CAS 2020/A/6879 Joaquín Bárcena Uriarte v. PFC CSKA-Sofia EAD & FIFA

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Fabio **Iudica**, Attorney-at-law, Milan, Italy
Clerk : Ms Stéphanie **De Dycker**, CAS Clerk, Lausanne, Switzerland

in the arbitration between

Joaquín Bárcena Uriarte, Bilbao, Spain
Represented by Mr José Carlos Páez Romero, Attorney-at-law with Nebot & Paéz Abogados, Madrid, Spain

- Appellant -

and

PFC CSKA-Sofia EAD, Sofia, Bulgaria
Represented by Mr Marc Cavaliero and Ms Carol Etter, Attorneys-at-law with Cavaliero & Associates, Zurich, Switzerland

- First Respondent -

and

Fédération Internationale de Football Association, Zurich, Switzerland
Represented by Mr Miguel Liétard and Mr Jaime Cambreleng

- Second Respondent -

I. PARTIES

1. Mr Joaquín Bárcena Uriarte is a players' agent / intermediary registered as such with the *Real Federación Española de Fútbol*, the Spanish Football Federation (the "Appellant" or the "Agent").

2. PFC CSKA-Sofia (the "New CSKA" or the "First Respondent") is a football club domiciled in Bulgaria. It is affiliated to the Bulgarian Football Union ("BFU"), which in turn is a member of the *Fédération Internationale de Football Association.*

3. The *Fédération Internationale de Football Association* (the "Second Respondent" or "FIFA") is the governing body of football worldwide. The Club and FIFA are jointly referred to as the "Respondents"; The Appellant and the Respondents are jointly referred to as the "Parties".

II. FACTUAL BACKGROUND

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

A. The Background facts

5. On 28 February 2012, the Original CSKA and the Agent signed a contract according to which the latter was entitled to receive certain amounts deriving from the signature of the employment contract between the Original CSKA and Mr Iván Bolado Palacios, a professional football player.

6. Following the filing of a claim by the Agent, on 23 April 2014, the Single Judge of the FIFA Players' Status Committee decided as follows:

> *"1. The claim of the Claimant, Joaquín Bárcena Uriarte, is partially accepted.*
> *2. The Respondent, PFC CSKA EAD, has to pay to the Claimant, Joaquín Bárcena Uriarte, the amount of EUR 40,000, within 30 days as from the date of notification of this decision.*
> *3. If the aforementioned sum is not paid within the aforementioned deadline, and interest rate of 5% per year will apply as of expiry of the fixed time limit and the present matter shall be submitted, upon request, to FIFA's Disciplinary Committee for consideration and a formal decision.*
> *4. Any further claims lodged by the Claimant, Joaquín Bárcena Uriarte, are rejected.*
> [...]"

7. The findings of the decision of the Single Judge of the Player's Status Committee ("the "PSC Decision") were duly communicated to the parties on 8 May 2014. The grounds were never requested and, as a result, the decision became final and binding.

8. On 2 October 2015, the Commercial Court of Sofia opened insolvency proceedings against the Original CSKA.

C. The Proceedings before the FIFA Disciplinary Committee

9. Upon the Agent's request dated 29 July 2014, the FIFA Disciplinary Committee (the "FIFA DC") opened disciplinary proceedings against the Original CSKA on 19 January 2015 on the basis of Article 64 FDC for failure to comply with the PSC Decision.

10. On 10 March 2015, the FIFA DC passed a decision sanctioning the Original CSKA for not complying with the PSC Decision. The terms were notified on 25 March 2015 and no grounds were ever requested (the "2015 DC Decision").

11. On 25 August 2015, the FIFA DC informed the parties that the Creditor requested that the 2015 DC Decision be enforced.

12. On 14 October 2015, the FIFA DC informed the parties that the disciplinary proceedings against the Original CSKA were suspended given that the latter was undergoing insolvency proceedings in Bulgaria.

13. By means of a letter received on 13 September 2017, the Bulgarian Football Union informed the FIFA DC that the Commercial Court of Sofia had declared the club PFC CSKA Sofia bankrupt and that the Bulgarian Football Union Executive Committee had decided on 20 June 2017 to disaffiliate the Original CSKA.

14. On 25 July 2018, 3 August 2018, 20 September 2018, 22 May and 8 October 2019, the Agent requested the FIFA DC to continue the enforcement of the PSC Decision against the New CSKA, which should be considered as the sporting successor of the Original CSKA.

15. On 22 October 2019, the FIFA DC notified to the Agent the opening of disciplinary proceedings against the New CSKA.

16. On 18 November 2019, the New CSKA filed its position denying being the sporting successor of the Original CSKA before the FIFA DC.

17. On 20 November 2019, the FIFA DC decided as follows (the "Appealed Decision"):

> *"1. All charges against the [New CSKA] are dismissed.*

2. *The disciplinary proceedings initiated against the [New CSKA] are hereby declared closed."*

18. The terms of the Appealed Decision were notified on 25 November 2019 and its grounds were communicated on 13 February 2020. The grounds of the Appealed Decision can be summarized as follows:

"[...] [T]he Chairman moves on to analyse whether the new Club, PFC CSKA-Sofia, has a connection with the original Debtor and therefore, can be held liable for the debts of the latter. [...] In this sense, the Chairman finds it worthwhile to recall the existing CAS jurisprudence on this particular topic.
[...] To that end, the Chairman first refers to decisions that had dealt with the question of the succession of a sporting club in front of CAS3 and in front of FIFA's decision-making bodies. In particular, it has been established that, on the one side, a club is a sporting entity identifiable by itself that, as a general rule, transcends the legal entities which operate it, meaning that the obligations acquired by any of the entities in charge of its administration in relation with its activity must be respected. On the other side, it has been determined that the identity of a club is constituted by elements such as its name, colours, fans, history, sporting achievements, shield, trophies, stadium, roster of players, historic figures, etc. that allow it to distinguish from all the other clubs. Hence, the prevalence of the continuity and permanence in time of the sporting institution in front of the entity that manages it has been recognized, even when dealing with the change of management completely different from themselves. In these circumstances, CAS already considered that a "new" club had to be considered as the "sporting successor" of another one in a situation where a) the "new" club created the impression that it wanted to be legally bound by obligations of its predecessor, i.e. the "old" club, b) the "new" club took over the licence or federative rights from the "old" club and c) the competent federation treated the two clubs as successors of one another. By the same token a "sporting succession" is the result of the fact that 1) a new entity was set up with the specific purpose of continuing the exact same activities as the old entity, 2) the "new" club accepted certain liabilities of the "old" club, 3) after the acquisition of the assets of the "old" club, the "new" club remained in the same city and 4) the "new" club took over the license or federative rights from the "old" club. [...] Further, the issue of the succession of two sporting clubs might be different than if one were to apply civil law regarding the succession of two separate legal entities. In particular, the Chairman recalls that according to CAS, a club is a sporting entity identifiable by itself that generally transcends the legal entities which operate it. Consequently, elements to consider are amongst others the name, the logo and colours, the registration address and/or the managing board of the club. [...] For the sake of completeness, the Chairman wishes to point out that this established jurisprudence from CAS has now been reflected in the 2019 FDC, under art. 15 par. 4 [...]. [...]
With the above in mind, the Chairman subsequently analyses the documentation at his disposal in light of the criteria set by the relevant jurisprudence of CAS (now reflected in art. 15 par. 4 of the 2019 FDC) and applied by the Committee in such situations.
[...] In this sense, the Chairman first notices that the new Club itself admitted that when the group of entrepreneurs bought the company "PFC Litex Lovech AD" – the legal entity behind the club Litex Lovech – at the beginning of the 2016/2017 season, the main idea

was to maintain and reflect the historical sporting history of the original Debtor, which was already declared insolvent. [...] In addition, the Chairman observes that the colours used by the original Debtor and the new Club are the same as well as the logo, the address and the stadium. Moreover, he notes that the name of both clubs are very similar and that according to the new Club's official website, they share the same history and sporting achievements.
[...] In this regard, the Chairman takes note from the new Club's submission that the latter bought certain logos and other trademarks out of the bankruptcy mass of the original Debtor. However, the Chairman observes that new Club claimed that it has different owners, licences, football teams and legal entities than the original Debtor, implying that the first one cannot be considered as the successor of the second one.
[...] Against this background, the Chairman notices that CAS already decided that a new club acquiring within the frame of the bankruptcy proceedings the "economic unit composed of all the assets seized" from the old club, was to be understood as a successor of the old club [...].
[...]
In light of all the above, the Chairman recalls that, in line with the jurisprudence of CAS, which is now reflected in art. 15 par. 4 of the 2019 FDC, the identity of a club is constituted by elements such as its name, colours, logo, fans, history, players, stadium, etc., regardless of the legal entity operating it. [...] Consequently, and bearing in mind that the new Club uses elements that constituted the identity of the original Debtor combined with its intention to appear as the original Debtor, the Chairman is of the opinion that these elements prevail over the arguments put forward by the new Club, such as its ownership, licence, football teams and legal entities being different from those of the original Debtor.[...] As a result, the Chairman considers that, on the basis of the information and documentation at hand, there is no other alternative but to conclude that the new Club, PFC CSKA-Sofia, appears to be the sporting successor of the original Debtor, PFC CSKA Sofia. [...]

First and foremost, the Chairman stresses that the original Debtor went bankrupt. In this context, and as established already by CAS, it appears relevant for the legal assessment of this case to analyse the diligence of the Creditor in recovering his debt in order to assess as to whether a sanction can be imposed on the new Club, i.e. whether the Creditor also contributed to create the breach of art. 64 of the 2011 FDC as it could be that his credit would have been paid in the bankruptcy proceedings and therefore no sanction may be imposed. [...] [T]he Chairman notes that, as mentioned above, CAS already discussed the possibility for the Disciplinary Committee to impose sanctions in accordance with art. 64 of the FDC on a new club that was considered as the successor of the bankrupt club11. In particular, CAS decided that no disciplinary sanctions could be imposed on the new club, should the player fail to claim his credit in the bankruptcy proceedings of the former/bankrupt club. [...] Bearing the above in mind, the Chairman shares CAS conclusion that there is no certainty that a creditor would receive the outstanding amounts in the bankruptcy proceedings but there is at least a theoretical possibility that he could recover his credit in the bankruptcy proceedings instead of remaining passive and pretending that disciplinary sanctions should be imposed on the new club, irrespective of his diligence or negligence in attempting to recover his credit.
36. As a result, should a creditor fail to pursue his claim in the bankruptcy proceedings,

such creditor will be, in principle, precluded from requesting disciplinary sanctions to be imposed on the new club that took over from the bankrupt club. In such a situation, the creditor, by his inaction, somehow contributed to create the breach by the bankrupt club of art. 64 of the 2011 FDC.
[...] The Chairman concedes that bankruptcy proceedings before national courts are complex, lengthy and differ from one country to another and that their outcomes are hardly predictable. However, in light of the aforementioned CAS award, it is of paramount importance that a creditor seeking to recover his credit participates in the bankruptcy proceedings at national level.
[...] Should, however, a new club appear and the creditor claim that this new club should be considered as the successor of the bankrupt one, the Chairman considers that the Disciplinary Committee may only decide on questions relating to the succession of the former club and the liability of the new club towards the debts of the former one provided that the creditor has first participated in the bankruptcy proceedings.
[...] Turning back to the case at hand, the Chairman observes that the new Club claimed that the Creditor was duly informed of the opening of the bankruptcy proceedings and had the opportunity to file a claim within those proceedings. However, the new Club submitted that for an unknown reason the Creditor decided not to participate in this bankruptcy proceedings and, therefore was negligent as he failed to properly register its claim in the aforementioned bankruptcy proceedings.
[...] Bearing the above in mind, and taking into consideration that the Creditor did not register his claim during the bankruptcy proceedings as he is not listed on the list of creditors dated 16 June 2017, it appears that the Creditor decided not to participate in the bankruptcy proceedings – or at least remained passive –, therefore waiving his right to collect his debt within the frame of the bankruptcy proceedings.
[...] As a result, the Chairman concludes that the Creditor failed to perform the expected due diligence that the circumstances demanded, and hence, contributed to the non-compliance by the original Debtor, and subsequently by the new Club, of the decision passed by the Single Judge of the Players' Status Committee on 23 April 2014. [...]"

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

19. On 5 March 2020, in accordance with Article R47 of the Code of Sports-related Arbitration, edition in force since 1 January 2019 (the "CAS Code"), the Appellant filed his Statement of Appeal with the CAS against the New CSKA and FIFA to challenge the Appealed Decision. In his Statement of Appeal, the Appellant specified that in case the present proceedings are consolidated with proceedings registered by CAS as CAS 2020/A/6878, he would nominate Mr Manfred Nan, Attorney-at-law in Arnhem, the Netherlands, as arbitrator among a three-arbitrators' panel; and that otherwise, he would request the appointment of a sole arbitrator to decide upon the present dispute.

20. On 26 March 2020, the Appellant informed the CAS Court Office that in view of enabling consolidation of the present proceedings with the proceedings under CAS 2020/A/6878, he would like the panel to be composed with the same number of arbitrators than in the case CAS 2020/A/6878.

21. On 26 March 2020, the CAS Court Office invited the Appellant to file his Appeal Brief and the Respondents to specify whether they agree to submit the present matter to a Sole Arbitrator as requested by the Appellant. Stating that consolidation of the present proceedings with the proceedings under CAS 2020/A/6878 is not possible as the appealed decisions are not the same, the CAS Court Office invited the Respondents to indicate whether they agreed to submit the present case to the same panel than that in the case CAS 2020/A/6878 and that both cases be decided upon by a sole arbitrator as requested by the Appellant.

22. On 30 March and 2 April 2020 respectively, FIFA and the New CSKA informed the CAS Court Office that they had no objection to submit both cases to the same panel, but that they preferred for a panel of three arbitrators to decide upon both proceedings.

23. On 3 April 2020, the CAS Court Office informed the Parties that since they disagreed as to the number of arbitrators to decide upon both proceedings, it shall be for the President of the Appeals Arbitration Division to decide this issue.

24. On 7 April 2020, the CAS Court Office informed the Parties that the Deputy President of the Appeals Arbitration Division had decided to submit the present proceedings and the proceedings under CAS 2020/A/6878 to the same sole arbitrator.

25. On 27 May 2020, the Appellant filed his Appeal Brief with the CAS Court Office.

26. On 4 June 2020, the Appellant requested the authorisation to supplement his Appeal Brief.

27. On 12 June 2020, FIFA and the New CSKA formally objected to the Appellant's request to supplement his Appeal Brief.

28. On 23 June 2020, the CAS Court Office informed the Parties that the Panel appointed to decide the present appeals proceedings is constituted as follows:

    Sole Arbitrator: Mr Fabio Iudica, Attorney-at-law in Milan, Italy

29. On 22 June 2020, the Respondents informed the CAS Court Office that they maintained their formal opposition to the Appellant's request to supplement his Appeal Brief.

30. On 1 July 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to grant the Appellant's request to supplement his Appeal Brief and that Respondents shall submit their Answers thereafter.

31. On 8 July 2020, the Appellant filed his Supplementary Brief.

32. On 14 September 2020, within the prescribed time-limit, the Respondents filed their respective Answers. The CAS Court Office invited the Parties, on 15 September 2020, to indicate whether they preferred a hearing to be held in this matter or for the Sole Arbitrator to issue an award based solely on the Parties' written submissions.

33. On 22 September 2020, the New CSKA indicated that it preferred a hearing to be held in

the present matter.

34. On 24 September 2020, the Appellant indicated that he also preferred a hearing to be held in the present matter. Moreover, the Appellant requested leave to inform the Sole Arbitrator on the outcome of his claim in the insolvency proceedings and submit the relevant court decision.

35. On 25 September 2020, FIFA indicated that a hearing was not necessary and requested the Sole Arbitrator to issue an award on the basis of the written submissions.

36. On 28 September 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to hold a hearing in the present matter and consulted with the Parties on possible hearing dates.

37. On 2 October 2020, further to the Parties' agreement on a hearing date, the CAS Court Office informed the Parties that a hearing will be held in the present proceedings on 1st December 2020 by videoconference and invited the Parties to communicate the names and contact details of all persons attending the hearing, which the Parties did on 5, 6 and 9 October 2020.

38. On 6 and 7 October 2020, the Respondents objected to the Appellant's request to produce new documents.

39. On 13 October 2020, the CAS Court Office issued the Order of Procedure and requested the Parties to return a completed and signed copy of it to the CAS Court Office, which the Parties did on 19, 20 and 21 October 2020.

40. On 15, 19 and 26 October 2020, the Respondents objected to the participation of one of the witnesses called by the Appellant. On 29 October 2020, the Appellant commented on the Respondents' position as to the admissibility of one of its witnesses at the hearing.

41. On 4 November 2020, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to admit the concerned person as witness at the hearing.

42. On 30 November 2020, the New CSKA informed the CAS Court Office of the unavailability of one of its witnesses for health reasons – who is also called by the Appellant – at the planned hearing and requested the postponement of the hearing in case the content of the witness' written statement is disputed by the other parties. On the same day, the CAS Court Office invited FIFA and the Appellant to comment on the New CSKA's request.

43. On the same day, FIFA informed the CAS Court Office that it had no objection for the hearing to take place as scheduled and the Appellant informed the CAS Court Office that he agreed with the postponement of the hearing.

44. On the same day, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to postpone the hearing.

45. On 3 December 2020, the CAS Court Office informed the Parties that the hearing in the present matter would be held on 9 February 2021 by videoconference.

46. On 11 January 2021, the Appellant requested the leave to file the court rulings rendered by the Bulgarian courts in the insolvency proceedings concerning the Original CSKA.

47. On 18 January 2021, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to grant the Appellant's request to file the relevant court rulings and their translation.

48. On 21 January 2021, the Appellant filed an original and translated version of the court rulings rendered by the insolvency courts with respect to his claim as well as summaries of such decisions. The Appellant also requested the Sole Arbitrator to order the Respondents to arrange for the availability at the upcoming hearing of the witnesses that are under their control and that are called by the Appellant.

49. On 26 and 27 January 2021, FIFA and the New CSKA respectively filed their comments on the new documents submitted by the Appellant.

50. On 29 January 2021, the CAS Court Office requested the New CSKA to make its best effort to make one of the witnesses called upon by the Appellant available for the hearing.

51. On 4 February 2021, the Appellant requested the Sole Arbitrator to authorise the Parties to file post-hearing briefs.

52. On 5 and 8 February 2021, the New CSKA and FIFA respectively objected to the Appellant's request to file post-hearing briefs.

53. On 8 February 2021, FIFA submitted new CAS jurisprudence that is in the public domain.

54. On 9 February 2021, a hearing was held via videoconference. The Sole Arbitrator, Mr Antonio de Quesada, Head of Arbitration at CAS, and Ms Stéphanie De Dycker, Clerk at CAS, as well as the following persons attended the hearing:

For the Appellant:	Mr José Páez, Ms Tsvetelina Georgieva; Mr Pencho Stanchev, legal counsels; Ms Alexandra Gómez Bruinewoud, witness; Ms Dora Mileva Slateva, witness; Ms Mihayla Emileva Milenkova, interpreter.
For the First Respondent:	Mr Georgi Cholakov, in-house counsel; Mr Marc Cavaliero, Ms. Carol Etter, legal counsels.
For the Second Respondent:	Mr Jaime Cambreleng Contreras, Head of litigation; Ms Marta Ruiz Ayucar, legal counsel.

55. At the hearing, the Sole Arbitrator heard evidence from Ms Dora Mileva Slateva, witness, named by both the Appellant and the New CSKA, as well as Ms Alexandra Gómez Bruinewoud, witness called by the Appellant. The witnesses had been informed by the

Sole Arbitrator of their duty to tell the truth, subject to the sanctions of perjury under Swiss law. The Parties and the Sole Arbitrator then had the opportunity to examine and cross-examine the witnesses.

56. The testimonies of the witnesses can be summarized as follows:

- Ms Alexandra Gómez Bruinewoud: Ms Gómez is a legal counsel at FIFPRO. According to Ms Gómez the requirement of due diligence from the creditors is not a legal practice; it is not at all a well-established jurisprudence in the view of FIFPRO as it is based essentially on one decision. The conditions imposed upon creditors are specified in Article 15(4) of the FDC and these conditions do not provide for a due diligence requirement. Article 15 (4) should be applied as such. Imposing a due diligence requirement on creditors constitutes an undue restriction of the access to justice. Ms Gómez also confirmed that FIFPRO is representing a creditor in other cases before the FIFA DC and/or CAS but that she was personally not involved in that case. In addition, Ms Gómez also confirmed that the FIFA DC as judicial body never consulted with FIFPRO in applying rules to specific cases.

- Ms Dora Mileva Slateva: Ms Mileva was appointed as trustee for the bankruptcy of the Original CSKA by the Commercial Court of Sofia in Bulgaria. According to the Bulgarian Commercial Act, the trustee represents the company during the insolvency proceedings as well as in other court proceedings. The trustee is requested to identify the assets and debts of the bankrupt entity so as to distribute the assets among creditors. In her capacity of trustee, Ms Mileva prepared a list of accepted claims based on the accountability of the Original CSKA and other documents; such list did not include the Agent's credit since there was no document establishing such credit. Such list is prepared on the basis of the documentation provided by the debtor at the opening of the insolvency proceedings. As a result, the Agent's credit was not confirmed by the court and was therefore not included in the distribution account. The Agent, as any other creditor, could have filed his claim before Court within a certain prescribed time limit, which he did not do. During the summer 2016, two healing plans were submitted to the Court but none of them was accepted. According to Ms Mileva, the party winning a public tender is not considered as the universal successor of the bankrupt entity since the buyer only buys assets. The Original CSKA had a contract with the Ministry of Youth and Sport for the right to use the stadium but it was terminated unilaterally by the Ministry of Youth and Sport in June 2016 because of unpaid amounts. Ms Mileva confirmed that Mr Ganchev, one of the majority shareholders of the New CSKA, was not involved in the management of the Original CSKA. Ms Mileva only met Mr Ganchev once at the start of the insolvency proceedings. Ms Mileva was not aware that a few weeks after the termination of that contract with the Original CSKA, the Ministry of Youth and Sport signed a similar contract for the use of the stadium with the New CSKA. According to Ms Mileva, there was no relation between the Original CSKA and the New CSKA.

57. At the hearing, the Sole Arbitrator also heard the testimony of representatives the Parties.

The Sole Arbitrator heard the testimony of Mr Cholakov as representative of the New CSKA and Mr Cambreleng Contreras as representative of FIFA. The Parties and the Sole Arbitrator then had the opportunity to ask questions to the party representatives. The testimony of the party representatives can be summarized as follows:

- Mr Cholakov: Mr Cholakov is in-house counsel representing the New CSKA. He was not aware that New CSKA's change of address to that of the stadium occurred a few weeks *before* the submission of healing plans for the Original CSKA which included the use of the stadium by the Original CSKA. Mr Cholakov could not confirm on what legal basis the New CSKA was using the domain name of the Original CSKA.

- Mr Cambreleng Contreras: Mr Cambreleng is head of litigation at FIFA. He stated that FIFA informed the Agent and his representative on 14 October 2015 that the Original CSKA was undergoing insolvency proceedings. The Appellant nevertheless failed to file his claim with the Court in Sofia and his passiveness contributed to the failure by the Original CSKA to comply with the PSC Decision. Instead, the Appellant only registered his claim in the bankruptcy in 2020. According to him, the requirement of due diligence needs to be assessed in the appropriate period of time, i.e. upon notification of the existence of insolvency proceedings. Depending on each case, the FIFA DC may consider certain specifics such as the theoretical possibility to recover the credit or the creditor's good faith.

58. Thereafter, the Parties were given a full opportunity to present their case, submit their arguments and submissions, and answer the questions from the Sole Arbitrator. At the end of the hearing, the Parties confirmed that they were satisfied with the hearing and that their right to be heard was provided and fully respected.

59. On 9 and 10 February 2021, following the Sole Arbitrator's instructions during the hearing, the Appellant sent the list of questions it had prepared for the planned examination of Mr Ganchev - witness called by the Appellant who did not attend the hearing - as well as proof of the Agent's registration with the Spanish Football Federation.

60. On 9 February 2021, FIFA requested leave to file the proof of fax transmission of the letter dated 14 October 2015.

61. On 24 February 2021, the CAS Court Office informed the Parties that the Sole Arbitrator had decided to allow the submission by FIFA of the proof of fax transmission of the letter dated 14 October 2015 to the Agent and that he invited the Appellant to comment on this document. The CAS Court Office also invited the Respondents to comment on the list of questions prepared by the Appellant for the examination Mr Ganchev.

62. On the same day, the Appellant objected to FIFA being allowed to submit the proof of fax transmission of the letter dated 14 October 2015.

63. On the same day, the CAS Court Office confirmed that FIFA is allowed to submit proof

of fax transmission of the letter dated 14 October 2015 considering that "*FIFA is just requesting to submit a document which merely supplements and completes a piece of evidence that it has already provided*" and that "*[t]herefore, FIFA is not introducing any new element or fact in the proceedings which could prejudice the [Appellant's] rights*". The Sole Arbitrator invited the Appellant to comment on the fax transmission and also invited the Respondents to comment on the list of questions prepared by the Appellant for the examination Mr Ganchev.

64. On 24 February 2021, FIFA send a copy of the proof of fax transmission of the letter dated 14 October 2015 to the Agent and provided its comments as to the list of questions prepared by the Appellant for the examination of Mr Ganchev.

65. On 25 February 2021, the CAS Court Office invited the Appellant to comment of the proof of fax transmission of the letter dated 14 October 2015 to the Agent.

66. On 11 March 2021, the Appellant submitted his comments on the proof of fax transmission of the letter dated 14 October 2015 to the Agent and the New CSKA filed its comments on the list of questions prepared by the Appellant for the examination of Mr Ganchev, objecting to its admissibility on file.

67. On 12 and 15 March 2021, FIFA and the New CSKA respectively objected to the admissibility of the Appellant's submission dated 11 March 2021.

68. On 16 March 2021, the Appellant objected to the Respondents' contention as to the inadmissibility of the Appellant's submission dated 11 March 2021.

69. On 17 March 2021, the CAS Court Office informed the Parties that the issue of admissibility of the submission made by the Appellant on 11 March 2021 will be dealt with in the final award.

IV. THE PARTIES' SUBMISSIONS

70. The following summary of the Parties' positions and submissions is illustrative only and does not necessarily comprise each and every contention put forward by the Parties. The Sole Arbitrator, however, has carefully considered all submissions made by the Parties, even if no explicit reference is made in what immediately follows.

A. The Appellant

71. In his Appeal Brief, the Agent requested the Sole Arbitrator to decide as follows:

"*[...]*

1. *to declare admissible the present appeal to partially annul the decision of the FIFA Disciplinary Committee dated 20 November 2019 (Ref. n 150034 bbu);*

2. *to annul [...] the conclusion of the FIFA Disciplinary Committee in the Appealed*

Decision that no disciplinary sanctions shall be imposed on PFC CSKA-Sofia and that all charges shall be dismissed due to the lack of diligence of the [Agent];

3. *in the alternative to 2,*

3.1 *to declare that the [Agent] did not fail to perform due diligence and did not waive his rights to collect his debt;*

3.2 *in the alternative to 3.1, to declare that the [Agent] may, following the notification of the Appealed Decision, attempt to register his credit in the insolvency proceedings of PFC CSKA Sofia and that, in so doing, he will have fulfilled his duty of expected due diligence;*

4. *to declare that the FIFA Disciplinary Committee may not deviate from its Decision 150034 PST BUL ZH of 10 March 2015 regarding a failure to comply with the Decision of the Single Judge of the Players' Status Committee of 23 April 2014*

5. *to declare that PFC CSKA-Sofia is responsible to pay the amounts granted to the [Agent] in the Decision of the Single Judge of the Players' Status Committee of 23 April 2014, and*

6. *in order to ensure full compliance with Decision 150034 PST BUL ZH of 10 March 2015, to order FIFA to enforce Decision 150034 PST BUL ZH of 10 March 2015 against PFC CSKA-Sofia and against any successors of PFC CSKA-Sofia;*

7. *to order FIFA to impose disciplinary sanctions on PFC CSKA-Sofia for the non-compliance of said club with Decision 150034 PST BUL ZH of 10 March 2015;*

8. *to declare that FIFA, as respondent in CAS appeal proceedings, may not avail itself of the right to withhold payment of its share of advance of costs, so shifting the full financial burden of the proceedings onto the [Agent], since it is FIFA how imposes on the its members CAS arbitration;*

9. *to order the Respondents to pay the entire CAS administration costs and the arbitration fees and to reimburse the [Agent] of any and all expenses he incurred in connection with this procedure; and*

10. *to rule that the Respondents have to pay the [Agent] a contribution towards legal costs."*

72. The Appellant's submissions can be summarized as follows:

- The Appellant cannot be regarded as having acted negligently in the present matter. The Original CSKA's trustee, Ms Dora Mileva Slateva, failed to notify the opening of the bankruptcy proceeding to the Agent pursuant to Article 40 of the Council regulation (EC) No. 1346/2000; as a result, the Appellant's time limit to register his claim in the

bankruptcy has thus not started to run yet. The Agent was unaware of the Original CSKA's insolvency proceedings and its subsequent declaration of bankruptcy until 7 September 2017 when FIFA DC provided Mr Iván Bolado Palacios, the Agent's player, and the Agent's legal representative with the Commercial Court of Sofia Order dated 2 October 2015 declaring the opening of insolvency proceedings with respect to the Original CSKA. The Agent cannot be held responsible for Ms Mileva's own negligence in discharging her obligation to notify the opening of the insolvency proceedings of the Original CSKA. Ms Mileva was aware – or had to be aware - of the Agent's credit because of the 2014 PSC Decision and 2015 DC Decision.

- FIFA's disciplinary system does not require a creditor to participate in the debtor club's insolvency or bankruptcy proceedings under penalty of being precluded from enforcing a financial decision through FIFA's disciplinary system:

  - ✓ Article 64 FDC (previous editions) or 15 FDC (2019 edition) do not expressly or implicitly provide for such due diligence requirement; the wording of such provisions is clear so that interpretation is not relevant. As a result, by requiring that the Appellant participates in the national insolvency proceedings so as to be able to access FIFA's disciplinary system, the Appealed Decision runs contrary to the principle of legality in disciplinary-related proceedings.

  - ✓ The due diligence requirement does not derive from consistent consolidated jurisprudence as demonstrated by a series of decisions which illustrate the inconsistency in FIFA dispute resolution bodies' decisional practice. Such requirement does not stem either from long standing and undisputed practice since the relevant FDC provision was not consistently construed or applied as requiring that creditors participate in insolvency proceedings in order to have access to FIFA's disciplinary system.

  - ✓ Should the due diligence requirement be based on the creditor's obligation to mitigate his/her damage, the Appellant contends that reasonableness and good faith should be taken into account. In the present matter, the Appellant acted in good faith and took reasonable steps in order to recover his claim so that he must be considered as having met his obligation to mitigate his damage.

- In the alternative, should such due diligence requirement exist, the Appellant contends that it must be called into question in the present matter:

  - ✓ because the New CSKA is already participating in organised football and has *de facto* replaced the Original CSKA. As a result, the Original CSKA is no longer in status of insolvency and continuity should prevail on the basis of *lex sportiva*.

  - ✓ because (i) the owners of New CSKA contributed to the bankruptcy of the Original CSKA, in particular by securing the use of the stadium by the New CSKA which

contributed to the Original CSKA's inability to come out of insolvency; and (ii) the New CSKA artificially influenced the bankruptcy proceedings to its own benefit by acquiring the Original CSKA's IP and name rights, which enabled the New CSKA to secure a UEFA licence on the one hand, and to fight off the creditors of the Original CSKA by preventing them from recovering their claim against the New CSKA.

B. The New CSKA

73. In its Answer, the New CSKA requested the Sole Arbitrator to decide as follows:

> "
> *[...] The Appeal shall be rejected.*
> *[....] The decision of the FIFA Disciplinary Committee shall be confirmed in its entirety.*
> *[...] Mr. Joaquín Bárcena Uriarte* shall *be ordered to bear the costs of the arbitration and he shall be ordered to contribute to the legal fees incurred by First Respondent at an amount of at least CHF 20,000."*

74. The New CSKA's submissions can be summarized as follows:

- Even if the New CSKA does not agree with all the legal considerations made by the FIFA DC in the Appealed Decision, such decision rules in complete favour of the New CSKA and as a result, the New CSKA was prevented from appealing against such decision for lack of legal interest. This does not prevent the New CSKA from raising any issues that were dealt with within the Appealed Decisions.

- FIFA did not have jurisdiction to hear the case of the Agent since agents are not listed as one of the persons entitled to make use of the "enforcement procedure" implemented at FIFA to ensure compliance with FIFA or CAS decisions.

- The New CSKA is not the successor of the Original CSKA: it has different owners, different players, different licence and a different affiliation with BFU. The New CSKA is operated by a new management which has nothing to do with the financial failures of the Original CSKA. The New CSKA is the successor of Litex Lovech: the New CSKA took the license, the players and staff as well as all financial obligations over from Litex Lovech, even after the change of name from "Litex Lovech" to "PFC CSKA-Sofia".

- The case law on sporting succession essentially covers cases (i) in which legal formalities were abused by a club with the sole purpose of avoiding its financial obligations, and (ii) where no proper bankruptcy proceedings were held. Such case law is not relevant where proper national bankruptcy proceedings have been initiated, like in the present matter. In addition, the concept of sporting succession addresses scenarios of circumvention of financial obligations, but in the present

matter, the Appealed Decision does not imply once that the Appellant acted in bad faith and tried to circumvent financial obligations. To the contrary, the New CSKA paid a very substantial amount of money into the bankruptcy mass to acquire the rights it needed to use the sporting history of the Original CSKA. Finally, the present proceedings show significant differences to the *Talca* case (CAS 2011/A/2646), and therefore the concept of sporting succession as applied in such case does not apply in the present matter.

- According to a long-standing practice of the FIFA DC, in cases of bankruptcy of a club, the FIFA DC is no longer in position to intervene in the enforcement of claims against such bankrupt entity. Acting differently would contradict the equality among creditors and would constitute an undue interference with a State's monopoly. The national bankruptcy proceedings of the Original CSKA are still on-going and the Commercial Court of Sofia as well as the appointed trustee remain exclusively competent. Moreover, any issue with the bankruptcy proceedings shall be raised in Bulgaria in accordance with the applicable national law.

- The Appellant did not act diligently in seeking payment of his claim in the bankruptcy proceedings concerning the Original CSKA and is therefore precluded from seeking the forum of FIFA to remedy such failure: the Appellant's credit was not listed as accepted claims by the appointed trustee and he did not actively file any claim within the applicable time limits. The Appellant and his legal representative however knew about the bankruptcy proceedings at the latest on 14 October 2015. In addition, the Appellant did not demonstrate that he qualified as one of the "*known creditors who have their habitual residence [...] in another Member State*" within the meaning of Article 40 of the Council Regulation (EC) No. 1346/2000 so that the bankruptcy trustee did not fail to notify the Appellant of the opening of the bankruptcy proceedings. Contrary to what the Appellant contends, there would have been a theoretical possibility for the Appellant to recover the full amount of his claim through the bankruptcy proceedings of the Original CSKA. Finally, the *Talca* case does not imply what happens if a creditor is diligent but rather only what happens if the creditor is <u>not</u> diligent and does <u>not</u> participate in the national bankruptcy proceedings. As a result, should the Sole Arbitrator consider that the New CSKA is the sporting successor of the Original CSKA, the Appealed Decisions shall be upheld as a result of the lack of due diligence by the Appellant.

C. FIFA

75. In its Answer, FIFA requested the Sole Arbitrator to decide as follows:

"

[...] Rejecting the requests for relief sought by the [Agent];

[...] Confirming the Appealed Decision;

[...] Ordering the [Agent] to bear the full costs of these arbitration proceedings."

76. FIFA's submissions can be summarized as follows:

- The part of the Appealed Decision concerning the issue of sporting succession between the Original CSKA and the New CSKA has become *res judicata* as it was not disputed by the Appellant and cannot be disputed at this stage by the New CSKA.

- The New CSKA is not the successor of Litex Lovech: according to the minutes of the general shareholders' meeting of PFC Litex Lovech AD held immediately after being acquired by the New CSKA, the legal personality of the entity remained the same and only the name was changed to "PFC CSKA-Sofia". As a result, the New CSKA did not voluntarily accept to respect all obligations of Litex Lovech, but rather had no choice in fulfilling such pre-existing contracts and financial obligations.

- The New CSKA has become the sporting successor of the Original CSKA: both entities share the same name, the same history, the same titles and sporting achievements, the same colours, the same logo, the same registered address, the same stadium as well as the same internet domain. It is therefore undeniable that the New CSKA has sought to be identified by the Original CSKA's fans as the same successful Bulgarian club. In doing so, the New CSKA has benefitted from a pre-existing fan base, commercial value and a legacy that a real new club could never have obtained from one day to another. The argument according to which the New CSKA directly compensated the very vast majority of creditors of the Original CSKA is wrong as it only served to cover debts that had been approved by the Commercial Court of Sofia and which represented a small percentage of the complete debts of the Original CSKA. It is also irrelevant since the New CSKA ultimately obtained the Original CSKA for a bargain price compared to its real value.

- The dispute resolution system within sports federation is based on private law and as such cannot overrule public law issues such as those deriving from national insolvency law. As a result, once the Original CSKA went into insolvency proceedings, the Appellant had no choice but to claim his credit in the insolvency proceedings.

- In the Appealed Decision, the FIFA DC proceeded in accordance with the relevant jurisprudence by analysing the Appellant's diligence prior to deciding whether to sanction the New CSKA. Article 15 (4) of the FDC (2019 edition), which is not

applicable *in casu*, is not relevant to this end as it only purports to codify the applicable criteria in order to assess the issue of sporting succession. In the Appealed Decision, the FIFA DC correctly applied a two-level assessment: (i) whether a sporting succession took place, and (ii) in the affirmative, whether the successor club should be deemed responsible to pay the debt of the debtor. The Appellant became aware of the insolvency proceedings regarding the Original CSKA on 14 October 2015 at the latest. As a result, the argument related to the lack of notification of the opening of the insolvency proceedings as provided under Article 40 of the Council Regulation (EC) No. 1346/2000 is moot. Finally, there is no evidence that the Appellant would not have been able to recover his full credit in the insolvency proceedings.

- The *Talca* case (*CAS 2011/A/2646*) dealt with the unique scenario combining insolvency and sporting succession in a disciplinary matter. Until recently, the issue was not dealt with by CAS, in particular the *Talca* case was thus not overturned. There are many similarities between the *Talca* case and the present proceedings so that the *Talca* case is very relevant for the present matter.

V. JURISDICTION OF THE CAS

77. The question of whether the CAS has jurisdiction to hear the present dispute must be assessed on the basis of the *lex arbitri*. As Switzerland is the seat of the arbitration and not all Parties are domiciled in Switzerland, the provisions of the Swiss Private International Law Act ("PILA") apply, pursuant to its Article 176.1. In accordance with Article 186 of PILA, the CAS has the power to decide upon its own jurisdiction ("*Kompetenz-Kompetenz*").

78. Article R47 of the CAS Code provides as follows:

"*An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to it prior to the appeal, in accordance with the statutes or regulations of that body.[...]*"

79. Article 58 para. 1 of the FIFA Statutes provides *i.a.* as follows:

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

80. The Sole Arbitrator has no doubt that the Appealed Decision qualifies as a final decision passed by a FIFA legal body within the meaning of Article 58 para. 1 FIFA Statutes as mentioned above. As a result, CAS holds jurisdiction to decide on the present appeal brought against the Appealed Decision. Furthermore, the Parties confirmed that CAS holds jurisdiction in the present procedure during the hearing and by signing the Order of Procedure.

VI. ADMISSIBILITY

81. Article R49 of the CAS Code provides as follows:

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

82. Article 58 para. 1 of the FIFA Statutes provides as follows:

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

83. The present appeal was filed on 5 March 2020, i.e. within 21 days of the notification of the grounds of each of the Appealed Decision, i.e. on 13 February 2020. The Sole Arbitrator further notes that the other conditions listed under Article R48 of the CAS Code are also fulfilled. The present appeal is therefore admissible.

VII. APPLICABLE LAW

84. Pursuant to Article R58 of the CAS Code:

"*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.*"

85. Pursuant to Article 57 para. 2 of the FIFA Statutes:

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

86. The Sole Arbitrator shall therefore apply primarily the various regulations of FIFA. In light of the nature of the present matter, the Sole Arbitrator shall apply the FIFA Disciplinary Code. Considering that, pursuant to Article 72 para. 1 of the 2019 edition of the FIFA Disciplinary Code, the potential disciplinary offence was committed before the 2019 edition of the FIFA Disciplinary Code entered into force, the Sole Arbitrator shall apply the 2017 edition of the FIFA Disciplinary Code (the "FDC") in the present matter.

Pursuant to Article 57 para. 2 of the FIFA Statutes, the Sole Arbitrator shall apply Swiss law complementarily, whenever warranted.

VIII. MERITS

87. In light of the Parties' submissions, the Sole Arbitrator shall decide on the issue of whether the New CSKA is liable and responsible to pay the amounts imposed upon the Original CSKA in the PSC Decision.

88. However, before delving into the analysis of this issue, the Sole Arbitrator needs to address preliminary issues raised by the Parties.

A. Preliminary Issues

a.) Admissibility of Appellant's submission dated 11 March 2021

89. First, the Sole Arbitrator notes that on 12 March 2021, FIFA objected to the admissibility of the Appellant's comments on the proof of fax transmission of the letter dated 14 October 2015 dated 11 March 2021. FIFA submitted that the Appellant's submission "*have no direct relation to the production of the fax confirmation of a letter that has been on file since the filing of our Answers and whose notification was questions by the [Appellant] only at the hearing*" and that as a result requested the Sole Arbitrator not to admit them to the case file. On 15 March 2021, the New CSKA informed the CAS Court Office that it seconded the contentions made by FIFA according to which the Appellant's comments were limited to the fax transmission confirmation and the evidential value of said document and that any consideration that fall beyond the scope of the Sole Arbitrator's request shall be disregarded. On 16 March 2021, the Appellant objected to the Respondents' contention considering that the Appellant's allegations on the said fax transmission "*are absolutely necessary in order to ensure that the [Appellant's] right to present [his case] is preserved in light of the new evidence*" and that "*[i]t must be recalled in this respect that the evidence on file until the hearing, after numerous filings by the Respondents (including their main briefs: the Answers), fell short of proving not only the receipt by, but also the dispatch to, Mr. Bárcena of the letter of 14 October 2015.*"

90. Through the CAS Court Office's letter dated 24 February 2021, the Sole Arbitrator decided that "*FIFA is allowed to submit proof of fax transmission to the letter dated 14 October 2015 to [the Agent]*" considering that "*FIFA is just requesting to submit a document which merely supplements and completes a piece of evidence that it has already provided. Therefore, FIFA is not introducing any new element or fact in the proceedings which could prejudice the [Appellant's] rights.*" The Sole Arbitrator also decided that "*the [Appellant] will thereafter be invited to comment on FIFA's new submission regarding the fax transmission by 11 March 2021.*"

91. The Sole Arbitrator notes that the 11-pages letter filed by the Appellant on 11 March 2021 contains submissions as to the admissibility of the fax transmission as produced by FIFA

on 24 February 2021 as well as to the consequences of said document on its legal position should the latter be admitted on file anyway, namely the Appellant's legal position as to the merits in case the opening of the insolvency proceedings was indeed notified to the Agent on 14 October 2015. In light of the instructions given to the Appellant on 24 February 2021, the Sole Arbitrator finds that the Appellant's submission dated 11 March 2021 shall be admitted on file only to the extent it strictly relates to the production of the fax transmission and its probative value. Any additional arguments put forward by the Appellant in this submission shall be disregarded by the Sole Arbitrator.

b.) The Appellant's standing before CAS

92. Secondly, the Sole Arbitrator notes that the Agent's standing to invoke Article 64 FDC was raised at the hearing in relation to the latter's registration with the *Real Federación Española de Fútbol*, the Spanish Football Federation, as agent. Following instructions given by the Sole Arbitrator, the Agent submitted a confirmation from the Spanish Football Federation, according to which he has been registered as agent with the Spanish Football Federation as from 22 April 2002 until 31 March 2015 and as from 6 September 2015 until today.

93. In accordance with past CAS panels decisions, the Sole Arbitrator finds that entities/persons that are not members of FIFA cannot invoke Article 64 of the FDC since they are not subject to the various regulations of FIFA, which is reinforced by the exhaustive list of entities/persons enumerated in Article 3 of the FDC that are subject to the FDC. In addition, contrary to what the New CSKA claims, Article 64 FDC does not contain any further express limitation as to the persons who are entitled to make use of the "enforcement mechanism" provided under that provision. Moreover, in line with past CAS panels decisions, the standing of an entity in order to invoke Article 64 of the FDC is in general to be examined at the moment of lodging the claim, as it concerns a formal prerequisite for the validity of the claim. In the present matter, the Sole Arbitrator notes that the Agent was registered as a players' agent as from 24 April 2002 until 31 March 2015 and as from 6 September 2015 until today, and therefore was registered as players' agent with the Spanish Football Federation at the moment he requested the FIFA DC to apply Article 64 of the FDC in respect of the Original CSKA and later in respect of the New CSKA. As a result, the Sole Arbitrator finds that the Agent has standing to invoke Article 64 of the FDC in the present proceedings in relation to the latter's registration as players' agent with the Spanish Football Federation. For the same reasons, the Sole Arbitrator finds that - contrary to what was argued by the New CSKA – the FIFA DC was competent to render the Appealed Decision.

94. Even though the Parties have not formally raised an objection on this, the Sole Arbitrator wishes to make a further observations on the issue of whether the Appellant has standing to appeal in the present proceedings since he was not formally a party to the proceedings leading to the Appealed Decision. There is indeed abundant CAS jurisprudence according to which Article 64 FDC serves to protect the interests of FIFA (e.g., CAS 2006/A/1206, 2007/A/1329&1330, CAS 2007/A/1367, CAS 2008/A/1620, CAS 2012/A/2981) and in

which the panels concluded that, in the event measures adopted by FIFA under (the provisions corresponding to) Article 64 FDC are challenged, the creditor of the unpaid amount has no standing to be sued, since "*the proceedings before the DC ... intended to protect primarily an essential interest of FIFA, i.e. the full compliance by the affiliates of the decisions rendered by its bodies. In other words, the core of the DC Decision, and of the appeal brought in these proceedings against it, regards only the existence of a disciplinary infringement by ... and the power of FIFA to sanction it*" (e.g. CAS 2012/A/2981, para. 48).

95. Despite the above, CAS panels have in the past also recognized that Article 64 FDC also serves the interests of the judgment creditor, in particular as disciplinary proceedings are only initiated upon request of the judgment creditor and not by FIFA *sua sponte* (for instance CAS 2015/A/4162, para. 74).

96. After careful analysis, the Sole Arbitrator finds that the fact that Article 64 of the FDC also serves the interests of the judgment creditor rather than only FIFA's interest, appears all the more evident when, like in the present case, in the framework of the disciplinary proceedings, the FIFA DC made findings on two issues of a substantive rather than disciplinary nature: (i) whether the New CSKA is the sporting successor of the Original CSKA and (ii) whether the Agent has been diligent enough in pursuing his claim in the bankruptcy proceeding of the Original CSKA. With respect to this last question, the FIFA DC explained that it was of paramount importance that a judgment creditor seeking to recover his credit participated in the bankruptcy proceedings at national level. If the Agent is not party to the procedure before the FIFA DC and cannot appeal against the Appealed Decision before the CAS, then the question arises as to how he can establish that he was diligent enough in collecting his debt in the bankruptcy proceedings of the Original CSKA.

97. The Sole Arbitrator therefore finds that, in the context of the present matter, the Agent is affected in his substantive rights by the outcome of the present appeal procedure. As a result, the Sole Arbitrator finds that the Agent has standing to appeal in the present procedure.

c.) Scope of review of CAS

98. FIFA contends that the issue of sporting succession has become *res judicata* and is no longer open for discussion since the Appellant focused its appeal on the issue of due diligence and fully agrees with the Appealed Decision to the extent it confirmed the sporting succession of the Original CSKA by the New CSKA. The New CSKA, however, contends that although it did not appeal against the Appealed Decision, it may still raise any legal consideration made in the Appealed Decision with which it disagrees. The Appellant submits that the issue of sporting succession is not the subject of the present appeal proceedings.

99. The binding effect of a judgment applies only to the operative part of the award and not

to its grounds, even if the latter may complement the meaning of the operative part. This is particularly true in cases where the operative part simply dismisses the claim. It follows that in matters of partial claims, the grounds of the first judgment have no binding effect on subsequent trials, even if the questions which arise are typically the same (Decision of the Swiss Federal Tribunal, 4A_536/2018, 16 March 2020, consid. 3.1.1 and references).

100. In the present matter, the operative part of the Appealed Decision states as follows:

> "*(...)*
>
> *1. All charges against the club PFC CSKA-Sofia are dismissed.*
>
> *2. The disciplinary proceedings initiated against the club PFC CSKA Sofia-CSKA are hereby declared closed.*"

101. The Sole Arbitrator observes that the operative part of the Appealed Decision makes no reference to the sporting succession issue. Therefore, the factual findings and legal grounds of the Appealed Decision with respect to this issue do not bind the Sole Arbitrator, which, pursuant to Article R57 of the Code, has full power to review the facts and the law.

102. In light of the above, the Appealed Decision has no *res judicata* effect as far as the sporting succession issue is concerned.

B. Liability of New CSKA to Pay the Debts imposed upon the Original CSKA in the PSC Decision

103. The Sole Arbitrator now turns to the analysis of whether the New CSKA is liable to pay the amounts imposed upon the Original CSKA in the PSC Decision. The Parties agree that if New CSKA qualifies as the sporting successor of the Original CSKA, it will be *liable* to pay the debts imposed upon the Original CSKA in the PSC Decision.

104. The legal concept of sporting succession has been extensively dealt with in CAS case law (see *inter alia* CAS 2007/A/1355; CAS 2011/A/2614; CAS 2011/A/2646; CAS 2012/A/2778; CAS 2013/A/3425; CAS 2016/A/4550; CAS 2016/A/4576; CAS 2018/A/5618). The effect of these decisions is that the sporting successor of a former, no longer existing club, as a matter of principle, be liable to meet the financial obligations of that former club notwithstanding in particular that the successor is not a party to any agreement, arrangement or understanding pursuant to which the financial obligation arose and regardless of whether there has been a change of management or corporate structure or ownership of the club in question (CAS 2020/A/6884).

105. The Sole Arbitrator notes that the issue of whether or not the New CSKA is the sporting successor of the Original CSKA has already been recently examined by another CAS panel in the framework of another dispute involving the New CSKA, FIFA and a third party (CAS 2020/A/6884). In the Sole Arbitrator's view, it is not necessary to decide, in

the framework of the present dispute, whether the New CSKA is the sporting successor of the Original CSKA or not, since (i) the Sole Arbitrator is free to determine how to address the sequence of the different substantive questions at stake in legal proceedings and (ii) for the reasons exposed hereafter, it will not change the outcome of the present procedure.

C. Responsibility of New CSKA to Pay the Debts imposed upon the Original CSKA in the PSC Decision

106. The Parties disagree as to the applicable conditions to be fulfilled in order for the New CSKA to be *responsible* to pay the debts imposed upon the Original CSKA in the PSC Decision. One of the Appellant's first contentions is that he was not required to attempt to recover his credit in the bankruptcy proceedings of the Original CSKA, whereas FIFA and the New CSKA argue that by failing to participate in the bankruptcy proceedings of the Original CSKA, the Appellant contributed to the non-compliance by the Original CSKA, and subsequently by the New CSKA, of the PSC Decision; as a result, the New CSKA shall not be sanctioned.

107. The Sole Arbitrator first notes that according to CAS case law, in order for a successor club to be *responsible* to pay the debts imposed upon the former club, the judgment creditor must have acted diligently in pursuing his claim in the bankruptcy proceedings of the former club (see *inter alia* CAS 2020/A/6884; CAS 2011/A/2646; CAS 2019/A/6461, CAS 2020/A/67.

108. In the *Talca* case, the CAS panel indeed stated that

> "[…] *[T]he [creditor] somehow contributed not to remove the prerequisite leading to the sanction imposed on the Decision: the lack of payment of the debt ordered in the FIFA DRC decision [...]. His inactivity did not foster the recovery of the debt and hence the elimination of the circumstances of fact which gave rise to the sanction imposed by the Decision.*
>
> *[...]At the present stage the Panel cannot ascertain if the [creditor] would have received the sum of his credit in case he had duly claimed for it in the bankruptcy proceedings, but it was at least a feasible theoretical possibility that could have happened (especially taking into account the privileged nature of his credit) and which would have provoked that the order of payment issued by the FIFA DRC was complied and thus, that the sanction imposed in the Decision became groundless. The Panel is of the view that the [creditor] should have explored such possibility, should have communicated his credit in the bankruptcy proceedings [....], should have tried to get the money and not simply remain passive, additionally pretending that disciplinary sanctions are imposed irrespective of his diligence or negligence in trying to achieve a result (recovery of the debt) that would remove the ground of the sanction." (CAS 2011/A/2646*, para. 30-31 in published award; see also: CAS 2020/A/6884; CAS 2019/A/6461, CAS 2020/A/6745.).

109. Hence, as was decided in the above cited jurisprudence of the CAS, in principle, no disciplinary sanctions can be imposed on a club as a result of succession should the judgment creditor fail to claim his credit in the bankruptcy proceedings of the former club, as there is a theoretical possibility he/she could have recovered his/her credit, instead of remaining passive. It is therefore necessary to examine whether a judgment creditor has shown the required degree of diligence to recover the amounts he/she is owned. As was also clearly considered by the panel in CAS 2019/A/6461, there is no blanket rule whether a judgment creditor has shown the required degree of diligence. The assessment of the judgment creditor's diligence has to be made based on the specific circumstances of the case.

110. In the Sole Arbitrator's view, the *Talca* case is relevant to the present matter since it dealt – like in the present matter – with the scenario combining insolvency and sporting succession in a disciplinary matter. Moreover, the *Talca* case was available to the Appellant already since 2012. Finally, contrary to what was argued by the Appellant, the *Talca* case was not overturned by the case in CAS 2013/A/3380. In the case CAS 2013/A/3380, the panel had to analyse a completely different set of circumstances than those of the *Talca* case (and of the present case), in particular considering that the debt under analysis in that matter were not subject to any insolvency laws.

111. In light of the above considerations, the Sole Arbitrator cannot accept the Appellant's argument, according to which there is no due diligence requirement for the creditor in pursuing his credit in the insolvency proceedings.

112. The Sole Arbitrator shall therefore examine whether the above-mentioned condition is met in the framework of the present matter. The Parties have different views on this also. The Appellant contends that he cannot be held responsible for the negligence of the trustee and that the condition to act with diligence is fulfilled in the present matter as the trustee failed to notify the opening of the insolvency proceedings to the Agent so that the latter was thus unaware of the existence of such proceedings until 2017. The New CSKA and FIFA contend to the contrary that the Agent was not diligent enough since he failed to file his claim into the bankruptcy proceedings of the Original CSKA within the prescribed time limits, although he knew about the ongoing insolvency proceedings since 2015 at the latest.

113. The Sole Arbitrator first notes that the Agent was informed of the existence of bankruptcy proceedings of the Original CSKA at the latest by the letter from the FIFA DC dated 14 October 2015, which attached the decision of the Commercial Court of Sofia dated 2 October 2015 declaring the opening of bankruptcy proceedings of the Original CSKA. In addition, the opening of bankruptcy proceedings of the Original CSKA was published in the Commercial Registry of the Republic of Bulgaria as well as in the media. In the Sole Arbitrator's view, the Agent knew or at least should have known about the bankruptcy proceedings of the Original CSKA.

114. Furthermore, the bankruptcy trustee of the Original CSKA, Ms Dora Mileva Slateva, confirmed at the hearing that:

a. The Agent's credit was not registered *ex officio* in the bankruptcy of the Original CSKA as there were no document in the accounting of the Original CSKA establishing a valid receivable in the benefit of the Agent.
b. Despite having the possibility to do it, the Agent did not contest the list of accepted claims that was published with the Commercial Registry and did not otherwise register his claim in the bankruptcy of the Original CSKA.
c. Since the Agent's credit was not included in the list of accepted claims that was approved by the court, his credit is not included in the distribution plan.
d. To date, the bankruptcy account contains funds for an amount of BGN 7'835'367,50 (EUR 4'006'159,79).

115. Considering the above elements of fact, it appears evident that despite knowing that the Original CSKA was undergoing bankruptcy proceedings, the Agent consciously chose not to pursue his credit in the bankruptcy proceedings. Indeed, the Agent did not take any step to ensure that his credit was registered in the bankruptcy proceedings or to contest the list of accepted claims until 2020 when the present appeals proceedings were ongoing. It appears therefore clearly that instead of exploring the possibility of receiving the payment of his claim from the bankruptcy proceedings, the Agent consciously chose to pursue his claim through the channel of the FIFA DC exclusively.

116. This is even more remarkable that chances for the Agent of recovering the entirety of his credit were far from being theoretical. Indeed, it is demonstrated that, as a result of the purchase of the Original CSKA's IP right by the New CSKA through a legal entity called "Red Animals EOOD", the bankruptcy account of the Original CSKA amounts to approximatively EUR 4'000'000. As a result, it is likely that the Agent would have received the full amount of his credit through the bankruptcy procedure, had he chosen to act diligently in such bankruptcy proceedings.

117. As a result, the Sole Arbitrator is of the view that the Agent should at the least have explored the possibility of claiming the entirety of his claim in the bankruptcy proceedings of the Original CSKA, also to reserve any legal right, instead of remaining passive as he did. The Agent therefore failed to show the required degree of diligence to recover the amounts he owns in the bankruptcy proceedings of the Original CSKA. As a result, the Sole Arbitrator finds that – even if the New CSKA was recognised as the sporting successor of the Original CSKA, which remains an open question – the New CSKA could anyways not be held responsible for the debts of the Original CSKA towards the Agent as recognised by the PSC Decision. The Appealed Decision is therefore confirmed.

IX. COSTS

118. Article R64 of the CAS Code provides the following:

"*At the end of the proceedings, the CAS Court Office shall determine the final amount of the cost of arbitration, which shall include:*

- *the CAS Court Office fee,*
- *the administrative costs of the CAS calculated in accordance with the CAS scale,*
- *the costs and fees of the arbitrators,*
- *the fees of the ad hoc clerk, if any, calculated in accordance with the CAS fee scale,*
- *a contribution towards the expenses of the CAS, and*
- *the costs of witnesses, experts and interpreters.*

The final account of the arbitration costs may either be included in the award or communicated separately to the parties. The advance of costs already paid by the parties are not reimbursed by the CAS with the exception of the portion which exceeds the total amount of the arbitration costs."

119. Article R64.5 of the CAS Code provides as follows:

"*In the arbitral award, the Panel shall determine which party shall bear the arbitration costs or in which proportion the parties shall share them. As a general rule and without any specific request from the parties, the Panel has discretion to grant the prevailing party a contribution towards its legal fees and other expenses incurred in connection with the proceedings and, in particular, the costs of witnesses and interpreters. When granting such contribution, the Panel shall take into account the complexity and outcome of the proceedings, as well as the conduct and the financial resources of the parties.*"

120. In light of the outcome of the present arbitration, the Sole Arbitrator finds that the costs of the present arbitration, to be determined and served to the Parties by the CAS Court Office, shall be entirely borne by the Agent.

121. In addition, pursuant to Article 64.5 of the CAS Code, and in consideration of the outcome of the present appeal proceedings as well as the financial position of each of the Parties, the Sole Arbitrator holds that the Agent shall pay a contribution to New CSKA towards the legal fees and other expenses incurred by the latter in connection with the present arbitration proceedings in the amount of CHF 3,000 (three thousand Swiss francs).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed on 5 March 2020 by Mr Joaquín Bárcena Uriarte against PFC CSKA-Sofia and the *Fédération Internationale de Football Association* with respect to the decision taken by the FIFA Disciplinary Committee on 20 November 2019 is dismissed.

2. The decision taken by the FIFA Disciplinary Committee on 20 November 2019 is confirmed.

3. The costs of the arbitration, to be determined and served to the Parties by the CAS Court Office, shall be borne entirely by Mr Joaquín Bárcena Uriarte.

4. Mr Joaquín Bárcena Uriarte shall pay a contribution to PFC CSKA-Sofia towards the legal fees and other expenses incurred in connection with the present arbitration proceedings in the amount of CHF 3,000 (three thousand Swiss francs).

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

Seat of arbitration: Lausanne, Switzerland
Date: 7 September 2021

THE COURT OF ARBITRATION FOR SPORT

Fabio Iudica
Sole Arbitrator

Stéphanie De Dycker
Clerk