**Arbitration CAS 2004/A/635 RCD Espanyol de Barcelona SAD v. Club Atlético Velez Sarsfield, award of 27 January 2005**

Panel: Prof. Massimo Coccia (Italy), President; Mr José Juan Pintó (Spain); Mr Hugo Mario Pasos (Argentina)

*Football*
*Transfer of a player*
*Distinction between substantive and procedurals aspects of contracts with respect of the* tempus regit actum *principle*
*Duty of a sports federation to abide by the principle of procedural fairness*
*Alleged violation of the* res judicata *and* ne bis in idem *principles*
*Alleged violation of the* lis pendens *principle*
*"Registration" of a player*
*"Economic rights" related to a player*
*Distinction between registration of a player and economic rights related to a player*
*Inadmissibility and unenforceability of the notion of "federative rights"*
*Pre-contract*
*Inadmissibility of open-ended employment contracts*

1. **According to the *tempus regit actum* principle, the substantive aspects of a contract keep being governed by the law in force at the time when the contract was signed, while any claim should be brought and any dispute should be settled (being part of the procedural aspects) in accordance with the rules in force at the time of the claim.**

2. **If a sports federation enacts rules which render unclear which time limit to apply, a judging body of that same federation should adopt the interpretation which could be more favourable to the appealing party, in compliance with the widely recognized interpretative principle *contra proferentem* or *contra stipulatorem*. Furthermore, if the rules of that same federation prescribe some specific requirement for the notification of a decision, the federation must comply with its own rules and duly fulfil any such requirement. Failing to abide by these formal requirements is a breach of the fundamental principle of procedural fairness, which the CAS has recognised and protects.**

3. **There is no violation of the *res judicata* and *ne bis in idem* principles if the judging body of a sports federation addresses an issue that it has declined to adjudicate in a previous decision.**

4. **The *lis pendens* principle is related to the contemporaneous pending of the same dispute before two different judges. If the case pending before a national civil court is not identical to the FIFA case, as the parties are not the same and the claim and the subject-matter are different, there is no *lis pendens* issue.**

**5. The *registration* of a professional player with a club and with the pertinent national federation serves the administrative purpose of certifying within the federative system that solely that club is entitled to field that player during a given period; obviously, such federative registration is possible only if there is an employment contract between the club and the player.**

**6. A club holding an employment contract with a player may assign, with the player's consent, the contract rights to another club in exchange for a given sum of money or other consideration, and those contract rights are the so-called *"economic rights to the performances of a player"*; this commercial transaction is legally possible only with regard to players who are under contract, since players who are free from contractual engagements – the so-called "free agents" – may be hired by any club freely, with no economic rights involved.**

**7. In accordance with the basic legal distinction to be made between "registration" of a player and "economic rights" related to a player, while a player's registration may not be shared simultaneously among different clubs – FIFA rules require that a player be registered to play for only one club at any given time –, the economic rights, being ordinary contract rights, may be partially assigned and thus apportioned among different right holders.**

**8. The notion of "federative rights" – insofar as such expression may be taken to mean that a club can bind and control a player without the player's explicit consent, merely by virtue of the rules of a federation – is unacceptable and unenforceable. Indeed, sports rules of this kind are contrary to universal basic principles of labour law and are thus unenforceable on grounds of public policy. In other terms, the player's consent is always indispensable whenever clubs effect transactions involving his employment and/or his transfer.**

**9. From a player's perspective, a contract apportioning the economic rights related to him between two clubs and according to which, as a result of their reciprocal commitments, neither club is in a position to lawfully hire the player or trade him to a third club without the other club's consent, in addition to the requisite player's consent, is a kind of employment pre-contract with both clubs, which has to be implemented through specific employment contracts with either club and which, conversely, precludes him from lawfully entering into employment contracts with third clubs.**

**10. In accordance with the FIFA rules, players' *"financial contracts"* with clubs must be *"concluded for a predetermined period"*. Consequently, a player's commitment towards a club/several clubs cannot be open-ended.**

RCD Espanyol de Barcelona SAD ("Espanyol" or "Appellant") is a professional football club incorporated under the laws of Spain with its registered office in Barcelona, Spain. It is affiliated to the Spanish Football Association (*Real Federación Española de Fútbol*, the "Spanish Federation" or RFEF), which is affiliated to FIFA.

Club Atlético Velez Sarsfield ("Velez" or "Respondent") is a professional football club incorporated under the laws of Argentina with its registered office in Buenos Aires, Argentina. It is affiliated to the Argentinean Football Association (*Asociación del Fútbol Argentino*, the "Argentinean Federation" or AFA), which is affiliated to FIFA.

The player P. ("P." or the "Player"), was born in Argentina in 1975. Until the season 1997/98 he performed as a professional footballer with the Respondent.

During the season 1997/98, the Respondent and the Player signed two coordinated contracts, on 5 and 18 March 1998, according to which they agreed on a three-year employment relationship expiring on 30 June 2000, i.e. at the end of the season 1999/2000.

On 4 August 1998, the Respondent and the Appellant, with the participation of the Player, signed a contract (the "Contract"), which included *inter alia* the following clauses (as translated from the Spanish original):

> *"FIRST: THE SELLER [i.e. Velez] declares to be the owner of one hundred per cent (100%) of the federative, economic and sports rights over the professional services of the player named P.;*
>
> *SECOND: In such capacity THE SELLER assigns, sells and transfers 50% of the federative, economic and sports rights over the professional football player P. to THE PURCHASER [i.e. Espanyol] for the sum of four million five hundred thousand United States Dollars (US$ 4,500,000);*
>
> *(…)*
>
> *FOURTH: THE PURCHASER obtains the sports labour availability of the player P. as from this date and for the complete official Spanish football season 1998/1999, free of charge;*
>
> *FIFTH: During the period the player renders services to THE PURCHASER, the parties shall be entitled to negotiate between themselves the purchase or sale of the 50% they own if any of the parties so requests;*
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> *SIXTH: THE PURCHASER, solely in the event that during the 1998/1999 season had not received any offer of an interested third party to purchase the 50% or 100% of the federative rights corresponding to the player P., con opt to, within five days after the ending of the aforementioned season, count on the professional services of the aforementioned player during the 1999/2000 season by paying to THE SELLER the sum of five hundred thousand United States Dollars (US$ 500,000);*
>
> *(…)*
>
> *TENTH: THE SELLER commits himself to send the corresponding international transfer once the pertaining liabilities have been met; likewise, the parties agree to execute all of the documents before the RFEF (Spanish Royal Football Federation) and the LNFP (National League of Professional Football) which shall be deemed necessary to fulfill the formalities of this agreement;*

*ELEVENTH: THE PURCHASER shall be liable for the contractual arrangements with the player P., circumstance in which THE SELLER shall not be involved as long as the player renders his services in favour of THE PURCHASER;*

*TWELFTH: The Player P. personally appears in this act and states that he expresses to know all the terms and conditions and the complete text of the agreement between THE SELLER and THE PURCHASER and, voluntarily and irrevocably, gives his consent without objection whatsoever and binds himself to fulfill all that shall be related to his professional services as a football player;*

*THIRTEENTH: The parties do hereby establish special domicile in the above mentioned place where notices shall be considered valid and, in the case of any dispute arising from the interpretation or enforcement of this agreement, the parties agree to be bound by the decision of the Arbitration Courts established by the Fédération Internationale de Football Association (F.I.F.A.)".*

In short, pursuant to the Contract, the Respondent agreed to sell and the Appellant agreed to purchase 50% of the rights over the Player's professional services for the price of USD 4,500,000, and to share in equal parts any benefits deriving from the sale of those rights to third parties. Moreover, the parties agreed that as long as P. played for Espanyol either club could propose to the other one to purchase or sell the remaining 50% of the rights.

The Player gave his express consent to such deal and acquired the right, in accordance with Argentinean law, to receive from Velez (through the Argentinean Players' Union) a compensation amounting to […]% of any sum paid by Espanyol as transfer price (in fact, he received USD […] in relation to the first sum of USD 4,500,000).

Besides the Contract, the parties and the Player filled out and signed an AFA form, according to which – in compliance with the fourth clause of the Contract – the Player was going to be transferred *"on loan"* from Velez to Espanyol until the end of the season 1998/99 without any further charge in addition to the already agreed USD 4,500,000, and that – in compliance with the sixth clause of the Contract – Espanyol had the right to obtain the renewal of the loan for the following season 1999/2000 by paying to Velez USD 500,000. Accordingly, AFA issued an International Transfer Certificate, allowing for FIFA purposes the transfer of the Player *"on loan"* from Argentina to Spain for the 1998/99 season.

On the same date of the Contract (4 August 1998), the Player signed with Espanyol a five-year employment contract as a professional football player (the "Espanyol Employment Contract") in accordance with Spanish law and the related Spanish collective labour agreement. The Espanyol Employment Contract contained the usual clauses of Spanish professional football employment contracts.

One year later, in August 1999, Espanyol paid to Velez the agreed sum of USD 500,000 and obtained the renewal of the loan for the new football season; in turn, the Player received from Velez his […]% share of the transfer sum (i.e. USD […]). The parties and the Player filled out and signed another AFA form for the transfer "on loan" of the Player for the season 1999/2000, and AFA issued for FIFA purposes an International Transfer Certificate analogous to that of the previous year.

On 2 July 2000, Espanyol proposed to Velez to borrow again the Player until 30 June 2001 for the amount of USD 250,000, sending a draft transfer agreement on loan, to be signed for acceptance by Velez. However, this draft transfer agreement was never signed and thus never entered into force.

On 31 July 2000, Velez and P. signed an employment contract expiring on 30 June 2001; the contract granted to Velez the unilateral right to extend the contact twice for further one-year periods and so did Velez, thus causing the contract to expire on 30 June 2003. A couple of years later, P. sued Velez before the Argentinean courts claiming that the contract was void because he had signed it under the mistaken belief, induced by Velez, that the contract was needed in order to obtain an international transfer certificate and thus play for Espanyol; however, with the judgments of 29 August 2003 and 18 December 2003, the civil courts of Buenos Aires rejected the Player's petitions and deemed the contract as valid. Currently, there is a final special appeal pending before the Argentinean Supreme Court of Justice.

On 17 August 2000, Espanyol and Velez agreed to continue the Player's loan for the upcoming season free of charge. On 18 August 2000, the 2000/01 loan transfer agreement was filed with AFA and, on the same date, AFA issued an International Transfer Certificate analogous to the previous ones.

At the beginning of the following season (2001/02), the parties did not reach any agreement with regard to the Player. Espanyol and RFEF asked FIFA whether an international transfer certificate from AFA was in fact required in order to field the Player. After FIFA offices' answer that no transfer certificate was needed (*infra*), the clubs did not reach any other agreement and the Player kept performing his football services for the Appellant.

On 21 September 2001, Mr Gianpaolo Monteneri, Head of the Players' Status Legal Services of FIFA (the "P.S. Legal Services"), prompted by the Appellant's queries, wrote a letter to the Spanish Federation, explaining that:

> *"the Player P. had signed an employment contract with R.C.D. Espanyol after his former contract with Atletico Velez Sarsfield had expired and that subsequently, an international transfer certificate was issued by the Argentine Football Federation on behalf of your federation. With the issuance of the mentioned certificate, the player was registered at the Spanish Football Federation on a definite basis for R.C.D. Espanyol. It was therefore unnecessary for the Argentine Football Federation to issue further international transfer certificates for the player P. on behalf of your federation, particularly since the player was and still is registered in a definite manner for R.C.D. Espanyol, ever since the issuance of the first international transfer certificate".*

On 23 October 2002, Mr Gianpaolo Monteneri wrote to both the Spanish and the Argentinean Federation, informing that Velez had filed a petition claiming compensation for the transfer of the Player, and that the Players' Status Committee of FIFA (the "P.S. Committee") would adopt a decision concerning the financial aspects of the dispute.

On 31 October 2002, the P.S. Committee issued a formal decision on the matter (the "P.S. Committee Decision"), holding that:

- the Player's employment contract signed in 2000 with Velez was to be considered invalid as there had never been an intention to truly perform it and, as a consequence, Velez was not entitled to ask for the Player's return;

- the sale of 50% of the rights over the Player, in accordance with the established P.S. Committee's jurisprudence, was *"against the spirit and terms"* of the FIFA Regulations for the Status and Transfer of Players, insofar as only 100% of the rights should be transferred;
- no international transfer certificate was needed and the Player had the right to keep performing for Espanyol, expressly confirming the view expressed by the P.S. Legal Services (see *supra*);
- as both clubs had infringed the FIFA Regulations, the matter *"did not deserve to be considered"* and the P.S. Committee would not adopt a decision with respect to the various contracts and agreements executed by the parties and, in particular, would not judge the merits of the Respondent's claim for compensation.

The lingering financial side of the dispute was entrusted with Mr Slim Aloulou in his capacity as Single Judge of the P.S. Committee (the "Single Jugde"), who issued a decision on 28 March 2003 (the "First S.J. Decision"). The Single Judge acknowledged that no decision had been taken by the P.S. Committee with regard to the financial aspects of the case. As in his opinion *"both clubs were responsible for having created a confusing legal situation in violation of FIFA regulations"*, he declined to adjudge on the contractual issues and on the compensation claim. However, the Single Judge did *"recognize the need to settle the dispute"* and, to that end, he solicited the parties to initiate an arbitration before the Court of Arbitration for Sport (CAS) to resolve the matter. However, although Velez took the first steps in order to start an arbitration before the CAS, Espanyol did not give its consent.

A few months later, as nothing had happened, Velez requested once more FIFA to adjudge its claim for compensation. The Single Judge took up the matter again, and this time he examined the merits of the case. On 13 October 2003, the Single Judge issued another decision (the "Second S.J. Decision"), which was notified to the Argentinean and the Spanish Football Federations on 24 October 2003.

In the Second S.J. Decision, the Single Judge noted that, in disregard of its decision, the CAS arbitration had not been initiated and *"reiterated that in the decision of 28 March 2003 it was determined that the question regarding compensation payable to Atlético Velez Sarsfield for the 50% of the transfer rights which had remained with the Argentinean club needed to be resolved"*. As a consequence, the Single Judge took the following decision:

> *"[T]he Single Judge maintained that it had not been the intention of the parties for R.C.D. Espanyol to acquire the entire federative rights to the player P., but rather to allow both sides to equally share the revenue that could have derived from the further transfer of the player.*
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> *In continuation, the Single Judge contemplated the fact that the contract signed by the parties on 4 August 1998 had been denominated a "loan-transfer" agreement and that it contained information on the loan fee payable by R.C.D. Espanyol in order to retain the services of the player P. for the season 1999/2000. Furthermore, the Single Judge noted that the Spanish club had confirmed by fax addressed to Atlético Velez Sarsfield on 17 August 2000 that it would pay an amount of USD 250,000 for the loan of the services of the player for the next season.*
>
> *Based on these facts, and given that the Argentine club had ensured an employment with the player P. until 2002/2003, the stated club must be compensated for the missed benefit of having the player at its disposal. Therefore, and bearing in mind that the Spanish club had stated its agreement to pay a loan fee for the services*

*of the player of USD 250,000 for one season, the Single Judge concluded that R.C.D. Espanyol shall pay an amount of USD 750,000 for the loan of the player to Atlético Velez Sarsfield until the end of the 2002/2003 season.*

*Finally, the Single Judge maintained that with the conclusion of the employment relationship between the player P. and the Argentine club and given the revised rules contained in the FIFA Regulations for the Status and Transfer of Players, Atlético Velez Sarsfield may no longer claim a compensation for the transfer of the player P., should the player change clubs in the near future.*

*As a result, R.C.D. Espanyol is instructed to pay the amount of USD 750,000 to Atlético Velez Sarsfield within 30 days of receipt of the present decision".*

On 24 November 2003, the Executive Committee of FIFA, convening as a body of appeal for disputes relating to the status and transfers of players, received, through the Spanish Football Federation, Espanyol's appeal against the Second S.J. Decision.

On 21 May 2004, the Executive Committee of FIFA issued its decision (the "Executive Committee's Decision"). In essence, the Executive Committee based its decision on the following remarks:

*"In the present case, the decision of the Single Judge of the FIFA Players' Status Committee was notified to the Spanish football association on 24 October 2003. Therefore the deadline to lodge the appeal was 13 November 2003. The Appellant lodged the appeal to the FIFA general secretariat on 24 November 2003. The written appeal was therefore not lodged within the deadline prescribed in Art. 24 § 1of the FIFA Regulations for the Status and Transfer of Players (October 1997 edition)".*

Accordingly, as the Executive Committee considered that Espanyol had not complied with the twenty-day time limit prescribed by art. 24.1 of the FIFA Regulations for the Status and Transfers of Players of October 1997 (the "1997 FIFA Regulations"), the Executive Committee held that it could not deliberate upon the merits of the appeal *"owing to non-fulfilment of a formal requirement"* and, as a consequence, it dismissed the case.

Espanyol appealed the Executive Committee's Decision before the CAS, filing its Statement of Appeal on 11 June 2004 and its Appeal Brief on 6 July 2004. The Appellant concluded the Appeal Brief petitioning the CAS to adopt an award declaring:

1. *The cancellation of the appealed decision of the Executive Committee dated 21st May 2004.*
2. *Consequently, the cancellation of the decision of the Single Judge of the FIFA Players' Status Committee dated 13th October 2003.*
3. *That Velez Sarsfield and FIFA must reimburse RCD Espanyol de Barcelona, SAD all the costs and legal expenses incurred by these proceedings.*

On 5 August 2004, Velez filed its answer with supporting exhibits. The Respondent submitted the following petitions for relief:

1. *That it be declared that the appeal before the FIFA Executive Committee, regarding decision of the Single Judge of the FIFA Players' Status Committee of the 13th of October 2003 (communicated to the parties on the 24th of October 2003), was lodged by the RCD Espanyol de Barcelona SAD out of term.*

2. *In consequence, it is requested to confirm the resolution adopted by the FIFA Executive Committee dated May 21st, 2004, which in turn confirms the appealed resolution that is singled out in the previous point;*

3. *That in any event, the resolution of the Single Judge of the FIFA Players' Status Committee of the 13th of October 2003 be confirmed […] which established a sentence to pay USD 750'000 by the RCD Espanyol de Barcelona SAD to the Club Atlético Velez Sarsfield.*

4. *Likewise, that the costs of the present process be imposed upon the RCD Espanyol de Barcelona SAD.*

On 27 October 2004, the President of the Panel decided to authorize both parties to file with the CAS a second round of submissions, in accordance with art. R56 of the Code of Sports-related Arbitration (the "Code"). The Appellant filed its additional brief on 3 November 2004, while the Respondent filed its response brief on 11 November 2004.

The hearing was held on 17 November 2004 in Lausanne. Upon invitation from the Panel in accordance with art. R44.3 of the Code, a representative of the FIFA administration was present at the hearing and was questioned by the Panel about the case at stake and, more in general, FIFA rules and procedures. Then, after having had ample opportunity to present their cases, both parties confirmed their petitions. In this respect, the Panel asked the parties' opinion on whether the Panel – in case it was to find that the Espanyol's appeal to the FIFA Executive Committee was not out of term – should issue a final decision on the merits replacing the challenged FIFA decision, or whether it should merely annul the decision and refer the case back to the FIFA Executive Committee, pursuant to art. R57 of the Code. While the Appellant stated that he would agree to either option, the Respondent expressed its preference for a final decision to be issued by the Panel.

## LAW

### Jurisdiction

1. The jurisdiction of CAS, which is not disputed, derives from arts. 59-61 of the FIFA Statutes and R47 of the Code. It is further confirmed by clause thirteenth of the Contract (*supra*) and by the order of procedure duly signed by both parties.

2. It follows that the CAS has jurisdiction to decide the present dispute.

### Applicable Law

3. Art. R58 of the Code reads as follows:

*"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 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".*

4. Then, art. 59.2 of the FIFA Statutes provides as follows:

*"The CAS Code of Sports-Related Arbitration governs the arbitration proceedings. With regard to substance, CAS applies the various regulations of FIFA [...] and, additionally, Swiss law".*

5. The Panel remarks that the *"applicable regulations"* are indeed all FIFA rules material to the dispute at stake. Then, the Panel notes that the Contract does not contain any express choice of law. Pursuant to R58 of the Code, as FIFA is a Swiss association having its seat in Zurich, *"the law of the country in which the federation [...] which has issued the challenged decision is domiciled"* is Swiss law. Art. 59.2 of the FIFA Statutes confirms that Swiss law should be applied in addition to FIFA rules.

6. Therefore, the Panel holds that the dispute must be decided according to FIFA Statutes and regulations and, complementarily, to Swiss Law.

**The Procedural Issues**

*A. The time limit issue*

7. In its decision on the appeal against the Second S.J. Decision, the Executive Committee of FIFA stated that the Espanyol's appeal, which was made on 24 November 2003, should have been made, in accordance with art. 24.1 of the 1997 Regulations, within 20 days of the communication of that decision, namely, by 13 November 2003 (see *supra*). As it was not made by that date, the Respondent submits that the CAS should confirm the Executive Committee's Decision and dismiss this appeal.

8. The Panel observes that, as a general rule, transitional or inter-temporal issues are governed by the principle *"tempus regit actum"*, holding that any deed should be regulated in accordance with the law in force at the time it occurred. As a consequence, procedural actions, such as the filing of an appeal, should be done in compliance with rules and time limits in force when they are performed. Undisputedly, the Second S.J. Decision was adopted and notified (see *supra*) when the 2001 Regulations and the 2001 Application Regulations (both adopted on 5 July 2001 and entered into force on 1 September 2001) had long been in force.

9. However, the third paragraph of art. 46 of the 2001 Regulation includes the following provision:

*"Contracts between players and clubs concluded before 1 September 2001 will continue to be governed by the previous version of these regulations, which came into force on 1 October 1997".*

Then, Point 8 (entitled *"Transitional arrangements"*) of the FIFA Circular 769 of 24 August 2001, after reiterating the above quoted provision of art. 46.3 of the 2001 Regulations, reads as follows:

*"In any event, disputes arising in connection with contracts governed by the earlier version of these regulations will be settled according to the procedural provisions of the present Regulations"* (with a footnote making express reference to the 2001 Regulations).

10. Even leaving aside the issue of the applicability to the Contract of art. 46.3 of the 2001 Regulations (which the Appellant denies while the Respondent affirms), the Panel finds that, whenever a claim is brought after 1 September 2001 with regard to a contract signed before that date (as is the case here), the two above quoted FIFA provisions appear to be ambiguous and possibly conflicting.

11. Nonetheless, the Panel deems that a plausible construal which would avoid any regulatory inconsistency could be the following: any *substantive* aspects of contracts entered into before 1 September 2001 are governed by the 1997 Regulations, whereas any *procedural* aspects (such as the settlement of disputes) are governed by the 2001 Regulations. This reading of the above FIFA provisions would be in full compliance with the *tempus regit actum* principle (cf. *supra* at 8), according to which – as a general rule – the substantive aspects of a contract keep being governed by the law in force at the time when the contract was signed, while any claim should be brought and any dispute should be settled in accordance with the rules in force at the time of the claim.

12. In light of the above, the time limit issue should be governed by the 2001 Regulations; however, the 2001 Regulations provide no time limit at all for appeals to the Executive Committee. The Panel finds that such absence of an explicit time limit did put the Appellant in a state of procedural uncertainty. Indeed, FIFA itself has recently recognized (in Circular no. 909 of 14 May 2004) that the transitional rule on dispute settlement included in Point 8 of Circular no. 769 (quoted *supra* at 9) was ambiguous and needed to be clarified. Surely, the hindsight now given by Circular no. 909 was not available to Espanyol at the time of its appeal to the Executive Committee. In the Appellant's situation at that time, it could appear wholly reasonable to resort to, and comply with, the time limit of one month set forth by art. 75 CC for complaints against decisions adopted by Swiss associations.

13. As a result, the Panel finds that the Appellant, at the moment of the appeal against the Second S.J. Decision, was unfairly put by the ambiguous FIFA provisions in a state of procedural uncertainty, which should have induced the Executive Committee to adopt a more prudent stance. In the Panel's view, if a sports federation enacts rules which render unclear which time limit to apply, a judging body of that same federation should adopt the interpretation which could be more favourable to the appealing party, in compliance with the widely recognized interpretative principle *contra proferentem* or *contra stipulatorem* (in Swiss jurisprudence see, e.g., ATF 22 October 2002 4C.186/2002; ATF 126 V 499, 3b; ATF 122 III 118, 2d).

14. Furthermore, even making reference to the 1997 Regulations, the Panel remarks that art. 24.1 provides that the twenty-day time limit starts to run from the day on which FIFA has notified the contested decision *"to the parties involved"*. In this respect, it is undisputed that FIFA notified the Second S.J. Decision to the Argentinean and the Spanish Federations (see *supra*) but not directly to the clubs involved. It is also undisputed that the Executive Committee based its

computation of the twenty-day period on the date in which the decision was received by the RFEF, without ascertaining when Espanyol actually received the decision. In the Panel's view, the clubs were the true *"parties involved"* and, therefore, the Executive Committee should have ascertained the exact day on which Espanyol (rather than the RFEF) was actually notified of the Second S.J. Decision and should have considered such date as *dies a quo* for the calculation of the appeal's time limit. CAS panels have repeatedly stated that if the rules of a federation prescribe some specific requirement for the notification of a decision, that federation must comply with its own rules and duly fulfil any such requirement (see, e.g., CAS 2003/O/466, in [2004] *I.S.L.R.*, SLR-57). Therefore, the Panel holds that, even applying the 1997 Regulations, the Executive Committee's Decision applied art. 24.1 of the 1997 Regulations in an unfair manner, which was prejudicial to the Appellant's right to be heard.

15. In these circumstances, the Panel has no hesitation in deciding that the Executive Committee's Decision, in rejecting the Appellant's claim on the above mentioned formal grounds (see *supra* at 0-0), was in breach of the fundamental principle of procedural fairness, which on many occasions the CAS has recognized and protected (see, e.g., CAS 96/153, in *Digest of CAS Awards I*, 341; CAS 98/200, in *Digest of CAS Awards II*, 66; CAS 2000/C/267, in *Digest of CAS Awards II*, 741; TAS 2003/A/443).

16. The Executive Committee's Decision must thus be declared to be void and of no effect.

*B. The* res iudicata *and* non bis in idem *issues*

17. Espanyol submits that the Single Judge could not pass a judgment on the Respondent's request of compensation insofar as the P.S. Committee and the Single Judge had already examined and adjudicated the case without accepting such claim. Espanyol, therefore, submits that the Second S.J. Decision was adopted in breach of the general principles of law known as *res iudicata* and *non bis in idem*, which prevent reopening a case and issuing a new decision on a matter which has already been determined with a definitive decision.

18. The Panel is not persuaded by the Appellant's argument, in view of the fact that the P.S. Committee Decision expressly declined to adopt a decision with respect to the Contract and, in particular, with respect to the issue of pecuniary compensation for non-performance of the Contract (see *supra*). Likewise, the First S.J. Decision declined to adjudicate the contractual and compensation claim and invited the parties to bring the dispute to the CAS (see *supra*). Espanyol is right in stating that the Single Judge could not oblige them to resort to arbitration without their consent and that such a request had to be considered merely as an offer to effect an *ad hoc* arbitration agreement; however, this does not alter the Panel's finding that the Single Judge – in its first ruling – did not address the compensation issue at all.

19. In the Panel's view, neither the general principles of law pointed out by the Appellant nor any FIFA rule precluded the FIFA Players' Status Committee and its Single Judge from addressing an issue that it has previously declined to adjudicate. The Single Judge was thus legitimately

entitled to deal with and decide on the Respondent's claim for compensation, which had been left undecided beforehand. Accordingly, this submission on behalf of Espanyol fails.

*C. The* lis pendens *issue*

20. The Appellant submits that the Single Judge could not deal with the compensation issue because the same dispute was pending in front of the Argentinean civil courts (see *supra*).

21. The Panel does not accept the Appellant' submission. First of all, the Panel cannot find any rule compelling FIFA to suspend its internal dispute settlement procedures when the same case is pending before state courts. Then, in any event, the *lis pendens* principle is related to the contemporaneous pending of the same dispute before two different judges, while the situation is different here. Indeed, the case pending before the Argentinean civil courts is not identical to the FIFA case, as the parties are not the same and the claim and the subject-matter are different: the Argentinean courts have dealt with the validity of the employment contract of 31 July 2000 between Velez and P., while the Single Judge addressed the compensation issue arising out of the Contract between Velez and Espanyol of 4 August 1998.

22. As a result, also this Espanyol's submission fails.

**The Merits**

*A. Decision* de novo

23. Pursuant to art. R 57 of the Code, the Panel *"shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*. As the Panel has determined to annul the FIFA decision challenged by the Appellant (see *supra* at 16), the Panel may decide either to issue a final decision on the substance of the present litigation or to remand the case to the FIFA Executive Committee so that it proceeds to adjudge on the merits. The Respondent is in favor of an immediate final decision on the substance of the case, while the Appellant has no preference (see *supra*).

24. The Panel remarks that a long time – more than two years – has elapsed since the beginning of this dispute at FIFA level and that, in case of remand, the new ruling by the FIFA Executive Committee would be most likely appealed again to the CAS by the losing party. As a consequence, considering that due process standards of fairness and justice command a reasonable duration of lawsuits, the Panel determines to adjudicate this case *de novo* and to issue a new decision replacing the challenged Executive Committee's Decision and all previous FIFA rulings, with a view to attaining the final settlement of this dispute.

*B. Enforceability of the Contract*

25. As mentioned (see *supra*), the Contract regulates the sale of 50% of the economic rights to the performances of the Player – actually, the Contract refers to the *"federative, economic and sports rights"*, but the Panel will only make reference to the "economic rights" for the reasons set out below (see *infra* at 32) – and provides the loan of the Player for the 1998/99 season.

26. During the various FIFA proceedings and in this arbitration, Velez has consistently put forward a claim for compensation based on the alleged Espanyol's breach of the Contract (see *supra*). Before examining the substance of the claim, however, the Panel must ascertain whether the Contract is enforceable, particularly in light of the P.S. Committee's assertion that a sale of 50% of the rights over a player is against the spirit and terms of the FIFA Regulations for the Status and Transfer of Players (see *supra*). Given that FIFA rules must be applied in this case (see *supra* at 3-6), should the Panel concur with the P.S. Committee's view, the Contract would not be enforceable by the CAS.

27. The P.S. Committee based its opinion on the circumstance that FIFA rules require that a player be registered to play for only one club at any given time. The Panel agrees that this is a basic tenet of FIFA rules; however, it seems to the Panel that this requirement does not prevent two clubs from apportioning between them the economic rights related to a player, as long as the player is under an employment contract with either team and expressly consents to such apportionment.

28. In the Panel's opinion, in professional football a basic legal distinction is to be made between the "registration" of a player and the "economic rights" related to a player:

- the registration of a professional player with a club and with the pertinent national federation serves the administrative purpose of certifying within the federative system that solely that club is entitled to field that player during a given period; obviously, such federative registration is possible only if there is an employment contract between the club and the player;
- a club holding an employment contract with a player may assign, with the player's consent, the contract rights to another club in exchange for a given sum of money or other consideration, and those contract rights are the so-called *"economic rights to the performances of a player"* (hereinafter "economic rights"); this commercial transaction is legally possible only with regard to players who are under contract, since players who are free from contractual engagements – the so-called "free agents" – may be hired by any club freely, with no economic rights involved.

29. In accordance with the above distinction, while a player's registration may not be shared simultaneously among different clubs – a player can only play for one club at a time –, the economic rights, being ordinary contract rights, may be partially assigned and thus apportioned among different right holders. Therefore, the Panel finds that the P.S. Committee was right in deeming incompatible with FIFA rules that a player be registered at the same time for two different clubs, but it erred in stating that two clubs may not share the economic rights concerning a player's employment contract. Indeed, the Panel notes that neither the 1997 nor

the 2001 FIFA Regulations include a rule forbidding a transaction such as that set out by the Contract. At the hearing, questioned by the Panel on this issue, the FIFA representative was unable to point out any specific provision of the FIFA Regulations which prohibited the type of contract here at stake.

30. Quite the reverse, the Panel finds implicit confirmation of the lawfulness of contracts trading portions of economic rights in both the 1997 and the 2001 FIFA Regulations. With specific regard to the 1997 Regulations (governing the substantive aspects of the Contract), art. 30.1 makes express reference to the *"validity of a transfer contract between clubs"*, and art. 33 so regulates the loan of a player:

> *"1 Under the provisions of these regulations, the loan of a player by one club to another is dealt with administratively like a transfer. An international registration transfer certificate shall therefore be issued:*
>
> - *whenever a player leaves a national association to join another national association to which the club to which he has been released on loan belongs;*
> - *whenever, on expiry of the period of loan, a player rejoins the national association of the club which released him on loan.*
>
> *2 The conditions governing the loan of a non-amateur player (duration of the loan, obligations to which the loan is subject) shall be regulated by concluding a separate written contract between the two clubs and the player concerned. Any clause in this respect appended to the certificate itself shall be null and void.*
>
> *3 A club which has accepted a player on a loan basis is not entitled to transfer him to a third club without the written authorisation of the club which lent him out and of the player concerned".*

31. In the Panel's opinion, the above FIFA provision is quite meaningful in that it clearly distinguishes between the registration issue (and the related transfer certificate), which is a sporting administrative matter necessary to ascertain which club is entitled to actually field the player, and the *"separate written contract between the two clubs and the player concerned"*, which is the private instrument dealing with the economic rights to the player's performances. In a loan situation, the title to the economic rights and the title to register and field the player are plainly split between two clubs. Logically, contract rights which can be loaned can also be partially assigned. In the Panel's view, as long as FIFA rules do not issue an express prohibition, clubs are allowed to treat those economic rights as assets and commercialize them in ways allowed by States' legal systems.

32. For the sake of clarity, the Panel wishes to spell out that, while it accepts the above notion of "economic rights", it deems unacceptable and unenforceable the distinct notions of "federative rights" – mentioned in the Contract and referred to by the parties (see *supra*) – insofar as such expression may be taken to mean that a club could bind and control a player without the player's explicit consent, merely by virtue of the rules of a federation. Indeed, the Panel is of the opinion that sports rules of this kind are contrary to universal basic principles of labour law and are thus unenforceable on grounds of public policy. In other terms, in the Panel's view, the player's consent is always indispensable whenever clubs effect transactions involving his employment and/or his transfer.

33. In conclusion, the Panel holds that the trade between clubs of portions of the economic rights to the performances of a player, with the player's crucial consent, is compatible with FIFA regulations. Accordingly, the Contract is legitimate and enforceable and the Panel may adjudicate the substance of the case, i.e. it may determine whether and to what extent the Appellant should indemnify the Respondent for having employed the Player without the Respondent's consent.

*C. The violation of the Contract*

34. In the Panel's view, by virtue of the Contract the two clubs have set up a sort of joint venture, insofar as they have arranged to jointly own and hold title to the economic rights to the performances of the Player. As a result of their reciprocal commitments, neither club was in a position to lawfully hire the Player or trade him to a third club without the other club's consent, in addition to the requisite Player's consent.

35. The Player, on his part, having expressly accepted the Contract (see clause twelfth, *supra*) and having directly benefited from it (see *supra*), assented to be bound to supply his performances to those two clubs. The Panel is of the opinion that, from the Player's perspective, the Contract was a kind of employment pre-contract with both clubs, which had to be implemented through specific employment contracts with either club and which, conversely, precluded him from lawfully entering into employment contracts with third clubs. The necessity of the consent of all three parties to the Contract for any further transaction involving the transfer and/or employment of the player is implicitly confirmed by art. 12.4 of the 1997 Regulations, which reads as follows:

*"A player may not be transferred during the period of validity of his contract unless the three parties involved – the club he is leaving, the player himself, the club he is joining – all concur".*

36. It seems to the Panel that the behavior of Velez and Espanyol has been consistent with the above reading, since for several seasons the two clubs have negotiated the yearly loan of 50% of the said economic rights (see *supra*). Only after three years Espanyol refrained from further negotiating such loan of 50% of the rights; it is not a coincidence that this change of attitude occurred just after the FIFA communication of 21 September 2001 (see *supra*). Indeed, the FIFA administration took the position that no international transfer certificate from AFA was needed, because the Player's earlier contract with Velez had expired and he was now under contract with Espanyol and definitely registered with the Spanish Federation.

37. In the Panel's opinion, the FIFA administration was absolutely right in its communication of 21 September 2001, inasmuch as it was addressing the *registration* issue and not the economic issue. In other terms, the communication did state correctly that FIFA rules entitled Espanyol to register and field the Player without any prior international transfer certificate; however, the FIFA administration did not (and could not) authorize Espanyol to disregard its obligations under the Contract.

38. It seems to the Panel that, because of the mix up about the registration and economic issues, the Appellant mistakenly assumed that FIFA had endorsed its belief that by that time the Contract could be ignored. For that reason, Espanyol did not seek any more the consent of Velez and started handling the economic rights to the performances of the Player as though Espanyol owned them entirely. The Panel finds that the behavior of the Appellant was clearly inconsistent with the Contract, in particular with clause fifth, which *"during the period the player renders services to [Espanyol]"* allowed both clubs only *"to negotiate between themselves the purchase or sale of the 50% they own"*, thus forbidding any unilateral action in respect of the other party's 50%. Accordingly, while Espanyol employed the Player, it did not have any right to disregard the joint ownership with Velez and to appropriate 100% of the economic rights.

39. The Panel finds, and so holds, that the Respondent breached the Contract insofar as it employed the Player without obtaining the Appellant's consent. As a result, Espanyol must compensate Velez.

*D. The compensation*

40. In order to assess an appropriate compensation, it is essential that the Panel ascertains the time-span during which Espanyol has been in breach of the Contract.

41. The Contract included no duration provision and no termination clause. However, the Panel is of the opinion, for the reasons set out above (at 3-6), that the Contract must be construed in compliance with the FIFA rules. Indeed, art. 5.2 of the 1997 Regulations provides that players' *"financial contracts"* with clubs must be *"concluded for a predetermined period"*. Consequently, the Player's commitment towards the clubs could not be open-ended. This means that the Panel must appraise the circumstances surrounding the formation and implementation of the Contract in order to determine its duration.

42. In the Panel's opinion, two circumstances carry great weight. First, on the same day of the Contract the Player signed with Espanyol a five-year employment contract expiring at the end of the season 2002/03 (see *supra*). Then, in July 2000, the Player signed another employment contract, this time with Velez, which also expired at the end of the season 2002/03 (see *supra*).

43. It seems to the Panel that the above circumstances are a very clear indication that the Player intended to commit himself, with both teams, only until the end of the season 2002/03. The Panel is thus of the view that the Contract must be construed as having had a duration of five years, after which the Player became a free agent. Moreover, this would be in line with the 2001 Regulations of FIFA, which provide that contracts between players and clubs may not last more than five years: (art. 4.2: *"contracts shall have a minimum duration of one year and a maximum duration of five years"*).

44. As a result, the Panel finds, and so holds, that the Contract came to an end on 30 June 2003 and that Espanyol must compensate Velez for having employed the Player during the seasons

2001/02 and 2002/03 without paying anything for the loan of 50% of the related economic rights. Accordingly, the Panel must determine an appropriate amount of compensation.

45. The Panel observes that after the first season, when the price for the loan was included in the total amount paid by Espanyol for the purchase of 50% of the economic rights related to the Player (clause fourth of the Contract, *supra*), Velez has consented to loan its portion of the economic rights at the following prices:

- 1999/00: USD 500,000;
- 2000/01: free of charge.

46. As a result, Espanyol paid in consideration of the said loan an average yearly amount of USD 250,000. Taking into account this amount agreed between the parties, and considering the circumstance that Espanyol itself at one point offered to Velez USD 250,000 for a one-season loan (see *supra*), the Panel is of the opinion that an equitable compensation for the two remaining seasons would be of USD 250,000 per annum.

47. In conclusion, the Panel holds, ruling *de novo* and replacing all previous FIFA decisions, that the Appellant shall pay to the Respondent the amount of USD 500,000 as compensation for the breach of the Contract.

48. Since no interest on the compensation has been claimed for in the Respondent's submissions, the compensation is awarded without interest.

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

1. The appealed decision issued on 21 May 2004 by the Executive Committee of FIFA is set aside.

2. RCD Espanyol de Barcelona SAD is ordered to pay to Club Atlético Velez Sarsfield an amount of USD 500,000 (five hundred thousand United States Dollars) as compensation for breach of contract.

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

(…).