un autre consort à entreprendre cette même décision; de même n'aura-t-il pas à se soucier du maintien

[5] The original decision was translated from German to English by www.swissarbitrationdecisions.com.

des recours formés par d'autres consorts, s'il entend retirer le sien (SCHAAD, op. cit., p. 281 ss). D'où il suit, entre autres conséquences, que l'autorité de la chose jugée du jugement intéressant des consorts simples doit être examinée séparément pour chaque consort dans ses relations avec l'adversaire des consorts, car il y a autant de choses jugées que de couples demandeur/défendeur (SCHAAD, op. cit., p. 317). […]

[…] la procédure […] s'apparente à une procédure étatique ordinaire, soumise à l'exigence de la double instance […] la décision de première instance était […] revêtue de l'autorité de la chose jugée […]".

134. It follows from this decision that – according to the SFT – the matter in dispute before the FIFA organs and before the CAS is identical and that, thus, the appeal against the FIFA decision can be lodged solely against the other indirect member affected by said FIFA decision. This, of course, is in direct conflict with the previously mentioned decision of the SFT. In view of these conflicting decisions of the SFT, it does not come as a surprise that also the CAS jurisprudence on the question of standing to be sued in the context of horizontal appeal proceedings is contradictory (cf. MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. 48 No. 65 et seq.).

E. Reasoning of the Panel

135. The Panel is of the view that the decision of FIFA in the present case must be qualified as a resolution of an association (Vereinsbeschluss), since it was issued – *inter alia* – based on the rules and regulations of FIFA. The decision, thus, clearly concerns the association life ("Vereinsleben") of FIFA, which is indicative of a resolution of an association, since resolutions – along with statutes and regulations – are the only (legal) measures known to an association to regulate and rearrange legal relationships linked to the association life.[6] However, the Panel also notes that it does not follow automatically from such qualification as a "Vereinsbeschluss" (resolution of an association) that any appeal against it must be directed against FIFA.

136. The Panel further notes in this respect that Art. 75 CC is – contrary to the legal situation in relation to public limited companies[7] –silent on who is the appropriate defendant of a "Vereinsbeschluss". The provision states as follows:

"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month of learning thereof".

[6] In Swiss legal literature it is disputed whether horizontal relationships between (indirect members) may form part of the association life ("Vereinsleben"), *pro*: RIEMER, in Berner Kommentar, Das Personenrecht, Bern 1990, Art. 70 No. 134; NIGGLI, Handkommentar zum Schweizer Privatrecht, Zurich 2012, Art. 70 ZGB No. 6; *contra*: BSK-ZGB-HEINI/SCHERRER, 5th edition, Basel 2014, Art 70 No. 5; HEINI/PORTMANN/SEEMANN, Grundriss des Vereinsrechts, Basel 2009, No. 178.

[7] Art. 706 CO: *"The board of directors and every shareholder may challenge resolutions of the general meeting which violate the law or the articles of association by bringing action against the company before the court"* (emphasis added).

137. In addition, the provision is primarily designed for appeals against resolutions of the general assembly of the association (RIEMER, in Berner Kommentar, Das Personenrecht, Bern 1990, Art. 75 No. 7). The Panel notes that jurisprudence and the legal literature apply the provision also to resolutions of others organs of the association (HEINI/PORTMANN, in Tercier (Ed), Das Schweizerische Vereinsrecht, Bd II/5, 3rd edition, Basel 2005, No. 281; RIEMER, in Berner Kommentar, Das Personenrecht, Bern 1990, Art. 75 No. 17 et seq.). In case the provision is applied by analogy, however, the substantive prerequisites for such appeals may differ from the case in which the appeal is directed against a resolution of the general assembly (see e.g. for the right to appeal, RIEMER, in Berner Kommentar, Das Personenrecht, Bern 1990, Art. 75 No. 20). Furthermore, the Panel observes that Art. 75 CC is construed on the basis that the appeal is lodged with a state court. It appears though, when analysing the legal literature and jurisprudence that in case the appeal is lodged with an arbitral tribunal different legal standards apply (CAS 2005/A/847, par. 7.1 et seq.; see also CAS 2008/A/1705, par. 8.2.7; BERNASCONI/HUBER, Die Anfechtung von Vereinsbeschlüssen: Zur Frage der Gültigkeit statutarischer Fristbestimmungen, SpuRt 2004, p. 268, 270; NATER/TUCHSCHMID, TAS: Ist Art. 75 ZGB im Appellationsverfahren zu beachten?, in: SpuRt 4/2006, p. 139, 143 seq.; RIGOZZI, L'arbitrage international en matière de sport, Basel 2005, No. 1041). To conclude, therefore, the Panel finds that Art. 75 CC is "home" to very different types of disputes and that the legal prerequisites of an appeal against a resolution of the association's general assembly must be applied and scrutinized with caution in case Art. 75 is applied by analogy to appeals directed against resolutions of the association other than the ones of the general assembly. This fact, however, is ignored by the decision of Federal Tribunal in SFT 136 III 345. Even though the matter concerned a horizontal dispute, the legal authorities cited in support of FIFA's standing to be sued in that decision do not refer to horizontal disputes among (indirect) members of the association, but to vertical disputes only, i.e. disputes opposing FIFA and its indirect member. In addition, these legal authorities refer only to cases where state courts take a cassatory decision and not to cases where an arbitral tribunal decides the matter de novo, i.e. with a reformatory mandate. Thus, the reference to these legal authorities is not very persuasive, since they do not deal with the legal problem at issue.

138. In view of all of the above, the Panel holds that in the absence of a clear statutory provision regulating the question of standing to be sued, the question must be resolved on basis of a weighting of the interests of the persons affected by said decision. The question, thus, is who in the context of a horizontal dispute before an arbitral tribunal deciding the matter de novo is best suited to represent and defend the will expressed by the organ of the association.

139. In this respect it is noteworthy to recall that in horizontal disputes the FIFA organ is – in principle – shaping the rights and obligations of a foreign legal sphere, i.e. the legal relationship between the indirect members. The legal situation in relation to a horizontal dispute, thus, differs considerably from vertical disputes. In the latter case the "Vereinsbeschluss" affects and modifies first and foremost the legal sphere of the association itself. Furthermore, in a vertical dispute the association can – at any time – modify the original decision taken. In horizontal disputes, on the contrary, the mandate of the FIFA judicial organs to shape the legal sphere between its indirect members is consumed once it has issued its decision.

140. The Panel further notes that cases in which a third person interferes with the legal spheres of others are quite frequent. One such example is legal representation. The representative – like a FIFA judicial organ in horizontal disputes – acts primarily within a foreign legal sphere, i.e. the legal sphere of the principal and his contractual partner. Disputes concerning alleged defects of the representatives' declaration of will, however, must be resolved between the principal and his contractual partner. The representative himself is not a party to such legal proceedings. This holds even true, if the representative not only acts with authority and on behalf of one of the parties, but also if the representative is authorized to represent both parties. The same principles still apply, if the power of representation was granted to the representative (also) in the interests of the latter. Another example of a third party interfering with the legal sphere of others is expert evaluation (cf. Art. 189 of the Swiss Code of Civil Procedure, CCP). The typical task of the expert evaluator is to determine with binding effect some (or all) of the relevant facts in a dispute opposing the two parties that have submitted themselves to the mandate of the expert evaluator (cf. KuKo-ZPO-SCHMID, 2nd edition, Basel 2014, Art. 189 No. 1). The CCP provides that an expert evaluation loses its binding effects (in relation to the legal sphere of the parties) in case of serious deficiencies (Art. 189 par. 3 CCP). The provisions of the CCP do not provide who has standing to be sued in case a party challenges the binding effect of the expert evaluation. It is undisputed however, that defects of the expert evaluation cannot be challenged through an appeal lodged against the expert. Instead, it is the other party that has submitted to the expert evaluation that has standing to be sued and must defend the declaration of will of the evaluator.

141. The question, thus, is whether the above principles apply by analogy also to the situation in which FIFA judicial organs interfere in horizontal disputes. In the Panel's view the better arguments speak in the affirmative. Not only is the legal situation in the above cited examples comparable to the judicial activity of FIFA organs in horizontal disputes. In addition, it appears to the Panel that FIFA in horizontal disputes is not best suited to defend the interests of its indirect members, since the outcome of the dispute between the indirect members will – in principle – not adversely affect FIFA. This being said, the Panel does not ignore a general interest of FIFA that its rules and regulations be applied consistently, uniformly and correctly vis-à-vis its (indirect) members. However, this general (and abstract) interest of FIFA in the correct application of its rules and regulations does not justify awarding it the standing of a party, since such interest will be – in most instances – be taken care of (and effectively be represented) by the Respondent in this procedure.

142. The criteria for awarding legal standing to be sued should not differ in vertical or horizontal disputes. In vertical disputes the association has (sole) standing to be sued because it is the party primarily concerned and the best representative of the interests of all other stakeholders affected by the dispute. The other stakeholders – in principle – only have a general and abstract interest that the associations' rules and regulations be applied to their respective co-member in an equal, consistent and correct way. This general interest – in principle – will be represented and taken care of by the association. Thus, there is no need – in vertical disputes – to direct the appeal against any other party than the association. Applying the same principles to horizontal disputes leads inevitably to the conclusion that the (sole) party having standing to be sued is the Respondent.

143. Having said this, the Panel does not ignore the danger that – in certain instances – the representative (in horizontal or vertical disputes) is not able or willing to co-represent the (general and abstract) interests of the other stakeholders. The question, thus, is whether it is compatible with notions of fairness and the right to be heard to bind such stakeholders to the outcome of a proceeding in which only the representative and not the other stakeholders have a say. However, it must be noted that a stakeholder (with interests diverging from the ones of the representative) is not bound to the outcome of such proceedings with both its hands tied. Instead, the stakeholder may always intervene in the proceeding and make itself heard in case it fears that the representative will not duly represent its interests. If the stakeholder fails to make use of such an opportunity to intervene, no issues of right to be heard arise.

144. In the case at hand FIFA was offered the opportunity to intervene in the present proceedings by the CAS Court Office (see the letter of CAS dated on 9 February 2015). FIFA expressly renounced such right by letter dated 20 April 2015. Thus, no issues of a violation of FIFA's right to be heard arise here, if FIFA is bound to any decision by the CAS deciding on the lawfulness of the Appealed Decision in the horizontal dispute opposing the Appellant and the Respondent.

X. STANDING TO SUE

145. In analysing whether the Appellant has standing to appeal, the Panel must determine whether the Appellant has shown that it has sufficient legal interest in the matter being appealed (CAS 2008/A/1674, order of 12 December 2008, par. 12 et seq.; see also CAS 2014/A/3744 & 3766, par. 173). Indeed, only an aggrieved party, having something at stake and, thus, a concrete interest in challenging a decision adopted by a sports body, may appeal to the CAS against a decision (CAS 2009/A/1880-1881, par. 29). It is only where a party does *"not have a cause of action or legal interest ('intérêt à agir') to act against the Appealed Decision [that such party] would have no standing to appeal on the basis of the well-known general procedural principle that if there is no legal interest there is no standing ('pas intérêt, pas d'action')"*.

146. In the case at hand it is questionable whether or not the Appealed Decision infringes upon the Appellant's rights. The Respondent denies this and submits that the Appellant has no right to bring the dispute in front of the FIFA judicial organs, since – according to Art. 6 par. 1 of the Procedural Rules – the parties to the proceedings before the Single Judge of the Players' Status Committee must be *"members of FIFA, clubs, players, coaches or licensed match and players' agents"*. Thus, according to the Respondent, the Single Judge did not violate any rights of the Appellant when deciding that the claim was inadmissible.

147. In principle, the Panel finds that it is within the autonomy of the federation to decide to what extent it makes its dispute resolution mechanism available to non-members of FIFA. It appears that FIFA has made use of its autonomy by listing the persons that may appear as a party before FIFA in Art. 6 par. 1 of the Procedural Rules. It appears to the Panel that the list in said article is exhaustive and that the Appellant does not qualify as a party under this article. The question, however, is whether or not FIFA has made use of its autonomy in an arbitrary

manner by excluding universal successors of parties within the meaning of Art. 6 par. 1 of the Procedural Rules from filing or pursuing a claim before the competent judicial organs of FIFA. The rejection of the claim by the Single Judge has wide-reaching implications for the Appellant. It does not amount to a denial of access to justice, since – in view of the valid arbitration agreement in the Employment Contract – the Appellant may pursue her (alleged) claim before CAS in an Ordinary Arbitration Procedure. However, a CAS award in a football-related matter, which is issued in an Ordinary Arbitration Proceeding will not be enforced by FIFA (cf. Art. 64 of the FIFA Disciplinary Code 2011 edition). The Appellant, thus, in case the CAS awards the claim, will have – in principle – to enforce the latter via the state courts in the country where the Respondent has its seat (or any other country where the Respondent has assets). These state courts will then apply the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 or any other bi- or multilateral convention and/or national source of law on recognition and enforcement of arbitral awards. Engaging foreign courts in the recognition and enforcement process of arbitral awards may be a costly and time-consuming endeavour. In the case at hand, it may seem particularly questionable to refer the Appellant to the Ordinary Arbitration Procedure (in conjunction with state enforcement proceedings) considering that at the time of initiation of the proceedings before the Single Judge the prerequisites of Art. 6 par. 1 of the Procedural Rules were fulfilled.

148. In order to clarify whether or not the Appealed Decision infringes upon the Appellant's rights, the Panel must assess the objective of Art. 6 par. 1 of the Procedural Rules. The Panel concludes that there are two different possible objectives for limiting the scope of the aforementioned provision on jurisdiction of the FIFA organs. On the one hand the purpose of said rules could be to describe the nature of those disputes that relate to the association life ("Vereinsleben") and that can be brought before the FIFA organs. On the other hand the purpose of the provision could also be to protect the interests of certain persons, i.e. the interests of members of the football family. If the purpose of the rule would be to circumscribe the types of disputes capable of being resolved by the FIFA organs, then the fact that legal succession occurred would be of no avail, since through universal succession the nature of the dispute remains unchanged. It is still a dispute that deals at its core with a matter related to the associations' life ("Vereinsleben"). If on the contrary, the purpose of the rule is to protect certain persons/entities, then the fact that universal succession occurred might be of some importance in case the legal successor does not belong to the group of protected persons.

149. The issue at stake here can be illustrated by looking at the jurisprudence of the European Court of Justice (ECJ) in the context of the Brussels I-Regulation on Jurisdiction and the Recognition and Enforcement of judgments in Civil and Commercial matters / Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial matters. The ECJ in a decision had to decide whether the assignee of a claim arising from a consumer contract could benefit from the specific forum on jurisdiction provided under the Brussels I-Regulation / Lugano Convention for disputes arising from consumer contracts. The ECJ in its decision (C-89/91 - 19.1.1993, *Shearson Lehmann Hutton Inc. ./. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH*, No. 19 et seq.) decided as follows:

> *"[…] The protective role fulfilled by those provisions implies that the application of the rules of special jurisdiction laid down to that end by the Convention should not be extended to persons for whom that protection is not justified […] As the Advocate General pointed out […], the Convention protects the consumer only in so far as he personally is the plaintiff or defendant in proceedings. It follows that Article 13 [15][8] of the Convention [Brussel I Regulation / Lugano Convention][9] is to be interpreted as meaning that a plaintiff who is acting in pursuance of his trade or professional activity and who is not, therefore, himself a consumer party to one of the contracts listed in the first paragraph of that provision, may not enjoy the benefit of the rules of special jurisdiction laid down by the Convention concerning consumer contracts".*

150. The purpose of a specific rule on jurisdiction is not always easy to determine. In this respect, reference is made to an example from Swiss law, i.e. to Art. 34 CCP. According thereto *"the court at the domicile or registered office of the defendant or where the employee normally carries out his or her work has jurisdiction to decide actions relating to employment law"*. The decisive criteria to qualify a dispute as an *"action relating to employment law"* are – according to the predominant view held in Swiss law – not the personal conditions of the respective parties, i.e. whether they are employer or employee, but the nature of the dispute (cf. ZK-ZPO-FELLER/BLOCH, 2nd edition, Zurich 2014, Art. 34 No. 9). Accordingly, also a legal successor can avail himself of the forum in Art. 34 CCP as long as the nature of the dispute relates to employment law (ZK-ZPO-FELLER/BLOCH, 2nd edition, Zurich 2014, Art. 34 No. 9; see generally for the scope Art. 35 CCP, KuKo-ZPO-HAAS/STRUB, 2nd edition, Basel 2014, Art. 35 No. 3).

151. Coming back to Art. 6 par. 1 of the Procedural Rules the Panel concludes that the purpose of the respective rule need not be decided in the case at hand. Even if the provision was meant (only) to provide specific protection to the persons listed therein, the Panel finds that – absent any indications to the contrary – this protection must be extended to the Appellant based on the specific and exceptional circumstances of this case, where the claim was filed by a person complying with the prerequisites of Art. 6 par. 1 of the Procedural Rules, i.e. where the procedural requirements were met at the time when the claim was pending before the FIFA organs and where the transfer of title occurred by law, i.e. with no (active) involvement of the coach and his legal successor. In such specific context the universal successor not only acquires the substantive claim of the defunct, but also the latter's legal position in the pending proceedings, i.e. the ability to file a claim before the FIFA instances. For the avoidance of any doubt the Panel clarifies, that it would have denied any standing to sue of the Appellant if not the defunct, but the Appellant had initiated the proceedings before the FIFA instances, because with respect to the question who is entitled to initiate proceedings before the FIFA instances, Art. 6 par. 1 of the Procedural Rules is very clear and not open to interpretation by this Panel. Only with respect to the question whether or not a procedure (initiated in compliance with Art. 6 par. 1 of the Procedural Rules) may be continued by a legal successor, the Panel finds that there is a lacuna in the applicable rules that needs to be solved in the manner advocated here, i.e. that any changes of facts in the course of the procedure will not

[8] Added for better understanding.
[9] Added for better understanding.

remove FIFA's competence to decide the matter. To conclude, therefore, the Panel finds that the Appellant has standing to sue.

XI. INTERIM FINDINGS AND MANDATE OF THE PANEL

152. The Panel concludes that FIFA was wrong in dismissing the Appellant's claim on procedural grounds and not entering the merits of the case. The question is, whether this Panel can and should examine whether or not the Appellant has a claim against the Respondent. The Respondent objects to such a mandate of the Panel and requests that the case shall be referred back to the FIFA Players' Status Committee if the CAS determines that the FIFA body acted wrongly by concluding the inadmissibility of the claim. The Respondent argues that he would lose an instance to appeal if the Panel issues a new decision. The Respondent relies on the fact that the previous instance rejected the claim only on the ground that the claim was inadmissible and not decided on the merits.

153. The Appellant rejects these arguments and submits that the Respondent omitted to participate in the proceedings before the previous instance and renounced the possibility to produce evidences. Furthermore, the Appellant could not see a reason why CAS should not be in the position to issue a new decision in the present case.

154. In order to define the power of CAS to issue a new decision or revert the case back to the previous instance, reference is made to Art. R57 par. 1 2nd sentence of the CAS Code:

> *"It [The CAS] may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance".*

155. Regarding the application of Art. R57 par. 1 2nd sentence of the CAS Code, the Panel notes that it is within the Panel's discretion whether to issue a new decision substituting the appealed decision or to send the matter back to the previous instance. Furthermore, the Panel notes that in the majority of cases, the CAS issues a new decision (instead of remanding the case back to the previous instance). Reasons of procedural economy speak in favour of such alternative (CAS 98/214, par. 10; NATER/TUCHSCHMID, TAS: Ist Art. 75 ZGB im Appellationsverfahren zu beachten?, in: SpuRt 4/2006, p. 139, 142; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. R57 No. 17).

156. However, CAS jurisprudence also shows that there are exceptions to this rule and that there are in fact cases in which CAS has referred the matter back to the previous instance (MAVROMATI/PELLAUX, Art. R57 of the CAS Code: A Purely Procedural Provision?, in: Sweet & Maxwell's International Sports Law Review 2013, p. 41; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. R57 No. 19). Instances in which CAS has contemplated such alternative were

- (i) if the previous instance never entered into the merits of the case;

- (ii) if the parties' rights were seriously breached by the previous instance;
- (iii) if the appealed decision is largely not determined by legal standards; and
- (iv) if the previous instance is in a better position to decide upon complex factual issues, e.g. in selection matters. In such cases CAS may lack the knowledge and factual basis to replace the decision of the selecting body or when additional information or investigation are needed (MAVROMATI/PELLAUX, Art. R57 of the CAS Code: A Purely Procedural Provision?, in: Sweet & Maxwell's International Sports Law Review 2013, p. 41; CAS 98/214, par. 10; MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015, Art. R57 No. 19 et seq.; NATER/TUCHSCHMID, TAS: Ist Art. 75 ZGB im Appellationsverfahren zu beachten?, in: SpuRt 4/2006, p. 139, 142).

157. In the present case, the first exception may be applicable, since the previous instance never entered into the merits of the case. However, an analysis of the CAS jurisprudence shows that there is no automatism in cases where the previous instance had not decided on the merits. Instead, whether or not to remand the case back to the previous instance is the result of a balancing of interests. This is clearly evidenced by the case law of CAS. Reference in this respect is made to CAS 2006/A/1301. In this matter a club brought a claim against a player for breach of contract before the FIFA Dispute Resolution Chamber (hereinafter referred to as the DRC). The DRC declined jurisdiction because the club had previously sought recourse with state courts and decided that *"the addressed civil court, which was the first contacted by a party, shall deal with a matter in its entirety"* (CAS 2006/A/1301, par. 38). The club appealed this decision before CAS. The Panel considered that *"the DRC erred in holding itself not competent to adjudicate on [the Club's] claim"* and that, even in such a case, *"it would have the option, contemplated Article R 57 of the Code, to issue an award on the contractual dispute between the parties or to refer the case back to FIFA for a decision on said dispute"* (CAS 2006/A/1301, par. 68). The Panel in that case decided to refer the case back to FIFA and justified this on the following grounds (CAS 2006/A/1301, par. 82):

> *"The Panel, indeed, fully appreciates the advantages, with respect time and costs, that a direct adjudication on the merits of the case would imply. The Panel, however, notes before the DRC no evaluation of the merits of the dispute had taken place, and that the Decision finally adopted by the DRC was severely influenced by the bad quality translations of the documents submitted by the parties. As a result, this Panel would deprive the parties of one level of adjudication, if it was to render an award on the merits of a dispute never examined by the FIFA competent body. In addition, the new examination of the dispute by the DRC would allow a unitary assessment of all the relevant aspects, including the position of [the new club], not a party to the proceedings before the [civil court], in respect of which, therefore, [the old clubs'] claims are in any case not precluded. […] In other words, the Panel intends to respect the freedom of FIFA in the prior evaluation of the factors which are relevant for the settlement of contractual disputes in accordance with Article 17 of RSTP 2005".*

158. When coming to its conclusion the Panel firstly notes that it enjoys, in its capacity as appellate body, the same discretion as the previous instances (MAVROMATI/REEB, The Code of the Court of Arbitration for Sport, Commentary, Cases and Materials, Alphen aan den Rijn 2015,

Art. R57 No. 18). Secondly, the Panel notes that – in light of Art. 6 par. 1 of the ECHR a party has no right to more than one legal instance. There is neither a right to appeal nor cassation (GRABENWARTER, European Convention on Human Rights, Munich 2014, Art. 6 No. 75). Thirdly, when balancing the respective interests, the Panel notes that there are substantial differences between the case previously mentioned (CAS 2006/A/1301) and the present case. In CAS 2006/A/1301 the parties neither had the possibility to produce their evidence nor to provide their position on the merits before the previous instance. Under such circumstances it may be appropriate to revert the case back to the previous instance.

159. However, in the present case the Respondent had the possibility to participate in the proceedings before the FIFA Players' Status Committee and to present its case. Although FIFA informed the Appellant by letter dated 8 May 2014 that it did not appear to be competent to hear the dispute, the case was not limited to procedural issues before the FIFA bodies. By letter dated 28 May 2014 FIFA invited the Appellant to pay the advance of costs. After the respective payment was made by the Appellant, FIFA invited the Club by letter dated 17 June 2014 to provide its position in response to Appellant's claim. One month later, FIFA determined that the Club had failed to submit its position.

160. Besides the fact that the Respondent had the possibility to participate in the proceeding before FIFA and to present its position on the merits, the Panel notes that procedural economy speaks for issuing a decision on the merits in this case. The matter has been left unresolved since almost three and a half year. The matter does not appear to be difficult from a factual perspective and the Panel feels that it is – compared to the FIFA Players' Status Committee – not in an inferior position to render justice. In view of all of the above, the Panel exercises its discretion such to finally conclude the matter by issuing a new decision according to Art. R57 of the CAS Code in lieu of FIFA.

XII. OTHER QUESTIONS RELATING TO THE MERITS

A. Termination of the Employment Contract with or without just cause

161. In the present case it is disputed between the Parties whether or not the termination of the Employment Contract was with just cause. Before commencing the analysis of the lawfulness of the termination of the Employment Contract, reference must be made to the burden of proof. According to the general rules and principles of law, facts pleaded have to be proved by those who plead them. This means, in practice, that when a party invokes a specific right it is required to prove such facts as normally comprise the right invoked, while the other party is required to prove such facts as exclude, or prevent, the efficacy of the facts proved, upon which the right in question is based (CAS 2007/A/1380, par. 25). Therefore, the Panel notes that the burden of proof regarding the lawfulness of the termination of the Employment Contract is upon the Respondent.

162. The Respondent submits that the Disciplinary Decision is an official document which proves by itself the misconduct of the Coach beyond any doubts. Furthermore, the Respondent argues that this is true irrespective of the fact whether or not certain rules or principles were

breached in the proceedings before the CFA. Since the Respondent itself was not a party to these proceedings, any procedural mistakes by the CFA in conducting the investigation cannot be imputed to it. The Appellant objects to this reasoning and argues that the Coach's basic procedural guarantees were violated in the proceedings before the CFA and that the Disciplinary Decision was never notified to the Coach. Furthermore, the Coach filed an appeal against the Disciplinary Decision but never got any answer from the CFA. In view of the above, the Appellant submits that the Disciplinary Decision is null and void and cannot be considered as evidence in the present case. In support of her arguments, the Appellant makes reference to the CAS jurisprudence in the case CAS 2014/A/3483, par. 69 et seq. which reads as follows:

> *"[…] the Panel finds that in case a club followed the regulatory requirements for the imposition of a fine on one of its players, if this procedure was compliant with basic procedural rights and if the player's right to be heard has been respected, a final decision to this effect should in principle have a res judicata effect and can no longer be reviewed by the FIFA DRC.*
>
> *[…] the Panel considers in the present case to have no evidence on record that the ratification of the [previous instance] was effectively notified to the Player. For any decision to become final and binding in the meaning of res iudicata it is, however, essential that such decision is effectively notified to the parties or addressees of such decision.*
>
> *Moreover, the Appellant did not prove that the Player was offered due opportunity to present his case, thus to ensuring fair disciplinary proceedings in which his right to be heard was respected. […] There is no evidence in the file regarding the proper summoning of the Player and as such the Panel is not convinced that the Player's right to be heard was respected.*
>
> *Therefore, the Panel comes to the conclusion that the decision [of the previous instance] had no res iudicata effect binding the FIFA DRC".*

163. The pertinent clauses in the Employment Contract pertaining to the termination with (or without) just cause are to be found in Art. 5 par. 4 and 5. These provisions of the Employment Contract read as follows:

> *"If the party B [the Coach] had any of the following behaviors, party A [the Club] can terminate the contract with Party B unilaterally without any financial compensation (including the bonus for league ranking): […]*
>
> *4. Severe violation of Contract stipulations or other administrative regulations of Party A; or violation of competition desciplines.*
>
> *5. Severe unprofessional or unsporting behavior, damaging the interest or the reputation of party A, seriously punished by the CFA China Football Association or FIFA; […]".*

164. It follows from the wording in par. 5 that the Employment Contract can be terminated with just cause in case of an unprofessional or unsporting behaviour that is seriously punished by

the CFA or FIFA. Thus, a sanction by the CFA by itself is not enough. What is further required according to the Employment Contract that there is a *"severe unprofessional or unsporting behaviour"* established. However, the Respondent did not provide any evidence for the latter. The Respondent in particular failed to provide the match report or the videos from the press conference even though the burden of proof rests with it.

165. Furthermore, the Panel shares the opinion of the Appellant that the Disciplinary Decision is seriously flawed and, thus, must be considered as null and void. The Appellant has substantiated the procedural flaws in her submissions. The Respondent has limited itself to dispute these submissions either in general terms in an unsubstantiated manner or to submit that any procedural flaws cannot be imputed to it. The Disciplinary Decision neither mentions the fact that the Coach was provided with the right to be heard nor does it contain any hints as to legal remedies available against it. Moreover, it follows from the fax number printed on the copy of the decision that the latter was sent to the Club but not to the Coach personally. Finally, the Respondent itself was the one to initiate disciplinary proceedings against the Coach before the CFA and should have warned the Coach of such proceedings. In view of all of the above the Panel holds that the Disciplinary Decision is null and void and cannot be considered as reliable evidence in the present matter.

166. To summarise, the Panel holds that the Respondent has failed to prove that it terminated the Employment Contract with just cause. Thus, the Appellant is entitled to receive compensation.

B. Calculation of the Compensation

167. In the present matter, the calculation of the compensation owed by the Respondent is disputed between the Parties. The dispute relates to the question what principles apply to the calculation of the damages and what influence must be attribute to the fact that the Coach died after the termination of the Employment Contract (during the term of the contract).

1. Calculation Mechanism

168. In order to determine the principles applicable to the calculation of the compensation, the Panel refers to the clause under the heading *"Remuneration"* in the Employment Contract:

> *"The remuneration for party B [the Coach] consists of 2 parts (the amount is Net of Tax):*
>
> *Part 1: The basic salary is 500'000 USD per year; […].*
>
> *Part 2: Match bonus: the amount of Match Bonus shall be 100% of the amount of 11 starting players of the Match, and shall be paid monthly".*

169. Furthermore, reference is made to the clause under the heading *"Liability for breach of the Contract"* in the Employment Contract:

"If any of the two parties breach the contract unilaterally, he should pay to the other party 50% of the salary amount of remaining period of the Contract as compensation. The case related to article 5 of this Contract is excluded".

170. The Panel notes that – absent any provision to the contrary – in case of unlawful termination of a contract by the club the other party is entitled to all the salaries agreed under the contract until the termination date (CAS 2012/A/2874, par. 97). However, the parties to an employment contract are free to agree otherwise. The clause under the heading *"Liability for breach of the Contract"* in the Employment Contract provides for such an alternative solution. According thereto the party that breached the Employment Contract must pay to the other party 50% of the *"salary"* as compensation. This wording is clear and exhaustive. Furthermore, the Panel notes that the clause under the heading *"Remuneration"* clearly distinguishes between fixed (salary) and variable (bonus) components of the remuneration. The Panel further observes that the clause *"Liability for breach of the Contract"* only refers to the term *"salary"*. Therefore, the Panel finds that when calculating the compensation in accordance with this provision, only the fixed components of the remuneration, i.e. the salary can be taken into account. Only 50% of the *"salary"* and no bonuses are owed in the case of a breach of the contract.

2. The death of the Coach during the term of the Contract

171. The Parties are in dispute whether or not the death of the Coach during the normal course of the term of the Employment Contract has any influence on the calculation of the compensation. The Panel notes that the clause under the heading *"Liability for breach of the Contract"* is silent on this issue. Furthermore, the Respondent has not adduced any provision, jurisprudence or legal literature from which a reduction of the claim for compensation might follow. Instead, the Respondent limits itself to the reference of generally recognized principles of law. The Panel is not prepared to follow this argument. The wording of the Employment Contract is clear. According thereto, the Respondent must pay 50% of the salary of the remaining period of the contract. Finally, the Panel is of the view that the entitlement for compensation arises in the full amount at the time of the breach of the contract and that, therefore, circumstances occurring after said point in time cannot influence the calculation of the compensation. To conclude, the Panel finds that the decease of the Coach has no influence on the calculation of the compensation.

172. The Appellant submitted that the Club already paid the Coach USD 184'000 for the year 2012. This is uncontested. Therefore, the remaining salary amounts to USD 316'000 for the year 2012 and USD 500'000 for the year 2013. According to the clause under the heading *"Liability for breach of the Contract"* of the Employment Contract the Respondent owes the Appellant the net amount of USD 408'000, i.e. $(\frac{316'000+ 500'000}{2})$.

C. Interests

173. The Appellant has requested relief as follows:

"If the aforementioned sum is not paid within the aforementioned deadline [30 days from the date of notification of this award], an interest rate of 5% per year will apply as of expiry of the fixed time limit".

174. In the Panel's view, the Appellant would be entitled to interests as of the date of unlawful termination of the Employment Contract or at the latest when the Respondent was notified to pay compensation by the Coach or the Appellant. However, the Appellant requests interests not for past periods but only for the time periods starting 30 days from the date of notification of this award. The Panel is bound by the Appellant's requests and, thus, only awards interests as of this time. The Respondent has not objected to the interest rate claimed by the Appellant. The latter is in line with the practice in the "football industry". In particular, the Respondent has not pointed to any provision of Chinese law that would indicate otherwise.

XIII. CONCLUSION

175. Based on the foregoing, and after taking into due consideration all the evidence produced and all arguments made, the Panel finds that:

(i) CAS has jurisdiction to hear the claim of the Appellant;

(ii) the Appeal of the Appellant is admissible;

(iii) the Appellant has standing to sue and the Respondent hast standing to be sued in the present matter;

(iv) CAS has discretion to issue a new decision in lieu of FIFA. Furthermore, it has full power to hear the case de novo.

(v) the Respondent unilaterally terminated the Employment Contract without just cause with the Termination Letter dated 28 May 2012;

(vi) the Appellant is entitled to compensation in the net amount of USD 408'000;

(vii) the Appellant is entitled to interests payments on such amount of 5% p.a. within 30 days from the notification of the present award.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The Court of Arbitration for Sport has jurisdiction to decide on the dispute between the Ms Ana Kuže and Tianjin TEDA FC.

2. The Appeal filed by Ms Ana Kuže on 3 February 2015 against the decision issued on 23 September 2014 by the Single Judge of the FIFA Players' Status Committee is partially upheld.

3. Tianjin TEDA FC is ordered to pay to Ms Ana Kuže a net amount of USD 408'000 (four hundred eight thousand US Dollar) as compensation as well as interest at a rate of 5% per annum as from the date starting 30 days after the notification of this award.

4. (…).

5. (…).

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