Arbitration CAS 2009/A/1781 FK Siad Most v. Clube Esportivo Bento Gonçalves, award of 12 October 2009

Sole Arbitrator: Mr Efraim Barak (Israel)

Football
Training compensation
Appealable decision before the CAS
Decision without grounds as a "decision" in the meaning of Article R47 of the CAS Code
Request for the grounds of the decision and exhaustion of internal remedies
Violation of the principle of due process and CAS power of review
Criteria for qualifying a player as "professional"
Registration of the player as a professional

1. **According to the CAS case law, in order for a decision to be appealable before CAS three conditions should be met: first, there must be a "decision" of a federation, association or another sports-related body; second, the parties must have agreed to the competence of the CAS and, third, the (internal) legal remedies available must have been exhausted prior to appealing to CAS.**

2. **CAS Panels have interpreted the term "decision" within the meaning of Article R47 of the Code broadly; decision is thus a unilateral act, sent to one or more recipients, intended to produce legal effects and containing a ruling which intends to affect the legal situation of the addressee of the decision or other parties. In this respect, a decision without grounds issued by the FIFA DRC shows all formal and material characteristics of a "decision" in the sense of Article R47 of the Code, as long as it shows the outcome of the deliberations regarding a specific issue ("unilateral act"), it carries the heading "decision", was passed by an organ of FIFA and was signed by the FIFA Deputy General Secretary. The fact that the decision is not motivated can, as such, not affect it being a "decision".**

3. **The right granted to a party to ask for the reasons of the decision cannot be qualified as an "internal remedy" within FIFA in the sense of Article R47 of the CAS Code.**

4. **In light of the fact that the CAS Panel has full power to review the facts and the law of a case, even if a violation of the principle of due process or of the right to be heard had occurred in prior proceedings, this could have been cured by the appeal to the CAS. According to the CAS case law, the virtue of an appeal system which allows for a rehearing before an appeal body is that issues relating to the fairness of the hearing before the tribunal of first instance "fade to the periphery".**

5. **The decisive criterion for qualifying a player as a "professional" player is whether the**

amount is "more" than the expenses effectively incurred by the player. In this respect, it is irrelevant whether it is much more or just a little more.

6. **Article 2 para. 1 and Article 3 para. 1 of Annex 4 to the FIFA Regulations on the Status and Transfer of Players (RSTP) refer to the first registration as a professional as the trigger element for payment, because registration is an easily identifiable element. However, Article 5 of the RSTP requires that the registration will reflect the true status of the player, and thus states clearly that the registration should adhere to the criteria of registration. The assumption of the regulations is that a Player will indeed be registered in a manner that complies with the criteria contained in Article 2 and therefore, under this assumption, there can be no distinction between the signing of the first professional contract and the registration for the first time as a professional.**

FK Siad Most ("Siad Most" or "the Appellant") is a professional football club with its seat in Most, Czech Republic. It is affiliated to the Football Association of the Czech Republic (CFA), a federation in turn affiliated to the Fédération Internationale de Football Association, the world governing body of football (FIFA).

Club Esportivo Bento Gonçalves ("Gonçalves" or "the Respondent") is a professional football club with its seat in Bento Gonçalves/RS, Brazil. It is affiliated to the Confederação Brasileira de Futebol (CBF), which in turn is affiliated to FIFA.

The Brazilian player A. ("the Player"), born in 1988, was registered as a player with the Respondent from 23 March 2004 to 28 April 2006. According to the Player's Passport issued by the CBF on June 2007, the Player was registered with the CBF as an amateur player while he was playing with the Respondent.

On 28 April 2006, the Player moved from Bento Gonçalves to another Brazilian club, Brusque Futebol Clube ("Brusque"). While playing at Brusque, A. was still registered with the CBF as an amateur.

A. signed an agreement with Brusque called "Private Agreement for the granting of financial aid to a football player" (the "Private Agreement"). The Private Agreement granted A. a monthly payment described in the Private Agreement (according to the English translation provided by the Respondent) as a monthly apprenticeship allowance worth R$620 (Reais) for *"his living costs and as an incentive to the practice of football*".

According to the terms of the Private Agreement, in addition to the aforementioned payment, A. was also entitled to medical, dental and psychological assistance, as well as to the costs related to transportation, food, housing/lodging, school, nutritionist and physical therapy. Furthermore, Brusque arranged life insurance for A. For his part, A. had to attend and participate in games and

training sessions scheduled by Brusque and in all other activities connected with the duties of a football player.

On 22 August 2006, A. was transferred from Brusque to the Czech club FK Siad Most and for the first time officially registered as a professional football player within a football association.

On 29 November 2007, the Respondent lodged a complaint with the FIFA Players' Status Committee regarding the non-payment of training compensation.

On 13 December 2007 FIFA notified the CFA of the claim and invited the Appellant to either pay the training compensation in accordance with the applicable rules, or alternatively to submit to FIFA *"valid reasons justifying the non-payment"*. In the same letter FIFA also requested the CFA to submit information with regard to the dates of registration of the Player with Siad Most and the date of the signature of the employment contract signed between the Player and Siad Most.

On 7 January 2008 the CFA provided FIFA with the requested information, but it was not until 12 and 14 of March 2008 that Siad Most reacted to FIFA's letter of December 13 and even then the Appellant just notified FIFA that it would be represented by Mr Vittorio Rigo of STUDIO E.L.S.A. In the same letters the appointed representatives asked FIFA to direct *"all future correspondence"* to them. Apart from this formal notice on the appointment of the representatives, neither Siad Most nor its lawyers sent any answers on the merits of the dispute.

On 25 July 2008 FIFA sent a reminder to Siad Most via its lawyers, granting Siad Most a deadline to submit its *"valid reasons"* for the non-payment and asked for a copy of the employment contract between Siad Most and the Player.

In response to FIFA's letter of July 25, the CFA (and not the lawyers representing Siad Most) sent a letter to FIFA, on 5 August 2008, explaining for the first time, very briefly, that Siad Most *"does not agree with the payment"* of the training compensation since the Player *"signed his first professional contract with the club Brusque Futebol Clube"*.

On 22 December 2008, five months after CFA sent its letter to FIFA, and presumably due to the fact that the answer was sent by the CFA and not by the law firm that was appointed by Siad Most to represent them, FIFA asked that Siad Most provide FIFA with a written confirmation authorizing the CFA to act on its behalf in the present matter, by 29 December 2008 at the latest. FIFA also requested the CBF to confirm the status of the Player at Brusque.

On 30 December 2008, FIFA informed the parties that the investigation would be closed and that the dispute would be submitted to FIFA's Dispute Resolution Chamber ("the DRC"), in order to render a decision on 9 January 2009. In the same letter, FIFA asked the CBF and the Appellant to comply again with the requests before 6 January 2009.

On 6 January 2009 the CFA sent a letter to FIFA, apologizing for not having answered earlier and informing it that, due to the Christmas holidays, the fax of FIFA of December 22 was only sent to

the Appellant on 5 January 2009 and that they were waiting for its answer. FIFA did not respond to this letter.

Notwithstanding the letter of the CFA, on 9 January 2009 the DRC rendered a decision accepting the claim of the Respondent and granting it training compensation payable by the Appellant. The decision sets out the findings of the DRC only, but does not contain any reasons. It was notified to the parties on 23 January 2009. The decision reads – *inter alia* – as follows:

> *"2. The Respondent, FK Siad Most, has to pay the amount of EUR 62,500 plus interest at 5% p.a. as from 28 June 2007 until the date of effective payment,* ***within 30 days*** *as from the date of notification of the decision.*
>
> …
>
> ***Note relating to the findings of the decision*** *(Article 15 of the Rules governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber):*
>
> *A request for the grounds of the decision must be sent, in writing, to the FIFA general secretariat* ***within 10 days*** *of receipt of notification of the findings of the decision. Failure to do so within the stated deadline will result in the decision coming into force".*

By letter dated 2 February 2009, the Appellant, without having previously filed a request with FIFA asking for the grounds of the decision, filed its Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered by the DRC, insofar as the decision sentenced the Appellant to pay EUR 62,500 plus 5% p.a. interest as training compensation to the Respondent. In the Statement of Appeal, the Appellant named both the Respondent and FIFA as respondent parties.

In its Appeal Brief dated 23 February 2009 and in its further submissions, the Appellant requested the CAS – *inter alia* - to,

> *(1) "adjudge the appealed decision of the DRC contrary to the facts of the dispute and to the applicable regulations insofar it, arbitrarily, without reference to any legal principle and in conflict with the facts and the law, sentenced the Appellant to correspond Euro 62.500,00 plus interest to the Respondent as compensation for the training and education afforded to Player A";*
>
> *(2) "dismiss the payment request of Bento Gonçalves";*
>
> *(3) "award Siad Most all costs, including attorney fees, incurred in the prosecution of this appeal".*

In its Answer to the Appeal and in its further submissions, the Respondent requested the CAS:

> *(1) to terminate the present arbitration procedure due to manifest lack of competence of the CAS;*
>
> *(2) to dismiss the Appeal and confirm the appealable Decision of the DRC;*
>
> *(3) to have the Appellant to reimburse the Respondent's attorney's fees and other expenses.*

On 11 February 2009, FIFA sent a letter to the CAS, disputing the jurisdiction of the CAS since the Appellant had not requested the grounds of the decision within the time limit set in Article 15 of the 2008 edition of the Rules governing the Procedures of the Players' Status Committee and the

Dispute Resolution Chamber ("the 2008 Rules"). As a result, FIFA submitted that the DRC's decision had become final and binding and thus not appealable to the CAS. Furthermore, FIFA stated that an appeal against a non-motivated decision could not be admissible *per se*. In the alternative, FIFA requested that as the matter related to a dispute over training compensation between two clubs it did not concern FIFA and therefore FIFA ought to be released as a party to the proceedings.

On 13 February 2009, the CAS Court Office noted that the Appellant had no objection to continuing the present arbitration proceedings without FIFA being a party.

By letter dated 24 February 2009, the CAS Court Office noted that the Respondent raised jurisdictional objections similar to those previously raised by FIFA.

On 12 March 2009, the CAS Court Office informed the parties that the President of the CAS Appeals Arbitration Division was of the view that in light of Article R52 of the Code of Sports-related Arbitration ("the Code"), it was not apparent that there was manifestly no arbitration agreement and that the Sole Arbitrator would decide the issue of jurisdiction as a preliminary matter.

By letter dated 2 July 2009, the CAS Court Office, on behalf of the Sole Arbitrator, issued an order of procedure, which was returned duly signed by both parties.

A hearing was held on 11 September in the CAS Premises in Lausanne.

The Player was called as a witness for the Appellant. The Player explained the circumstances of the termination of his relations with the Respondent and his transfer to Brusque. The Player stated that he requested the payment of money from the Respondent in order for him to be able to support his family but the Respondent refused. He then stated *inter alia* that he signed the contract with Brusque although Brusque was far away from his home town (about ten hours by bus), because there he could be paid an amount of money that he considered to be substantial. He added that Brusque was paying all his living costs and in addition they were paying him the amount of R$620 (Reais) which he described as "free money" (since all other costs were covered). The Player stated that, in his understanding, it was a professional contract, in the sense that he received money in cash and was able to send some of the money back to his family in Bento Gonçalves. The Player, when asked by Counsel to the Respondent if the amount received by the Respondent was the net amount or whether he had to pay some taxes, said that he was receiving the R$ 620 cash, without any deductions. The Player further stated that he left the Club Brusque without having paid compensation to his former club (i.e. Brusque), and did not know whether the Appellant paid any compensation to Brusque.

At the end of the hearing, both parties confirmed that their right to be heard had been duly respected during the hearing.

LAW

CAS Jurisdiction

1. According to the Respondent, the CAS does not have jurisdiction in the present case and should reject the case due to *"manifest lack of jurisdiction"*. The Respondent asserts that, since the DRC issued a decision without grounds and since neither party asked for the grounds of the Decision within the granted time limits, the Decision became final and binding according to Article 15 of the 2008 Rules and cannot be appealed against according to Article 63 of the FIFA Statutes (2008 Edition). The Respondent further submits that, regardless of the question whether the 2005 or the 2008 rules are applicable in the present matter, a decision without grounds can *de facto* not be considered as an *"appealable decision"*, since the Appellant actually appealed against the findings of the decision and not against the decision as such, i.e. without knowing which facts had been taken into account by the DRC and thus, without knowing the reasons for the decision.

2. The Sole Arbitrator does not share this view. As a general starting point for judging whether the CAS has jurisdiction to rule on the present matter, and even before deciding on the question of the applicable regulations and its impact on the lack of grounds of the DRC decision, the Sole Arbitrator refers to the CAS Code. In order to decide whether the CAS has jurisdiction to rule on the case at hand, the conditions set in Article R47 of the Code should be met.

3. According to Article R47 of the Code *"An appeal against a decision by a federation, association or other sporting body may be filed with CAS insofar as the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him in accordance with the statutes and regulations of the said sports-related body"*.

4. According to CAS case law, the three conditions of Article R47 are the following (cf. CAS 2004/A/748 no. 83):
   - there must be a *"decision"* of a federation, association or another sports-related body,
   - the parties must have agreed to the competence of the CAS and
   - the (internal) legal remedies available must have been exhausted prior to appealing to CAS.

A. Decision by a federation

5. In the particular case, the Sole Arbitrator should first rule on whether the Decision (without grounds) issued by the DRC is an appealable *"decision"* within the meaning of Article R47 of the Code.

6. CAS Panels have interpreted the term "decision" within the meaning of Article R47 of the Code broadly (cf. CAS 2008/A/1583&1584, no. 5.2.1). The concept of an appealable decision has been defined in the case law of the CAS as follows:

"A decision is thus a unilateral act, sent to one or more recipients and is intended to produce legal effects" (CAS 2004/A/659, no. 36; CAS 2004/A/748, no. 89)

"In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. However, there can also be a decision where the body issues a ruling as to the admissibility or inadmissibility or a request, without addressing the merits of such request" (CAS 2008/A/1705, para. 5.2.1; CAS 2005/A/899, no. 61; CAS 2004/A/748, no. 89).

7. The Sole Arbitrator is satisfied that, although the Decision of the DRC issued on 9 January 2009 and notified to the parties on 23 January 2009 does not address the grounds on which the decision was passed, it clearly shows all formal and material characteristics of a *"decision"* in the sense of Article R47 of the Code. On a material level, it shows the outcome of the deliberations regarding the issue of the training compensation owed for the Player. Therefore, the content of this text represents a *"unilateral act"* which aims at affecting the legal situation of the addressee. On a formal level, the letter carries the heading *"decision"*, was passed by an organ of FIFA (the DRC) and was signed by the FIFA Deputy General Secretary. The fact that the decision is not motivated can, as such, not affect it being a *"decision"* (cf. CAS 2008/A/1705, para. 5.2.2; cf. also CAS 2004/A/748, no. 91).

8. Furthermore, the fact that the Decision was erroneously issued by FIFA without grounds (by applying the 2008 Rules instead of the 2005 Rules that should have been applied, see *infra* under *"Timeliness of the Appeal and the Applicable Procedural Rules"*) and without legal instructions on how to challenge it, cannot be construed as depriving the Appellant from his fundamental right to appeal the decision based on Article 63 of the FIFA Statutes.

B. Consent to arbitrate

9. In the case at hand the parties are subject to the FIFA regulations. The FIFA Statutes (2008 Edition) provide in Article 62 that *"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"*. In addition, Article 63 para.1 of the FIFA Statutes clarifies that: *"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"*. Furthermore, by lodging the appeal, participating in these proceedings and by signing the Order of Procedure, the parties have actively acknowledged the competence of CAS to deal with this dispute. This competence includes, under Art. 186 of the Swiss Federal Code on Private International Law, the competence of the Arbitral Panel to rule on its Jurisdiction.

C. Exhaustion of legal remedies

10. According to Article R47 of the Code, a decision may be appealed to CAS *"insofar as the Appellant has exhausted the legal remedies available to him in accordance with the statutes and regulations of the said sports-related body"*. Decisions of the DRC cannot be appealed before any other internal legal body of FIFA. What is more, even under the 2008 Rules the right granted to a party to ask for the reasons of the decision cannot be qualified as an *"internal remedy"* within FIFA in the sense of Article R47 of the Code (cf. CAS 2008/A/1705, para. 5.2.4). It is even more so in this case, where the decision was granted without reasons based on the erroneous application of the new rules that should not have been applied in this case. Consequently, as there is no other internal legal remedy, the conditions laid down in Article R47 of the Code are met and the CAS has jurisdiction to rule on the present case.

Timeliness of the appeal and the applicable procedural rules

11. According to Article R49 of the Code, the appeal has to be lodged within a certain time limit. Article R49 refers to the time limits set in the statutes and regulations of the federation whose decision is being appealed. The FIFA rules contain a deadline to file an appeal in Article 63 para. 1 of the FIFA Statutes (2008 Edition). According to this provision the appeal has to be filed with the CAS within 21 days of notification of the decision in question. Another deadline is contained in Article 15 of the 2008 Rules, when a party decides to ask for the grounds of a decision. In cases where the 2008 rules apply, the procedural rules distinguish the "Decision" (Article 15 para. 1, Article 15 para. 3) from the "Motivated Decision" (Article 15 para. 2); this provision reads as follows:

> *"1. The Players' Status Committee, the DRC, the single judge and the DRC judge may decide not to communicate the grounds of a decision and instead communicate only the findings of the decision. At the same time, the parties shall be informed that they have ten days from the receipt of the findings of the decision to request, in writing, the grounds of the decision, and that failure to do so will result in the decision coming into force.*
>
> *2. If a party requests the grounds of a decision, the motivated decision will be communicated to the parties in full, written form. The time limit to lodge an appeal begins upon receipt of this motivated decision.*
>
> *3. It the parties do not request the grounds of a decision. a short explanation of the decision shall be recorded in the case files (…)".*

12. The Respondent asserts that the Decision of the DRC, having been issued on the basis of the 2008 Rules, was notified to the Parties on 23 January 2009, and the parties had only a 10-day deadline to ask for the grounds of the Decision, upon the expiry of which the Decision became final and enforceable and therefore not appealable before the CAS. The Sole Arbitrator does not share this view. In the present case, the Sole Arbitrator finds that FIFA inaccurately applied the 2008 Rules instead of the 2005 Rules, which should have been applied in the particular case, viewed that the proceedings before the FIFA's DRC commenced with the claim lodged by the Respondent on 29 November 2007. According to Article 21 of the 2008 Rules:

"2) These Rules are applicable to proceedings submitted to FIFA on or after the date on which these rules came into force.

"3) These rules replace the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (DRC) dated 29 June 2005. The previous rules shall apply to cases submitted to FIFA before these rules came into force".

13. This means that the 2008 Rules – and in particular Article 15 thereof – are of no relevance for the present dispute and the CAS should consider the 2005 Rules as the relevant legislation applicable to this matter. The 2005 Rules do not alter the time limits to appeal, as they do not distinguish "decisions" from "motivated decisions" but merely state, in Article 24 that *"Decisions reached by the Dispute Resolution Chamber or by the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)"* and thus the general time limit of 21 days (stated in Article 63 para. 1 of the 2007 FIFA Statutes) should apply to the case at hand.

14. The Respondent further asserts that, even if one should apply the 2005 Rules to the case at hand, Article 13 of the 2005 Rules states that *"written decisions shall contain at least the following: (…) f) the reasons of the decision (…)"*. The Sole Arbitrator notes that one of the rationales of a provision obliging the adjudicating party to issue the reasons of a decision is to protect the party against which the decision was rendered from an arbitrary decision. However, the fact that FIFA erroneously issued a decision without grounds (against the Appellant) cannot be held against the fundamental right of the Appellant to challenge the decision on the basis of Article 63 para. 1 of the FIFA Statutes (2008 Edition).

15. Therefore, the deadline foreseen in Article 15 of the 2008 Rules should be disregarded since the 2008 Rules were not applicable to the dispute at hand, and the 2005 Rules should have been applied. In the present case, the decision of the DRC was notified to the Parties on 23 January 2009, and the Statement of Appeal was filed with CAS on 9 February 2009, that is, well before the expiry of the 21 days deadline imposed by Article 63 para. 1 of the FIFA Statutes (2008 edition). To summarize, the Sole Arbitrator holds that the Appeal was filed in a timely manner, and is in any case admissible because the 2008 Rules and especially Article 15 of same rules are not applicable in the present case.

Applicable law

16. Article 187 of the Swiss Private International Law Act of 1989 (PIL) 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.*" The applicable law in the field of arbitration is thus different from the principles instituted by the general conflict-of-law rules of the PIL: Article 187 of the PIL enables the parties to mandate the arbitrators to settle the dispute in application of provisions of law that do not stem from a particular national law, such as sports regulations or the rules of an international federation (cf KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, Zurich 2006, marg. no. 597, 636 *et seq*.; POUDRET/BESSON, Droit comparé de l'arbitrage international, Zurich 2002, marg no. 679; RIGOZZI A., L'arbitrage international en matière de sport, Basle 2005, marg no. 1177 *et seq*.).

17. An analogous provision may be found in Article R58 of the Code, which provides that the Panel shall decide the dispute according to the applicable regulations and 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 issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.

18. In the present case, although the parties have not made an express choice of law, they both mention the FIFA RSTP and the FIFA Statutes (2008 Edition) in their respective submissions. The dates that are relevant for defining which version of the RSTP is applicable in the present matter are the date that the Player signed the Agreement with Siad Most and the date in which he was registered in the CFA as a Player of Siad Most. Both dates lie within the period of the applicability of the 2005 RSTP. The 2005 RSTP should therefore be considered as the *"applicable regulations"*, together with the FIFA Statutes (in their 2008 Edition). In addition, i.e. subsidiarily, Swiss law applies to the dispute at hand. This follows from the applicable FIFA Statutes which refer to Swiss law. According to Art. 62 para. 2 of the FIFA Statutes (2008 Edition):

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

19. The Sole Arbitrator is of the view that the referral to Swiss Law in Article 62 para. 2 of the FIFA Statutes does not comprise a comprehensive remission to Swiss law, but rather that Swiss law applies "additionally". According to previous CAS case law, Swiss law serves only to fill gaps – if any – in the rules and regulations of FIFA (CAS 2005/A/983&984, no. 92 *et seq.*; CAS 2004/A/791, no. 60).

20. In light of the foregoing, the *"applicable regulations"* under Article R58 of the CAS Code are primarily the rules of FIFA – accepted by all parties – and, additionally Swiss law.

Merits of the dispute

21. The issues to be resolved by the Sole Arbitrator are the following:

A) Has the right to be heard of the Appellant been violated in the proceedings before the FIFA DRC so that the Decision made by DRC should be annulled?

B) While registered with the Club Brusque under the regime of the "Private Agreement", was the Player an amateur or a professional under the 2005 RSTP?

C) Is the Appellant obliged to pay any training compensation to the Respondent according to the 2005 RSTP for the training of the Player, and, if yes, what amount and how is this compensation to be calculated?

A) Has the right to be heard of the Respondent been violated in the proceedings before the FIFA DRC so that the DRC Decision should be annulled?

22. The Appellant asserts that the DRC, by requesting the Appellant on 22 December 2008 a written confirmation authorizing the CFA to act on its behalf *"by 29 December at the latest"*, violated the Appellant's right to be heard, by contravening the applicable procedural regulations, i.e. Article 14 paras. 8 and 11 of the 2005 Rules, according to which *"All time limits shall be suspended in the period from 20 December up and including 5 January"* and *"Time limits that are to be set by the Players' Status Committee and the DRC should normally run for no less than ten and no more than twenty days"*. Therefore, the Appellant submits that the Decision of the DRC of 9 January 2009 should be annulled.

23. The Sole Arbitrator does not share this view; indeed, at first glance, a legitimate question can be raised as to the fact that FIFA presumably disregarded its own regulations in fixing the last deadlines and in deciding the case on 9 January 2009, while the CFA notified FIFA that due to the Christmas holidays the last letter of FIFA (of 22 December 2008) was sent to Siad Most only on 5 January 2009. However, through a careful look at the correspondence found in the FIFA file, it seems that the Appellant should first look at its own conduct during the period the case was pending before FIFA. The claim was first sent to the Appellant through the CFA on 13 December 2007 and it took Siad Most seven months to answer for the first time on the merits. This was made only on 5 August 2008 by the CFA. Furthermore, FIFA was notified in March 2008 by Siad Most that it would be represented by its counsel from STUDIO E.L.S.A. What is more, Siad Most's counsel wrote to FIFA on 12 March 2008 that their client is *"preparing a response to the claim lodged and hope to be in a position to revert to you in the near future"*. Nevertheless, no response was sent by Siad Most. It was only after FIFA sent a reminder on 25 July 2008 that the CFA (and not Siad Most's counsel) responded on behalf of Siad Most in what seems to be Siad Most's answer on the merits.

24. The letter sent by FIFA on 22 December 2008 was merely a request to send a confirmation of the CFA's authorization to represent Siad Most. FIFA was right in doing so, since, as already mentioned, it was Siad Most that previously notified FIFA that it would be represented by its attorneys, but then FIFA received an answer from the CFA presumably on behalf of the Appellant. FIFA reasonably requested such confirmation from Siad Most, in order to clarify who was acting in behalf of Siad Most.

25. Nevertheless, it is clear and obvious that FIFA had full legitimacy to consider the letter sent by the CFA on 5 August 2008 as Siad Most's answer to the claim. These findings are sufficient in order to reject the allegation of the Appellant that his right to be heard was violated.

26. Furthermore, the Sole Arbitrator notes that the mission of the CAS Panel follows, in principle, from Article R57 of the Code, according to which the CAS Panel has full power to review the facts and the law of the case. Article R57 of the Code provides that the CAS Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance. In order to deliver the present Award, the

Sole Arbitrator has carefully taken into consideration both the written submissions of the parties and the submissions made during the hearing that took place in Lausanne, on 11 September 2009. In consequence, even if a violation of the principle of due process or of the right to be heard had occurred in prior proceedings (which is not the case in the present matter), it could have been cured by the appeal to the CAS (see CAS 2006/A/1177, no 7.3.2; CAS 94/129, published in Digest of CAS Awards I, 1986-1998, pp. 187 at 203; CAS 2005/A/1001). The virtue of an appeal system which allows for a rehearing before an appeal body is that issues relating to the fairness of the hearing before the tribunal of first instance *"fade to the periphery"* (CAS 98/211, published in Digest of CAS Awards II, pp. 255 at 264, citing Swiss doctrine and case law). Furthermore, the case law of the Swiss Supreme Court clearly establishes that any violation of the right to be heard can be cured when the procedurally flawed decision is followed by a new decision, rendered by an appeal body which had the same power to review the facts and the law as the tribunal of first instance and before which the right to be heard had been properly exercised (see CAS 2006/A/1177, no. 19; see also ATF 124 II 132, especially p. 138; ATF 118 Ib 111, especially p. 120 and ATF 116 Ia 94, especially p. 95).

27. The Appellant used the opportunity provided by the FIFA Statutes to bring the case before CAS, where its fundamental rights have been duly respected. In the present proceedings, Siad Most has presented extensive submissions on every point on which the appeal is based, and the Sole Arbitrator has duly heard and considered all these submissions as well as the testimony of the witness of Siad Most. At the end of the hearing, the Appellant expressly confirmed that it had the opportunity to fully present its case. Accordingly, even if the Appellant had been denied a fair hearing by FIFA (which he was not), the *de novo* proceedings before CAS have cured any such purported violations of the rules of natural justice (see also CAS 2006/A/1177, no 7.3.3).

B) While registered with the Club Brusque under the regime of the "Private Agreement ", was the Player an amateur or a professional under the 2005 RSTP?

28. In order to answer the question whether the Respondent is entitled to training compensation, the Sole Arbitrator should start by addressing the relevant regulation under the applicable RSTP 2005.

29. According to Article 20 of RSTP 2005:

"Training compensation shall be paid to a player's training club(s): (1) when a player signs his first contract as a professional and (2) each time a professional is transferred until the end of the season of his 23rd birthday. The obligation to pay training compensation arises whether the transfer takes place during or at the end of the player's contract. The provisions concerning training compensation are set out in Annex 4 to these regulations".

30. Article 2 para. 1 and Article 3 para. 1 of Annex 4 of RSTP 2005 read as follows.

31. Article 2 para. 1:

"Training compensation is due when:

i) a player is registered for the first time as a professional; or

ii) a professional is transferred between clubs of two different associations (whether during or at the end of his contract

before the end of the season of his 23rd Birthday".

32. Article 3 para. 1:

"On registering as a professional for the first time, the club with which the player is registered is responsible for paying training compensation within 30 days of registration to every club with which the Player has previously been registered (in accordance with the Player's career history starting from the season of his 12th birthday. The amount payable is calculated on a pro rata basis according to the period of training that the player spent with each club. In the case of subsequent transfers of a professional, training compensation will only be owed to his former club for the time he was effectively trained by that club".

33. The core of the dispute at stake lies in the different assertions of the parties as to the status of the Player while playing and registered with Brusque under the regime of the Private Agreement. While the Respondent argues that the Player was an Amateur while playing with Brusque, it considers the registration of the Player with Siad Most as his first registration as a professional player, and thus entitling the Respondent to training compensation under the first part of Article 3 para. 1 of Annex 4 of the 2005 RSTP. Contrary to this view of the facts, the Appellant asserts that the player was already a professional while he played and was registered with Brusque, and therefore, his transfer to Siad Most was a *"subsequent transfer"* governed by the last paragraph of Article 3 para. 1 of the Annex 4 of the 2005 RSTP, and therefore the Respondent is not entitled to training compensation, since it is not *"the former club"* in the sense of Article 3 para. 1.

34. The Sole Arbitrator has to analyze and decide under which criteria the status of the Player in Brusque has to be examined, and subsequently to analyze the facts and decide whether the Player had the status of a professional football player during his time at Brusque.

35. Article 2 para. 2 of the 2005 RSTP defines the meanings of "Professional" and "Amateur" for the purposes of the application of the same regulations on a given dispute and circumstances. The article reads as follows:

"A Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs".

36. From the aforementioned provision it becomes obvious that FIFA identifies only two categories of players, i.e. Professionals and Amateurs. There is no space within the regime of the FIFA regulations for a third category. Thus, there is no space within the FIFA regulations for a third category to which might belong players undertaking training dedicated to the practice of football, but who are at the same time still students with the goal of becoming professional football players, even if such players would not ordinarily be called either amateurs or professionals (cf. CAS 2006/A/1177, no 7.4.3).

37. The Respondent, both in its written submissions and during the hearing, referred to the Brazilian law no. 9.615/98 (also known as "the Pele Law") and argued that, under the Brazilian national law, a *"Private Contract"* in which a club grants financial assistance to a football player is not considered as a professional contract and therefore the player is not registered with the CBF as a professional but as an amateur. The Respondent further submitted an example of the mandatory CBF form of a professional football player agreement (*"Contrato de Trabalho de Jugador"*), in order to establish the difference under the Brazilian national law and the CBF registration between Professionals and Amateurs. The Respondent also addressed the Sole Arbitrator on various articles in the "Pele Law" in support of its interpretation of the Private Agreement" between the Player and the Club Brusque as an agreement intended to govern the relations between an amateur player and a club (for instance, the fact that under Brazilian law a player cannot sign a professional contract in the first two years of his stay at one club).

38. Nevertheless, the Sole Arbitrator is of the opinion that there is no place for the application of Brazilian law or Brazilian national definitions and criteria in deciding the status of the Player in the case at hand. National Brazilian law, as well as the way the CBF defines the status of a player in Brazil, are no doubt relevant and govern internal transfers within Brazil. Article 1 (2) of RSTP 2005 clearly recognizes the governance of such regulations (and still subject also to mandatory terms imposed by FIFA) in *"The transfer of players between clubs belonging to the same association"*. However, the national laws and the internal regulations are not the applicable law in case of a dispute with an international element. Such disputes are solely governed by the terms of the FIFA RSTP and its definitions. (cf. CAS 2007/A/1370 & 1376, no. 87). In such cases, the 2005 RSTP set down the applicable criteria to establish and decide on the status of a player when a transfer occurs between *"clubs belonging to different associations"* (see Article 1 para. 1 of RSTP 2005).

39. Moreover, according to Article 1 para. 3 of the 2005 RSTP ("scope"), *"The following provisions are binding at national level and have to be included, without modification, in the Association's regulations: Art. 2 – 8, 10, 11 and 18"*. This means that the Brazilian Football Association should transpose – without modification – Article 2 on the *"Status of Players"* which includes the mandatory (and worldwide) definition (for the purposes of the RSTP) of "Professionals" and "Amateurs". Furthermore, in a specific reference to the mandatory requirements of the registration of players with national associations, Article 5 para. 1 of RSTP 2005 is very clear when stating that: *"A player must be registered at an association to play for a club as either professional or an amateur in accordance with the provisions of article 2"* (Emphasis added). FIFA could not choose more specific wording to express its clear intention in this regard.

40. Therefore, even if in this case there is no need to elaborate on an internal transfer when the definitions of the national association are inconsistent with those of the FIFA RSTP, in a case of a transfer between clubs belonging to different associations as the case at hand, in case of inconsistency between a CBF provision and a FIFA provision, the FIFA provision should prevail. Otherwise, the deference to international sports rules proclaimed in Brazilian legislation and the obligation assumed by CBF in its own Statutes (and accepted by its clubs,

players, etc.) to comply with FIFA rules would make no more sense (CAS 2008/A/1370 & 1376, para. 105).

41. In addition to the extensive explanation made above, and in light of the fact that the 2005 RSTP foresee a single remuneration-related test (see hereunder), the Sole Arbitrator considers that it is not necessary to have recourse to the application of any national law or to take into account the formal classification of the Player according to the CBF; in CAS 2007/A/1207 (no. 87), the CAS Panel ruled that

"Given the existence of the single remuneration-related test, the Panel considers that it is not necessary to enquire any further on the classification of the agreement between the Player and Fiorenzuola under Italian law and sporting regulations".

This ruling is also applicable in the case at hand.

42. Turning now to Article 2 of RSTP 2005 *"A Professional is a player who has a written contract with a club and is paid more than the expenses he effectively incurs in return for his footballing activity. All other players are considered as Amateurs".*

43. The status of the Player while playing for Brusque will be examined in light of this article. The first condition, namely the existence of a "written contract", is undisputedly fulfilled. The Player signed the Private Agreement with Brusque which, *inter alia*, provides the following:

"Article 1: Brusque grants the Athlete an apprenticeship allowance in the amount of R$620 for his living costs and as an incentive to the practice of football.

Article 2: Brusque shall provide the Athlete with the free medical, dental and psychological aid, as well as shall cover expenses for transportation, board, accommodation, school lessons, nutritionist and physical therapist".

44. What is more, according to Article 4 of the Private Agreement, the Player was entitled to life insurance. However, if one takes into consideration that all these expenses were already covered by the Club Brusque, which expenses should be qualified as "living costs"? In other words: what exactly did the R$620 reflect? The Sole Arbitrator is satisfied that this amount cannot correspond to the *"expenses he effectively incurs in return for his footballing activity"* since medical, dental, psychological aid, physical therapist, nutrition, transportation, board and accommodation and school lessons costs were all provided for by Brusque. The Player also testified that this was *"free money"* since all his expenses were covered, thus allowing him to use this money to support his family.

45. The Respondent also argued that the money received by the Player is equivalent to only EUR 200 and that this amount is consistent with the concept of an Amateur player as foreseen in the FIFA RSTP; the Sole Arbitrator is not convinced by this argument; indeed, the minimum monthly salary in Brazil in 2006 was about R$350[1] and R$380[2] and the average wage in Brazil in 2006 was R$883[3]. It should also be noted that in Brazil, at the relevant time to this case,

[1] http://www.portalbrasil.net/salariominimo_2005.htm
[2] http://www.portalbrasil.net/salariominimo_2006.htm
[3] http://www.ibge.gov.br/home/presidencia/noticias/noticia_visualiza.php?id_noticia=977

R$620 was an amount that could be considered a salary. A further argument in favour of this view stems from the Player's testimony during the hearing, according to which, as already mentioned, the Player used to send part of his salary to his family. Furthermore, under the criteria set out in Article 2 of 2005 RSTP, even if the amount paid in excess of the expenses is relatively small (which is not the case at hand), the decisive criterion is still whether the amount is "more" than the expenses effectively incurred and it is irrelevant whether it is much more or just a little more. Having said this, the Sole Arbitrators is satisfied that the amount that the Player received was in excess of the expenses and costs described in Article 2 of the 2005 RSTP, particularly since the costs related to the practice of football were already taken over by Brusque (See CAS 2006/A/1177, no. 7.4.6 and 7.4.11; see also CAS 2006/A/1207, no. 90-91).

46. As established through CAS jurisprudence, the only relevant criterion is whether the player is paid more than the expenses he effectively incurred in return for his football activity. In CAS 2006/A/1177 (no 7.4.5), the CAS ruled that

"The only relevant criterion according to this provision is thus one of remuneration. In the Panels' view, the receipt by the player of any remuneration other than for the actual expenses incurred during the course of their participation in or for any activity connected with association football is what alone distinguishes an amateur from a non-amateur player".

47. At this point, the Sole Arbitrator notes that, although the aforementioned Award used the terms "amateur" and "non-amateur" taken from the 2001 RSTP, the principle of the two categories of football players remains the same in the 2005 RSTP.

48. During the hearing, the Respondent asserted that, according to Article 3 para. 1 of Annex 4 of the 2005 RSTP, *"when a player is registering as a Professional for the first time, the club for which the player is being registered is responsible for paying Training Compensation"*. Therefore, according to the Respondent's assertion, since the Player was registered with the CBF as an Amateur and was only formally registered for the first time as a Professional when he joined Siad Most, it is the first formal registration which should be taken into account.

49. The Sole Arbitrator finds this argument unconvincing. Undeniably, there is an inconsistency in the wording used in the RSTP. While Art. 20 refers to the *signing* of the first professional agreement as the trigger element for the paying of training compensation, Article 2 para. 1 and Article 3 para. 1 of Annex 4 refer to the *first registration* as a professional as the trigger element for payment. Nevertheless, it is the Sole arbitrator's view that the articles of Annex 4 are mainly focused on the procedure for payment and therefore refer to *registration*, being an easily identifiable element. However, the principle can be found by reading Article 20 together with Article 5 of the 2005 RSTP. Article 5 requires that the registration will reflect the true status of the player, and thus states clearly that the registration should adhere to the criteria of Article 2. The assumption of the regulations is that a Player will indeed be registered in a manner that complies with the criteria contained in Article 2 and therefore, under this assumption, there can be no distinction between the signing of the first professional contract and the registration for the first time as a professional.

50. Furthermore, as seen above, according to Article 1 para. 3 of the 2005 RSTP, the CBF, as a national federation, was obliged to literally transpose Article 2 of the 2005 RSTP. Under Article 26 para. 3 of the 2005 RSTP, Article 1 para. 3 should have been implemented in the national regulations from 1 July 2005. The mere fact that the CBF registered the Player in a way inconsistent with the requirements of the FIFA 2005 RSTP should not affect the decision as to the true status of the Player and should not remove the Player from the scope of the FIFA Regulations and the criteria established in Article 2 of the 2005 RSTP (cf. CAS 2007/A/1370 & 1376, no. 87).

51. The Sole Arbitrator therefore concludes that the status of the Player at the time he was playing and registered with Brusque was that of a professional player.

C) Is the Appellant obliged to pay any training compensation to the Respondent according to the 2005 RSTP for the training of the Player, and, if yes, in what amount and how is this compensation to be calculated?

52. The Sole Arbitrator concluded that the Player received remuneration that would go beyond the actual expenses he incurred during his football activity with Brusque and therefore matched the definition of a "professional" player as established in the 2005 RSTP; therefore, the transfer of the Player from Brusque to Siad Most was a subsequent transfer according to the terms of Article 3 of the Annex 4 to the 2005 RSTP which states *"in the case of subsequent transfers of the Professional, Training Compensation will only be owed to his Former Club for the time he was effectively trained by that club"*. From the application of this provision it becomes obvious that Brusque was the *"former club"* and this leads to the conclusion that the Respondent is not entitled to training compensation from the Appellant for the training of the Player for the period from 23 March 2004 to 28 April 2006.

53. Given that the Respondent is not entitled to training compensation, there is no need to deal with the second part of the question, namely with the issue of calculation of the training compensation.

Conclusion

54. In light of all of the above, the Sole Arbitrator concludes that the Decision of the DRC of 9 January 2009 should be set aside and the Appeal should be upheld.

The Court of Arbitration for Sport rules:

1. The appeal filed by FK Siad Most against the decision issued on 9 January 2009 by the FIFA Dispute Resolution Chamber is admissible.

2. CAS has jurisdiction to decide on the present matter.

3. The appeal is upheld and the decision issued by the FIFA Dispute Resolution Chamber on 9 January 2009 is set aside.

4. No training compensation for the Player A. should be paid by FK Siad Most to Clube Esportivo Bento Gonçalves.

(…).