TAS / CAS
TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

**Arbitration CAS 2023/A/9477 Joan Carrillo Milan v. DVSC Futball Szervezo & Fédération Internationale de Football Association (FIFA), award of 14 February 2024**

Panel: Mrs Yasna Stavreva (Bulgaria), Sole Arbitrator

*Football*
*Contractual dispute*
*Representation of a party in CAS proceedings*
*Concept of "forum shopping"*
*Absence of sufficient proof of bad faith for a party's course of action to qualify as "forum shopping"*

1. **The parties may be represented or assisted during the CAS proceedings by a person of their choice, not necessarily a lawyer.**

2. **It is considered that parties should not be allowed to engage in the so-called "*forum* shopping" practice, which could be understood as a situation where a party brings the same dispute before multiple *fora* in order to seek the most favourable judgement. Such practice is viewed as unlawful. The concept of "*forum* shopping" is closely connected to the principle *electa una via non datur recursus ad alteram.* In other words, once the choice of competent dispute resolution *forum* is made, it should become binding on both parties with respect to the dispute in question.**

3. **Although widely accepted in the sports-related dispute resolution system, the concept of "*forum* shopping" has not been regulated or defined. In view of the description made of it in the Commentary on the Regulations on the Status and Transfer of Players, and while this document does not constitute *per se* the applicable regulation, it appears that the practice is characterized by the intent of a claimant and his/her purposeful conduct aimed at "gaming the system" to the detriment of the opponent party. Its inherent element is therefore the bad faith of a party initiating a dispute. Conversely, one party should not be seen as having engaged in an unlawful "*forum* shopping" if it is not sufficiently proven that it acted in bad faith when filing its claims before the two deciding bodies. *In casu*, it is reasonable to assume that by filing a claim before a State Court, a coach wanted to preserve his rights deriving from his dismissal by the club who had also contested FIFA's jurisdiction to hear the claim.**

## I. PARTIES

1. Mr Joan Carrillo Milan (the "Appellant" or the "Coach") is a coach of Spanish nationality.

2. DVSC Futball Szervezo Zrt. (the "First Respondent or the "Club") is a Hungarian professional football club with its seat in Debrecen, Hungary. It is affiliated to the Hungarian Football Federation (the "HFF"), which in turn is an affiliated member of the Fédération Internationale de Football Association (the "FIFA").

3. Fédération Internationale de Football Association (the "Second Respondent" or "FIFA") is an association under Swiss law and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials, coaches and players worldwide. The Club and FIFA are jointly referred to as the "Respondents" and together with the Coach as the "Parties" where applicable.

## II. INTRODUCTION

4. The appeal is brought by the Appellant against the decision of the FIFA Players' Status Chamber (the "FIFA PSC") dated 22 November 2022 with regard to the payment of compensation for breach of contract (the "Appealed Decision").

## III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, pleadings and evidence adduced at the remote hearing held on 24 August 2023. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, she refers in her Award only to the submissions and evidence she considers necessary to explain her reasoning.

6. On 7 November 2021, the Coach and the Club concluded an employment contract (the "Contract") whereby the Coach was appointed as head coach of the Club's first team. This contract was valid from 8 November 2021 until 30 June 2023.

7. Pursuant to the Contract the Club undertook to pay to the Coach a monthly salary of Hungarian Forint (HUF) […] net, payable until the 10th day of every following month, as well as benefits based on the ranking achieved in the 2021/2022 and 2022/2023 league seasons, as follows:

<u>League season 2021/2022</u>

| NB I Championship Rank | Benefits (HUF) |
|---|---|
| 1. hely/ 1st place | […] |
| 2. hely/ 2nd place | […] |
| 3. hely/ 3rd place | […] |
| 4. hely/ 4th place | […] |
| 5. hely/ 5th place | […] |
| 6. hely/ 6th place | […] |

| | |
|---|---|
| 7. hely/ 7th place | […] |
| 8. hely/ 8th place | […] |
| 9. hely/ 9th place | […] |
| 10. hely/ 10th place | […] |
| 11. hely/ 11th place | - |
| 12. hely/ 12th place | - |

League season 2022/2023

| NB I Championship Rank | Benefits (HUF) |
|---|---|
| 1. hely/ 1st place | […] |
| 2. hely/ 2nd place | […] |
| 3. hely/ 3rd place | […] |
| 4. hely/ 4th place | […] |
| 5. hely/ 5th place | […] |
| 6. hely/ 6th place | […] |
| 7. hely/ 7th place | […] |
| 8. hely/ 8th place | […] |
| 9. hely/ 9th place | […] |
| 10. hely/ 10th place | […] |
| 11. hely/ 11th place | - |
| 12. hely/ 12th place | - |

8. Regarding the termination, Article 17 of the Contract reads as follows:

> *"With regard to the status of the Employee as a senior employee, the Employer may terminate this contract with a unilateral legal declaration (termination), without any obligation to state reasons, in spite of the specified period of time, as follows:*
>
> - *Before the 30th of June 2022, by paying to the Employee the amount of the basic salary until 30th of June 2022 and the end-of-season bonus corresponding to the placement at the time of termination.*
>
> - *If the Employer nevertheless justifies the termination, the Parties shall consider the following in particular as a ground based on the Employee's ability to justify the employer's lawful termination:*
>
>  - *if the first team is eliminated from NB I, based on the announced final result of the 2021/2022 league season;*
>
>  - *if the first team is relegated in three consecutive rounds at any time after the 5th round in the NB I championship season 2022/2023 and it is four or more points behind the 10th placed team".*

9. Regarding jurisdiction in case of disputes, Clause 22 of the Contract states as follows:

*"The Parties agree to seek an amicable settlement of any dispute through negotiation. In the event of failure to do so, the Parties shall have the right to apply to the dispute settlement of the FIFA Dispute Resolution Chamber".*

10. As to the governing law, Clause 23 of the Contract provides as follows:

*"The Parties shall apply the rules and regulations of MLSZ, UEFA, FIFA and the rules of Hungarian law to their legal relationship. In matters not regulated in this contract, the Hungarian Civil Code, the Sports Act, the LC and other relevant laws and regulations shall prevail".*

11. On 27 June 2022, the Club unilaterally terminated the Contract pursuant to its Article 17 Chapter IX and Article 210 (1) point *"b"* of the Hungarian Labour Code, providing *inter alia* as follows ("the Termination Letter"):

*"In view if the fact that the Employee qualifies as a senior employee, pursuant to point b) of Article 210 (1) of the Hungarian Labour Code and the first sentence of point 17 of Chapter IX of the Employment Contract, the Employer is entitled to terminate the employment relationship of the Employee with a unilateral legal declaration (termination), without the obligation to state reasons, on the basis of which the Employer has decided as described above.*

*The Employee may submit a claim in 3 copies against the present termination notice to the Debrecen Regional Court (1.Perenyi utca, Debrecen, H-4026) within 30 days of its receipt. There is no suspensory effect of bringing an action".*

12. On 1 July 2022, the Coach indicated the Club that his dismissal was not in accordance with the Hungarian Labour Code and proposed to amicably settle the case, requesting the Club to pay 9 months' salary and the bonus.

13. As there was no answer from the Club, on 24 July 2022, the Coach lodged a claim before the FIFA PSC against the Club for termination of the contract without just cause.

14. On 26 July 2022, the Coach lodged a claim before the Tribunal of Szekesfehervar in Hungary against the Club, requesting the amount of HUF […] as compensation corresponding to 12 months' salary, the default interest being due since 27 June 2022 and the legal costs. The Coach argued that: (1) the dismissal shall be invalid, as it was not signed by a person exercising the employer's rights and it falsely indicated the possibilities for legal remedy; and (2) the dismissal shall be unlawful, as it did not have legal basis and the Club refused to comply with the precondition of dismissal. The Coach also noted the Tribunal of Szekesfehervar about the claim filed to FIFA PSC.

15. According to the Coach, on 1 February 2023 he signed a new employment contract with the Spanish 2nd division club CD Lugo, valid until 30 June 2023, earning remuneration for the 5 months period of EUR […] net.

16. On 24 February 2023, the Coach withdrew his claim lodged before the Tribunal of Szekesfehervar.

## IV. PROCEEDINGS BEFORE THE FIFA PLAYERS' STATUS CHAMBER

17. On 22 November 2022, the FIFA PSC rendered the Appealed Decision, in the following terms:

> *"1. The claim of the Claimant, Juan Antonio Carrillo Milan, is inadmissible.*
>
> *2. This decision is rendered without costs".*

18. In substance, the FIFA PSC held as follows:

> *"29. The Single Judge recalled that the competence shall be examined also ex officio, as there seems to exist elements of Forum Shopping since the Claimant lodged two parallel claims before FIFA and in Hungary.*
>
> *30. In this respect, the Single Judge referred to the Commentary on the regulations on the Status and Transfer of Players (p.372), which sheds the following light on the concept of forum shopping:*
>
> > *"The final considerations concern the practice known as "forum shopping" – a party taking the same matter to multiple fora in the hope of obtaining the result that suits its purposes. The relevant jurisprudence is designed to prevent such behaviour, which is viewed as illegitimate. A party should not be able to game the system by having multiple fora hear the same argument in the hope one of them will hand down the judgement it wants. For example, a party should not be allowed to ask a national body to confirm that a contract has been breached without just cause, and then, having obtained a favourable decision at national level, ask the DRC to settle compensation payable in the case. The principle that a party that has chosen to have a case heard under one competent jurisdiction cannot then have recourse to another (known colloquially as "forum shopping") is consistently applied".*
>
> *31. While in the case at hand FIFA was seized first, it is also clear that the Claimant decided two days later to file a claim to the Hungarian Civil tribunal. It is to be noted that both claims had the same content, also similar amounts were requested.*
>
> *32. The Claimant grounds his position on the admissibility on the fact that (1) due to the Hungarian strict deadline, the Claimant prudent and careful act was to file to file; (2) FIFA tribunals are not "arbitral tribunals" but only internal decision-making bodies and thus a formal collision of jurisdiction is excluded.*
>
> *33. On this note as opposed to the Claimant's argumentation, the Single Judge was firmly of the opinion that the Claimant indeed engaged in a sophisticated form of forum shopping; the Claimant filed the FIFA Claim first, admittedly hoping that this would create lis pendens vis-avis the Hungarian claim and its particularities. The Hungarian Claim however is, as per the information on file, still ongoing".*
>
> *34. The Single Judge finds this behaviour pivotal in the matter at hand, given that the Claimant deliberately acted in a manner to conduct two identical proceedings only to determine, later and at his convenience, which proceedings he preferred to carry on with.*

*35. The Single Judge was comforted to rule that this attempt to manipulate the system at the Claimant's will cannot subsist for, the Claimant's position is contradictory. If he wanted FIFA to adjudicate on the FIFA Claim (and he was certain on FIFA's jurisdiction per his statement of claim), the Claimant should have abstained from filing the Hungarian Claim.*

*36. Moreover, the Single Judge highlighted that allowing the Claimant's claim to be entered would be in sharp opposition with the jurisprudence of FIFA and CAS in the matter of forum shopping (for reference, the cases Stancu, Simkovic and 0181141-FR ruled upon by the Dispute Resolution Chamber, as well as the matter CAS 2007/A/1301 Ituano Sociedade de Futebol Ltda v. Silvino Joao de Carvalho, Buyuksehir Belediyesi Ankaraspor & Federation Internationale de Football Association (FIFA), award of 10 March 2008, for instance). The Single Judge particularly underlined the wording under Simkovic:*

> *"The DRC observed that it therefore cannot condone the conduct of a player or a club who has specifically chosen to submit a labour dispute to the afore mentioned national body/court, and then subsequently submits the identical or essentially identical dispute between the same parties, based on the same legal framework i.e. the employment contract, to the FIFA Dispute Resolution Chamber;* ***the same is to be noted if the party submits a claim first before the FIFA DRC and thereafter lodges the same claim in front of the national body****" (emphasis added).*

*37. The Single Judge therefore concluded that once the player lodged the Hungarian Claim, the Claimant de facto renounced to have his FIFA Claim heard by the Football Tribunal".*

19. On 17 February 2023, the grounds of the Appealed Decision were notified to the Parties.

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

20. On 7 March 2023, the Appellant lodged a Statement of Appeal with the Court of Arbitration for Sports ("CAS") against the Respondents with respect to the Appealed Decision, pursuant to Articles R47 and R48 of the CAS Code of Sports-related Arbitration, 2023 edition (the "CAS Code"). In the Statement of Appeal, the Appellant requested a Sole Arbitrator to be appointed.

21. On 16 March 2023, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

22. On 6 April 2023, the First Respondent filed his Answer in accordance with Article R51 of the CAS Code.

23. On 24 April 2023, the CAS Court Office informed the Parties that, pursuant to Article R54 of the CAS Code, the Panel had been constituted as follows:

Sole Arbitrator: Mrs Yasna Stavreva, Attorney-at-law in Sofia, Bulgaria.

24. On 25 May 2022, the Second Respondent filed its Answer in accordance with Article R51 of the CAS Code.

25. On 19 June 2023, the Sole Arbitrator, after having consulted the Parties, decided to hold a hearing, by video-conference, pursuant to Article R57 of the Code.

26. On 17 July 2023, the CAS Court Office, on behalf of the Sole Arbitrator, issued the Order of Procedure, which was duly signed by the Parties.

27. On 24 August 2023, a hearing was held by video-conference. Besides the Sole Arbitrator and Mrs Delphine Deschenaux Rochat, CAS Counsel, the following persons remotely attended the hearing:

- For the Appellant: Dr Kristof Wenczel - by proxy;
- For the First Respondent: Dr Andor Leka - attorney-at-law and Dr Peter Leka - attorney-at-law;
- For the Second Respondent: Mr Alexander Jacobs - Senior legal counsel at FIFA.

28. At the hearing the Parties confirmed that they had no objections as to the constitution of the Panel. The First Respondent maintains its objection against the presence of Dr Kristof Wenczel as a representative of the Appellant and invited the Sole Arbitrator to take a decision on the issue. The Sole Arbitrator allowed Dr Kristof Wenczel to attend the hearing and requested from him to provide a new power-of-attorney. The reasons for the Sole Arbitrator's decision will be addressed further below in this Award. The Parties further made full oral submissions and at the end of the hearing they expressly confirmed that they were afforded the opportunity to present their case, submit their arguments and that their right to be heard had been fully respected.

29. On 24 August 2023, following a request made by the Sole Arbitrator at the hearing, the Appellant sent a new power-of-attorney in favour of Dr Kristof Wenczel, which was duly noted by the CAS Court Office on 25 August 2023.

## VI. SUBMISSIONS OF THE PARTIES

### A. The Appellant's position

30. In its Statement of Appeal and Appeal Brief, the Appellant requests CAS to render an award which:

*"i. Sets aside the Decision adopted by the FIFA PSC on **22 November 2022**, (whose grounds were notifies on **17 February 2023**, Ref.Nr.**FPSD-6806**);*

*ii. Declares that the FIFA PSC is the competent body to deal with the matter at hand; and*

*iii. Returns the matters to FIFA and orders the FIFA PSC shall pass the decisions on the merits based on the claim, lodged by the Coach on* ***24 July 2022*** *to the FIFA PSC against the Club.*

*In the alternative:*

*iv. should CAS accept the request "i" above, the Appellant requests that the matter be judged by the CAS itself, i.e. the ground of action of the question, having in mind the competence of the latter and the procedural economy, according* ***to article R57*** *of the Code of Sports – related Arbitration.*

*In the further alternative:*

*v. Should the CAS deems that the Club terminated the Employment Agreement without just cause,* ***to uphold the right of the Coach to receive outstanding salary and compensation corresponding to 12 months' salary and bonus in the amount of HUF*** […]***, - minus the residual value of the new contract of the Coach in accordance with article 6-2 b) of the RSTP = HUF*** […]***, - plus default interest and legal costs****.*

*In all events:*

*vi.* ***Order both Respondents to:***

- ***reimburse the Appellant his legal costs and other expenses pertaining to this appeal; and***

- ***bear any and all costs pertaining to the arbitration****".*

31. In support of its Appeal, the Appellant's position, in essence, may be summarised as follows:

- The Appellant submits that FIFA Regulations and Swiss law shall apply to the present proceedings and subsidiarily, Hungarian law to the merits of the case.

- The Appellant further submits, that his act to lodge a claim to two different tribunals does not constitute "*forum* shopping" and the FIFA PSC has improperly applied such term in the Appealed Decision. By analysing the definition of "*forum* shopping" in general and in the Commentary on the FIFA Regulations on the Status and Transfer of Players (the "Commentary") it can be presumed that "*forum* shopping" is no way unlawful if it does not meet the criteria of unjustified inequality between the parties. By taking the dispute to two different *fora* the Appellant did not act in bad faith and did not attempt to put the First Respondent in a weaker position which could have established inequality between the parties as the First Respondent could equally defend its interests at national and international level.

- The Appellant stresses that he submitted his claim first to the FIFA PSC and subsequently to the Labour Tribunal of Szekesfehervar, respecting Article 22 of the Contract and following the principle of "*pacta sunt servanda*". The main reason to initiate proceedings at national level was not to obtain a better outcome by one of the *forums* but to demonstrate

the unlawfulness of the jurisdictional clause, contained in the Termination Letter that determined exclusivity of a certain court in Hungary where the Appellant could lodge his claim against illegal termination. Another reason was the impossibility an award rendered by the FIFA PSC to be enforced in Hungary as it contradicts the Hungarian law. The Hungarian Act on Arbitration prohibits labour-related disputes to be resolved by an arbitral tribunal which means that even the FIFA PSC has rendered an award in favour of the Appellant, its enforcement would have been hindered on a national level. Thus, the relevant provisions of the Commentary related to the main motive of "*forum* shopping" for obtaining a better outcome by taking a dispute to multiple *fora*, do not apply.

- Furthermore, the Appellant underlines as important fact that he duly informed the Tribunal of Szekesfehervar about the proceedings before the FIFA PSC and it was not taken into account as a decisive factor for the national court to terminate or suspend the proceedings at national level.

- The Appellant further notes, that he withdrew his claim before the Tribunal of Szekesfehervar and thus, the element of choosing multiple jurisdictions was ceased.

- Additionally, the Appellant contests the FIFA PSC's denial to deal with the matter at hand and considers that it had exclusive jurisdiction to resolve the dispute between the Appellant and the First Respondent on the basis of Article 23 para. 1 and Article 22 para. 1 lit. c) of the FIFA RSTP. According to him FIFA's "*ex officio*" examination of its competence had to be limited only to which chamber of the Football Tribunal should hear the case and not to the admissibility of the claim.

- Furthermore, the Appellant deems that the awards, mentioned in the Appealed Decision *(Stancu, Simkovic and 0181141-FR)* ruled upon the FIFA DRC are not applicable to the case at hand because they have different factual and legal background and on the other hand are not publicly accessible and legally binding. The interpretation of the CAS jurisprudence (award CAS 2007/A/1301) also does not support the FIFA PSC's stance to the matter of "*forum* shopping".

- Finally, the Appellant considers that the Appealed Decision contradicts Article 186 (1) bis of the Swiss Federal Act on Private International Law (PILA) and the CAS award CAS 2013/A/3364 which specifies that *"forum shopping occurs routinely in international litigation, and its mere existence is not in and of itself a reason for staying proceedings. In fact, the ratio legis of Article 186 1bis cited supra is precisely the Swiss legislator's will to signal that, unless serious reasons exist, the jurisdiction of international arbitral tribunals sitting in Switzerland should not be put into question".*

## B. The First Respondent's position

32. In its Answer to the Statement of Appeal and the Appeal Brief, the First Respondent submitted the following prayers for relief, requesting the CAS:

*"1. (…) to establish the ineffectiveness and invalidity of the statement of appeal dated the 7th March 2023 and the appeal brief dated the 15th March 2023 – which documents were submitted by Dr. Kristof Wenczel, in the absence of his right of representation, and thus, their ineligibility for legal effect and, as in the absence of an appeal submitted within the time limit and with legal force, terminate the procedure, or reject the appeal that does not come from the person entitle to it without a substantive examination.*

*2. (…) as an alternative to reject the appeal as unfounded and to uphold FIFA's decision.*

*3. (…) oblige the claimant to pay the costs incurred during the procedure to the First Respondent based on R64.5 of the Code: Procedural Rules of CAS.*

*4. (…) pointing out that the claimant's appeal request that the Honorable CAS adjudicate his appeal on the merits is ruled out simply because, in view of the fact that FIFA did not make a substantive decision in the present case, thus, the Honorable CAS has no legal opportunity to make a decision, taking into account the CAS jurisprudence (CAS 2007/A/1301)".*

33. In support of its defense, the First Respondent, in essence, submitted the following:

- The First Respondent first argues that the Statement of Appeal and the Appeal Brief submitted by Dr Kristof Wenczel as a legal representative of the Appellant are null and invalid, without providing legal effect because when they were filed to CAS Dr Kristof Wenczel was not a licenced attorney, practicing law. According to the public register of the Hungarian Bar Association his registration as an attorney was suspended on 7 February 2023 and then, cancelled on 16 February 2023 which makes him impossible to represent the Appellant and sign the submissions on behalf of *"Wenczel & Partners"* Law office. In this regard, the First Respondent insists CAS proceeding to be terminated or the Appeal Brief to be rejected on the basis of a lack of an authorised representation.

- The First Respondent further submits that "*forum* shopping" clearly exists at the case at hand because by claiming in parallel to two different tribunal (the FIFA PSC and the Tribunal of Szekesfehervar) the Appellant acted in bad faith, trying to manipulate both of the proceedings and providing contradictory statements with the only intention to achieve the most favourable result for him.

- The First Respondent underlines that if the Appellant wanted FIFA PSC to adjudicate on his claim and was sure on its competence, he should have abstained from lodging the same claim to the national court. By subsequently filing a claim before the Tribunal of Szekesfehervar the Appellant waived his right to have the claim assessed by the FIFA PSC.

- According to the First Respondent the Appellant's withdrawal of his claim before the national tribunal was a result of the transfer of the litigation process from the Tribunal of Szekesfehervar to the Court of Debrecen which was competent to judge on the termination procedure. Being aware of the facts and the possible negative outcome for him at national level, the Appellant tried to assert his claim mostly to the FIFA PSC and thus, continued to maintain the form of "*forum* shopping".

- Furthermore, the First Respondent submits its allegations on the merits of the case concerning the termination of the Contract. It refers to its position already explained during the proceedings before the FIFA PSC, which can be summarized as follows:

  - The First Respondent terminated the Contract with the Appellant with just cause on the basis of the Hungarian law (the Hungarian Act I of 2012 on the Labour Code) which governs the labour relationship between the Coach and the Club and is the law that shall apply to the merits of the matter at hand.

  - The termination of the Contract was executed by an authorized person, exercising the Employer's rights – Mr Balazs Makray who was elected as a company manager by the General Assembly held on 26 June 2022.

  - The Appellant performed a position of the so called "executive employee" under Clause 2.3 Chapter I of the Contract which gives the right to the First Respondent being an employer to prematurely and unilaterally terminate the Contract, without any obligations to provide reasons for that.

  - The legal remedy, provided in the Termination Letter was appropriate and did not limit the Appellant to enforce his claim.

  - The First Respondent fulfilled its final payment obligations with two days delay which did not reflect the contractual termination and did not make it invalid.

  - The Appellant was not entitled to any additional bonus benefits after the contractual termination because the Coach and the Club agreed in Clause 9.3 Chapter IV of the Contract that *"if the Employee's employment is terminated during the NB I Championship Season, the amount of the benefits under clauses 9.1 and 9.2 is not even partially due"*.

## C. The Second Respondent's position

34. In its Answer to the Statement of Appeal and the Appeal Brief, the Second Respondent submitted the following requests for relief:

*"FIFA respectfully requests the Sole Arbitrator to:*

*(a) reject the requests for relief sought by the Appellant;*

*(b) confirm the Appealed Decision;*

*(c) order the Appellant to bear the full costs of these arbitration proceedings".*

35. The Second Respondent's arguments in support of its requests for relief may, in essence, be summarized as follows:

- The Second Respondent submits that FIFA Statutes and the FIFA Regulations, namely the FIFA RSTP (edition October 2022) constitute the applicable law to the present proceedings and subsidiarily Swiss law applies should the need arise to fill a possible gap in the regulations of FIFA.

- According to the Second Respondent the essence of the matter is that the Appellant elected to initiate legal proceedings before the FIFA PSC as well as before the Hungarian national court. Thus, he was clearly engaged in a form of "*forum* shopping" which is an unaccepted practice.

- Further, the Second Respondent points the specificities of the concept of "*forum shopping*" which are addressed in the Commentary and the jurisprudence of both the CAS and the Football Tribunal. It makes references to several CAS awards (CAS 2007/A/1301, CAS 2021/A/7775, CAS 2017/A/6626) and recent FIFA DRC jurisprudence *(Stancu, Simkovic and 0181141-FR)* where the concept of "*forum* shopping" is confirmed and concludes that the matter at stake can be described as a blatant or obvious form of "*forum* shopping".

- The Second Respondent contests all arguments raised by the Appellant on "*forum* shopping" referring to different definitions (*e.g.* even relying on an opinion of the advocate general of the European Court of Justice) but staking on (i) *"unjustified inequality"* eradication as a *"legitimate legislative objective"*, (ii) the Commentary itself and (iii) on the general features of "*forum* shopping" by EWERT J.-P. and WESLOW D.. It deems these arguments based on a flawed premise, unworkable and non-credible for the following reasons:

    - The Appellant ignored the specificities of the *"principle of coordination between the State and the sporting adjudicating systems*" trying to extrapolate findings originating outside of the scope of the FIFA regulations (and the subsidiarily applicable Swiss law) instead of staying within of the confines of the FIFA dispute resolution system and its relation to state courts.

    - The Termination Letter did not contain a jurisdiction clause and did not establish that the parties should or had to adjudicate their dispute before the Hungarian national court. Therefore, the Appellant did not have to *"challenge"* the *"unlawfulness of the jurisdiction clause"* before the Hungarian national court. On the other hand if the Appellant had genuinely submitted a claim only to address the *"unlawfulness of the jurisdiction clause"* he would not have claimed an amount of HUF […] (an amount which mainly corresponds to twelve months of salary) which clearly concerns the breach of contract.

    - The Appellant withdrew his claim before the Tribunal of Szekesfehervar on 24 February 2023 despite the initial claim having been filed on 26 July 2022 (or 6 months later), the terms of the Appealed Decision having been notified on 22 November 2022 and the grounds of the Appealed Decision having been notified on 17 February 2023 which put in question the sincerity of all his arguments on "*forum* shopping".

- The nature of the proceedings before the FIFA PSC and the Hungarian national court was the same: concerned the same parties (the Appellant and the First Respondent), the same object (compensation for breach of contract) and the same cause of action (the First Respondent's dismissal of the Appellant). Recognizing that he filed his claim before the Hungarian national court because CAS awards and FIFA decisions were not enforceable in Hungary, the Appellant fulfilled the elements of "*forum* shopping" described by him, since he was *"gaining a perceived or actual advantage"*.

- In addition, beyond the Appellant's specific arguments involving "*forum* shopping", the Second Respondent objects the other arguments raised by the Appellant on (i) the chronological order of the proceedings, (ii) "*nemo auditor propriam turpitudinem allegans*", (iii) the FIFA's exclusive jurisdiction, (iv) the non – enforcement of the Appealed Decision in Hungary, (v) the absence of case law concerning Article 22 RSTP, (vi) the inaccessibility of a case cited in the Appealed Decision and the different and factual background of the jurisprudence, (vii) the absence of a specific reference to FIFA regulations and/or Swiss law, (viii) the alleged contradiction of the Appealed Decision and the Private International Law Act (the "PILA"). It considers these arguments lacking both in coherence and relevance, none of them substantiated by any jurisprudence (CAS or Football Tribunal) or legal doctrine.

- The Second Respondent concludes further in its submissions that the matter at stake is very straightforward because:

  - Article 22 RSTP establishes FIFA's competence in employment-related disputes and a right for the parties to seek redress either before the FIFA's adjudicatory bodies or before the local courts.

  - As explained in the CAS award CAS 2021/A/7775 and confirmed in the CAS award CAS 2019/A/6626 *"in case the parties opt for a local forum, the FIFA adjudicatory bodies are no longer competent"*.

  - The FIFA Commentary serves as a guidance or a *"reference text"* as explained in Circular letter no. 1075 and for the purpose of the matter at stake describes the concept of "*forum* shopping" and refers to the current state of the consolidated DRC/PSC jurisprudence in that regard.

- Lastly, the Second Respondent comments the Appellant's allegation that the Appealed Decision contradicts with the PILA and the *"Bergodi decision"* or CAS award CAS 2013/A/3364. It points that these conclusions are based on a flawed understanding of the cited CAS award and an isolated citation from the same award - which addressed a preliminary issue when the Panel was requested to stay the proceedings until the issuance of a decision by the respective Romanian Court where the question of jurisdiction to adjudicate the dispute had been submitted. The CAS award refers to the concept of "*lis pendens"* which differs from the concept of "*forum* shopping" ("*lis pendens*" typically occurs when the two opposing parties submit their dispute to different "*forums*" while "*forum*

shopping" occurs when one and the same party submits its dispute to two different *"forums"*).

## VII. JURISDICTION

36. Article R47 para. 1 of the CAS Code provides as follows:

> *"An appeal against the decision of a federation, association or sports-related bodies maybe 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 it prior to the appeal, in accordance with the statutes or regulations of that body".*

37. Article 58 (1) of the FIFA Statutes states as follows:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

38. Article 23(4) of the FIFA RSTP reads – in its pertinent part – as follows:

> *'Decisions reached by the single judge or the Players' Status Committee may be appealed against before the Court of Arbitration for Sport (CAS)".*

39. The Sole Arbitrator also takes note of the fact that neither of the Parties objected to the jurisdiction of the CAS and that the Order of Procedure was duly signed by them without reservation.

40. It follows from all of the above that the CAS has jurisdiction to adjudicate and decide on the present dispute.

## VIII. ADMISSIBILITY

41. Article R49 of the CAS Code reads as follows:

> *"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, 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".*

42. In accordance with Article 58 para. 1 of the FIFA Statutes:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

43. The grounds of the Appealed Decision were notified to the Parties on 17 February 2023 whilst the Statement of Appeal was filed on 7 March 2023, therefore within the deadline set forth in Article 58 (1) of the FIFA Statutes. The Statement of Appeal also complied with the requirements of Article R48 of the CAS Code. Consequently, the appeal is admissible.

## IX. APPLICABLE LAW

44. Article 187 para. 1 of the Swiss Private International Law Act ("PILA") provides:

> *"The arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such choice, according to the rules of the law which in the case has the closest connection".*

45. Article R58 of the CAS Code provides as follows:

> *"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 application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

46. Article 56(2) of the FIFA Statutes (edition 2022) stipulates the following:

> *"The provisions of the CAS Code of Sports-related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law".*

47. In addition, Clause 23 of the Contract provides as follows:

> *"The Parties shall apply the rules and regulations of MLSZ, UEFA, FIFA and the rules of Hungarian law to their legal relationship. In matters not related to this contract, the Hungarian Civil Code, the Sports Act, the LC and other relevant laws and regulations shall prevail".*

48. The Appellant submits that the present dispute shall be governed first and foremost by the FIFA Regulations and Swiss law. Hungarian law shall apply subsidiarily when necessary to evaluate whether the Contract was terminated with or without just cause.

49. The First Respondent does not refer in its Answer to a specific choice-of-law but it can be presumed from its content that it agreed on the application of the Hungarian law to assess the Contract's termination.

50. According to the Second Respondent, as per Article 56(2) of the FIFA Statutes the provisions of the CAS Code shall apply to the proceedings. Pursuant to the same article FIFA Regulations, namely the FIFA RSTP constitute the applicable law to the matter at hand and subsidiarily Swiss law shall apply if the need arise to fill in a possible gap in the regulations of FIFA.

51. In evaluating the position of the Parties regarding the applicable law, the Sole Arbitrator notes that they have submitted their dispute to CAS and therefore decided that the CAS Code, including Article R58 of the CAS Code, shall govern the appeal arbitration proceedings. This finding is further corroborated by the Order of Procedure, signed by the Parties, which states in relation to the applicable law as follows:

> *"In accordance with Article R58 of the Code, the Sole Arbitrator shall decide the dispute according to the applicable regulations and, subsidiarily, the rules of the 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 the law, the application of which the Sole Arbitrator deems appropriate. In the latter case, the Sole Arbitrator shall give reasons for her decision".*

52. The Sole Arbitrator further notes that, according to Article R58 of the CAS Code, she shall firstly *"decide the dispute according to the applicable regulations"* and secondly, based on the *"rules of the 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 the law, the application of which the Sole Arbitrator deems appropriate"*. By corollary, Article R58 of the CAS Code, in principle gives precedence to the applicable regulations (of the relevant federation) over the Parties' choice of law.

53. The above finding is not contradicted by Clause 23 of the Contract. The latter does not provide for any hierarchy of norms. It rather appears that the clause in question merely lists the various applicable legal regimes that may be applicable to the case at hand. This follows from the fact that the wording of Clause 23 of the Contract only refers to *"and"* instead of *"additionally"* or *"subsidiarily"* and therefore does not give precedence to Hungarian law over the rules and regulations of FIFA.

54. In view of the above, the Sole Arbitrator finds that the dispute in question must be resolved primarily according to the *"applicable regulations"*, *i.e.* the rules and regulations of FIFA, in particular the FIFA RSTP (edition July 2022). In addition, Swiss law shall be applied subsidiarily, should the need arise to interpret or fill a possible gap in the various regulations of FIFA. For all questions not covered by the FIFA regulations, the Sole Arbitrator will resort to the *"rules of law"* chosen by the parties, *i.e.* the Hungarian law.

## X. PROCEDURAL ISSUE – REPRESENTATION IN CAS PROCEEDINGS

55. It is recalled that the First Respondent objected the participation of Dr Kristof Wenczel as a representative of the Appellant during the CAS proceedings and the hearing, which the Sole Arbitrator ultimately decided to reject for the following reasons.

56. Article R30 of the CAS Code states:

> *"The parties may be represented or assisted by persons of their choice. The names, addresses, electronic mail addresses, telephone and facsimile numbers of the persons representing the parties shall be communicated to*

*the CAS Court Office, the other party and the Panel after its formation. Any party represented by an attorney or other person shall provide written confirmation of such representation to the CAS Court Office".*

57. Accordingly, it means that during the CAS proceedings the parties may be represented or assisted by a person of their choice, not necessarily a lawyer.

58. In the case at hand the Appellant requested to be represented during the CAS proceedings by Dr Kristof Wenczel providing with his Statement of Appeal an explicit power-attorney and additional one after the hearing, as required by the Sole Arbitrator. Both documents contain the necessary data for representation and comply with the provision of Article R30 of the CAS Code. Thus, the First Respondent's allegations that the Appellant is represented by an unauthorised person, lacking the capacity of a *"licenced attorney, practicing law"* are rejected.

59. In view of the above, the Sole Arbitrator finds that the requirements for representation are not violated by allowing the person of the Appellant's choice to attend the CAS proceedings, and accordingly permitted him to do so.

## XI. MERITS

60. The relevant questions that the Sole Arbitrator needs to answer in this appeal and based on the Parties' written submissions can be grouped into two sets of issues:

A. Did the FIFA PSC correctly renounced jurisdiction to adjudicate and decide on the Coach's claim against the Club?

B. In case the previous question is not answered in the affirmative, should the Appealed Decision be annulled and the case referred back to the FIFA PSC or the Sole Arbitrator should directly adjudicate on the matter if the Club had just cause to terminate the Contract and, if so, what are the consequences thereof?

### A. Did the FIFA PSC correctly renounced jurisdiction to adjudicate and decide on the Coach's claim against the Club?

61. In the Appealed Decision the FIFA PSC held that in principle it was competent to deal with the matter at stake since it concerned an employment-related dispute of an international dimension, arising from the nationality of the Appellant and the First Respondent (a coach with Spanish nationality and a Hungarian club) but found the claim inadmissible as the Appellant was engaged in a sophisticated form of "*forum* shopping". According to the FIFA PSC when the Appellant lodged two identical claims, first before the FIFA PSC and then, before the Hungarian national court he tried to manipulate the system at his convenience, thus his behaviour was considered pivotal. Once the Appellant lodged the claim before the national court in Hungary he *de facto* renounced the FIFA PSC's jurisdiction to adjudicate on the matter at hand.

62. It is reminded that, according to the Appellant, the FIFA PSC had exclusive jurisdiction to hear the dispute at stake on the grounds of Article 22 of the FIFA RSTP and Clause 23 of the Contract and it erred when declined its competence finding the case inadmissible on the grounds of "*forum* shopping". He argues that the concept of "*forum* shopping" was improperly applied in the Appealed Decision having in mind the FIFA Commentary, the opinion of the advocate general of the European Court of Justice and the general features of "*forum* shopping" by EWERT J.-P. and WESLOW D. In his view there was no abuse in the matter at hand as it is not prohibited to bring different claims in different jurisdictions. The main reasons to file a claim before the Hungarian national court were to contest the *"unlawfulness of the jurisdictional clause in the Termination Letter"* and to avoid a possible non-enforcement of the FIFA PSC decision on a domestic level because of the Hungarian law. The Appellant also rejects the notion that both claims were filed simultaneously, as FIFA PSC was seized first. Finally, he underlines that he withdrew his claim before the Hungarian national court which suspended *"the element of choosing multiple fora"*.

63. The Respondents, in turn, argue that the FIFA PSC was not competent to decide on the matter at hand because the Appellant was engaged in a form of *"forum* shopping*"* by filing two parallel claims: one before the FIFA PSC and one before the Hungarian national court. By lodging the claim before the Hungarian national court, the Appellant renounced his right to have his claim heard by the FIFA PSC, thereby rendering his claim inadmissible. The Appellant's arguments are generally based on a misconstrued understanding of Article 22 of the FIFA RSTP which does not state that FIFA competence in employment – related disputes is absolute. When the Appellant sought redress before the national *forum* the FIFA PSC became no longer competent. Lastly, the Respondents object the withdrawal of the claim before the Hungarian national court stressing that such action cannot refute the existed elements of *"forum* shopping*"* which made the Appellant's claim before the FIFA PSC inadmissible.

64. In light of the above, the starting point of the Sole Arbitrator's analysis is Article 22 lit. c) and Article 23 para. 2 of the FIFA RSTP.

65. Article 22 lit. c) of the FIFA RSTP provides as follows:

> *"Without prejudice to the right of any player, coach, association, or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear: (…)*
>
> *c) employment – related disputes between a club or an association and a coach of an international dimension; the aforementioned parties may, however, explicitly opt in writing for such disputes to be decided by an independent arbitration tribunal that has been established at national level within the framework of the association and/or a collective bargaining agreement".*

66. Article 23 para. 2 of the FIFA RSTP states as follows:

> *"The Players' Status Chamber of the Football Tribunal shall adjudicate on any of the cases described in article 22 paragraphs 1 c) and f), and 2".*

67. The Sole Arbitrator further reiterates that Clause 22 of the Contract provides as follows:

*"The Parties agree to seek an amicable settlement of any dispute through negotiation. In the event of failure to do so, the Parties shall have the right to apply to the dispute settlement of the FIFA Dispute Resolution Chamber".*

68. According to the above-mentioned provisions, as a rule, FIFA is competent to deal with employment – related disputes between a club and a coach of an international dimension. There are only two exceptions from this rule – when the parties explicitly opt to refer their dispute to *"an independent arbitration tribunal"* or to *"a civil court for employment-related disputes"*.

69. The international dimension of the matter at hand is clear as the Coach is of a Spanish nationality and the Club is based in Hungary. The dispute further concerns an employment relationship.

70. Additionally and undisputedly, Clause 22 of the Contract is sufficiently clear that the Parties agreed on the jurisdiction of the FIFA adjudicatory bodies and not on the jurisdiction of an independent arbitration tribunal at national level or the state courts to resolve their disputes.

71. Consequently, the competence of the FIFA PSC is, in principle given and that was duly noted in the Appealed Decision.

72. Bearing in mind the above, the question is whether the FIFA PSC's competence can be denied on the grounds of "*forum* shopping" since a party (here it is the Coach) lodged a claim before the FIFA PSC and, two days after, a claim before the national court in Hungary.

73. As an initial matter, the Sole Arbitrator considers parties should not be allowed to engage in the so-called "*forum* shopping" practice which could be understood as a situation where a party brings the same dispute before multiple *fora* in order to seek the most favourable judgement. The concept of "*forum* shopping", although widely accepted in sports-related dispute resolution system, has not been regulated or defined. It is closely connected to the principle *electa una via non datur recursus ad alteram.* In other words, once the choice of competent dispute resolution *forum* is made, it should become binding on both parties with respect to the dispute in question (ref. CAS 2007/A/1301, CAS 2017/A/5111, CAS 2018/A/5664).

74. In this respect, the Sole Arbitrator refers to the concept of *"forum shopping"* which, in the absence of a specific definition is addressed in the FIFA Commentary on the Regulations on the Status and Transfer of Players (the "FIFA Commentary"). While this document does not constitute *per se* the applicable regulation, it provides useful guidelines as to which practice could be regarded as unlawful *forum shopping* within football-related dispute resolution system.

75. The FIFA Commentary specifically explains the concept of *"forum shopping"* as follows:

*"The final considerations concern the practice known as "forum shopping" - a party taking the same matter to multiple fora in the hope of obtaining the result that suits its purposes. The relevant jurisprudence is designed to prevent such behaviour, which is viewed as illegitimate. A party should not be able to game the system by having multiple fora hear the same argument in the hope one of them will hand down the judgment it wants. For example, a party should not be allowed to ask a national body to confirm that a contract has*

*been breached without just cause, and then, having obtained a favourable decision at national level, ask the DRC to set the compensation payable in the case. The principle that a party that has chosen to have a case heard under one competent jurisdiction cannot then have recourse to another' (known colloquially as "forum shopping") is consistently applied".*

76. Taking the above into account, the Sole Arbitrator is of the view that the unlawful *forum shopping* practice is characterized by the intent of the claimant and his/her purposeful conduct aimed at "gaming the system" to the detriment of the opponent. Its inherent element is therefore bad faith of the party initiating the dispute.

77. Analyzing the facts of the case the Sole Arbitrator is not convinced that the Appellant was engaged in inadmissible "*forum* shopping". In particular, the Sole Arbitrator does not find it sufficiently proven that the Appellant acted in bad faith when filing the claim before FIFA and subsequently the claim before the Hungarian State Courts. The Appellant's intention to file the claim before the Hungarian State Courts was explained by the Appellant himself as follows:

> The Hungarian Labor Code (HLC) strictly allows 30 days for the employee to file a claim against any employer's resolution, including unilateral termination (see R's A 2.4.3.2. refers to the same provision). As Respondent referred falsely to the exclusive jurisdiction to the Debrecen Regional Court in the Termination Notice, the Claimant prudent and careful act was to file his claim to the Székesfehérvár Labour Court.

78. Further to the First Respondent's objection to the jurisdiction of FIFA to hear the case, the Sole Arbitrator notes that the Appellant explained to FIFA the reason why he filed the claim before the Hungarian Courts. The Sole Arbitrator notes that while the statute of limitations under the applicable FIFA regulations is of two years (Article 23 para. 3 of the RSTP), the Appellant's claim before the national court would have become time-barred already 30 days after the termination of the Contract. As consequence, should the Appellant not have filed the claim before the Hungarian State Courts, he would have been permanently prevented to do so, even in case in which FIFA, for any reason, whatsoever (*i.e.* the First Respondent contested its jurisdiction), would decline its jurisdiction.

79. Considering the First Respondent's objection to the jurisdiction of FIFA, the Sole Arbitrator considers that the Appellant may have filed the claim before the Hungarian State Courts with the purpose of protecting his rights.

80. Taking into consideration the foregoing, the Sole Arbitrator finds that the Appellant did not engage in unlawful *"forum shopping"*. It could not have been established that the Appellant's intent was to *"game the system"* to the detriment of the First Respondent in order to check which *forum* would bring a more favourable judgment. The Panel is not convinced that the Appellant's actions were characterized by bad faith. Rather, it is reasonable to assume that by filing the claim before the Hungarian State Courts, the Appellant wanted to preserve his rights deriving from his dismissal by the First Respondent (who also contested the jurisdiction of FIFA to hear the claim).

81. In view of the above, the Sole Arbitrator considers that the FIFA PSC erred in finding that the Appellant's claim filed before FIFA was inadmissible because the Appellant was engaged in *"forum shopping"*.

82. In light of the above, the Sole Arbitrator considers that the appeal shall be upheld and, consequently, the Appealed Decision is set aside.

83. Furthermore, considering that the Appellant's principal prayer for relief was to send the case back to FIFA and his arguments were focused on the jurisdiction of FIFA to hear this case, the Sole Arbitrator decides to refer the case back to FIFA to allow the latter to decide on the merits of the case.

## ON THESE GROUNDS

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

1. The appeal filed on 7 March 2023 by Joan Carrillo Milan against the decision rendered on 22 November 2022 by the FIFA Players' Status Chamber is upheld.

2. The decision issued on 22 November 2022 by the FIFA Players' Status Chamber is annulled.

3. The case is referred back to the FIFA Players' Status Chamber to decide on the merits of the dispute.

4. (…).

5. (…).

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