CAS 2021/A/8290 Club Menemenspor v. KF Laçi & Fédération Internationale de Football Association

PRELIMINARY ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

Sole Arbitrator: Mr Edward **Canty**, Solicitor, Manchester, United Kingdom

in the arbitration between

Club Menemenspor, Menemen, Turkey

Represented by Mr Ali Topuz, Attorney-at-Law, Istanbul, Turkey

Appellant

and

KF Laçi, Laçi, Albania

Represented by Mr Jan Schweele, Attorney-at-Law, Berlin, Germany

First Respondent

&

Fédération Internationale de Football Association (FIFA), Zurich, Switzerland

Represented by Mr Miguel Liétard Fernández-Palacios, Director of Litigation, Zurich, Switzerland

Second Respondent

I. PARTIES

1. Club Menemenspor (the "Appellant" or "Menemenspor") is a football club with its registered office in Menemen, Turkey. The Appellant is registered with the Turkish Football Federation (Türkiye Futbol Federasyonu) (the "TFF"), which in turn is affiliated to the Fédération Internationale de Football Association ("FIFA").

2. KF Laçi (the "First Respondent" or "Laçi") is a football club with its registered office in Laç, Albania. The First Respondent is registered with the Football Association of Albania (Federata Shqiptare e Futbollit) (the "FSHF"), which in turn is affiliated to FIFA.

3. Fédération Internationale de Football Association (the "Second Respondent" or "FIFA") is an association under Swiss law (Articles 60 et seq. of the Swiss Civil Code (the "SCC")) and has its registered office in Zurich, Switzerland. FIFA is the world governing body of international football. It exercises regulatory, supervisory and disciplinary functions over national associations, clubs, officials and football players worldwide.

II. FACTUAL BACKGROUND

4. Below is a summary of the main relevant facts, as established based on the Parties' written submissions and the evidence examined in the course of the present appeals arbitration proceedings[1]. This background is made for the sole purpose of providing a synopsis of the matter in dispute. Additional facts and allegations found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal analysis that follows. While the Sole Arbitrator has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, this Award refers only to the submissions and evidence considered necessary to explain its reasoning.

A. Background Facts

5. The player Gentian Selmani (the "Player") was born on 9 March 1998. He was registered with and trained by the First Respondent for the seasons between his 17th and 20th birthday.

6. On 16 August 2019, the Player transferred from the First Respondent to the Appellant.

[1] Several of the documents submitted by the Parties and referred to in this Award contain various misspellings: for the sake of efficiency and to facilitate the reading of this Award, not all of the misspellings have been identified with a [sic] or otherwise.

B. Proceedings before the FIFA Dispute Resolution Chamber

7. On 19 April 2021, the First Respondent filed a claim against the Appellant before the FIFA Dispute Resolution Chamber (the "FIFA DRC") for the unpaid training compensation relating to the Player's transfer and included the following information:

"*The Claimant requests that the FIFA Dispute Resolution Chamber (hereafter, the "FIFA DRC") issues a decision, based on the events and legal arguments described below and backed by the documentary evidence, in favour of the Claimant, and sentences the Respondent to pay to the Claimant training compensation in the amount of* ***EUR 120,000.00*** *plus interest of 5 % p.a. as of the due date until the date of effective payment.*

The present claim does not hold any complex factual and/or legal issues and the DRC has already established clear jurisprudence for the matter at hand. Therefore, according to art. 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber the Claimant requests FIFA Administration to present a written proposal to the parties.

[…]

Unfortunately, the Respondent has not complied with its obligation to compensate the Claimant to date and did not react to the continued payment requests made by the Claimant.

Thus, the intervention of the FIFA DRC is required.

[…]" (emphasis in original)

8. On 21 April 2021, FIFA issued its proposal based on Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, January 2021 edition (the "Procedural Rules") as follows (the "Proposal Letter"):

"***Proposal from the FIFA general secretariat***

FIFA has been informed on 19 April 2021 that KF Laci has not received payment of a training compensation related to the registration of the player, Gentian Selmani, in your club. This notification is contained in TMS for your persual.

*In accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber, (**Procedural Rules**) the FIFA general secretariat proposes to settle this matter as follows:*

The Respondent, Menemen Belediyesporm, shall pay the Claimant, KF Laci: *EUR 120,000 plus 5% interest per annum as from 15 September 2019 until the date of effective payment.*

*Payment (including any applicable interest) shall be made within **30 days** as from notification of the confirmation letter.*

This proposal is without prejudice to any decision made by the relevant FIFA decision-making body if a party rejects the proposal.

*Article 13 of the Procedural Rules provides that the parties must either accept or reject the proposal **within 15 days of notification of this letter, i.e. by 6 May 2021**.*

A party that fails to respond to a proposal is deemed to have accepted it.

If both parties accept the proposal, a confirmation letter shall be issued and the proposal will become a final and binding decision.

The Claimant may only accept or reject the proposal. They may not amend their claim.

*If the Respondent rejects the proposal, the latter will have **five additional days, i.e. until 11 May 2021,** to provide its position to the claim (including any exhibits duly translated if need be to English, Spanish, German or French).*

*Should the respondent require further time after rejection of the proposal, it must request an extension of time in writing by **11 May 2021**. If a valid request is received, the deadline shall be automatically extended by **five (5) additional days, i.e. until 16 May 2021**.*

If either party rejects the proposal, the relevant FIFA decision-making body will make a decision on the matter. In such case, the date of the meeting as well as the composition of the FIFA decision-making body will be confirmed in due course.

[…]" (emphasis in original)

9. On 27 April 2021, the First Respondent accepted the proposal as set out in the Proposal Letter by FIFA's Transfer Matching System ("TMS").

10. The Appellant failed to respond before the issued deadline, or at all, which lead to FIFA issuing a further letter dated 17 May 2021 confirming that the proposal had become binding (the "Confirmation Letter"):

"***Confirmation Letter***

*We refer to the proposal made by the FIFA general secretariat in accordance with Article 13 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (**Procedural Rules**).*

*As both parties either accepted the proposal or failed to respond to it, we confirm that the following now constitutes a final and binding decision on all parties pursuant to the FIFA Regulations on the Status and Transfer of Players (**Regulations**).*

Decision

The Respondent, Menemen Belediyesporm, shall pay the Claimant, KF Laci: *EUR 120,000 plus 5% interest per annum as from 15 September 2019 until the date of effective payment.* *Payment (including any applicable interest) shall be made within **30 days** as from notification of the confirmation letter.*

Full payment (including all applicable interest) shall be made to the bank account set out in the enclosed Bank Account Registration Form.

In the event that full payment (including all applicable interest) is not made by the Respondent within the stated time limit, the matter shall be submitted, upon request of the Claimant, to the FIFA Disciplinary Committee.

[…]" (emphasis in original)

11. On 28 July 2021, the First Respondent wrote to FIFA requesting that it opens disciplinary proceedings against the Appellant due to its failure to pay the outstanding amounts due.

12. On 2 August 2021, the secretariat to the FIFA Disciplinary Committee (the "FIFA DC") opened disciplinary proceedings and informed the Appellant and First Respondent that the case would be heard by the FIFA DC on 26 August 2021 and requested the Appellant to provide its position in advance of that date.

13. On 9 August 2021, the Appellant provided its position as follows:

"*We refer to the above-captioned matter and in particular, Mr. Carlos Schneider's letter dated 2 August 2021 in which was notified that the disciplinary proceedings have been opened against Club Menemenspor ("the client club") (**Annex-1:** Power of Attorney) for the potential breach of Art. 15 of FDC.*

*Please kindly note that Club KF Laçi had given a waiver in favour of the client club, Menemenspor, which is attached herein this petition (**Annex-2**). Pursuant to the enclosed waiver signed by Mr. Pashk Laska, the President of Club KF Laçi, we have lodged a new claim in front of the FIFA PSC, today, regarding the present matter (**Annex-3**).*

In this respect, we respectfully request from the Disciplinary Committee to consider our recently submitted claim as preliminary issue, hence; to suspend the ongoing disciplinary proceedings.

[…]" (emphasis in original)

14. On 26 August 2021, the FIFA DC passed the following decision (the "FIFA DC Decision") which was notified to the Appellant on 30 August 2021:

> "*1. Menemen Belediyespor is found responsible for failing to comply in full with the decision passed by FIFA on 17 May 2021.*
>
> *2. Menemen Belediyespor is ordered to pay to KF Laci as follows:*
>
> *- EUR 120,000 plus 5% interest per annum as from 15 September 2019 until the date of effective payment.*
>
> *3. Menemen Belediyespor is granted a final deadline of 30 days as from notification of the present decision in which to settle the said amount. Upon expiry of the aforementioned final deadline and in the event of persistent default or failure to comply in full with the decision within the period stipulated, a transfer ban will be pronounced until the complete amount due is paid or the non-financial decision is complied with. The transfer ban will be implemented automatically at national and international level by the Turkish Football Association and FIFA respectively, without a further formal decision having to be taken nor any order to be issued by the FIFA Disciplinary Committee or its secretariat. In addition, a deduction of points or relegation to a lower division may also be ordered in addition to a transfer ban in the event of persistent failure, repeated offences or serious infringements or if no full transfer could be imposed or served for any reason.*
>
> *4. Menemen Belediyespor is ordered to pay a fine to the amount of CHF 15,000. The fine is to be paid within 30 days of notification of the present decision.*"

C. Proceedings before the FIFA Players' Status Committee

15. On 9 August 2021, the Appellant filed a claim against the First Respondent before the FIFA Players' Status Committee (the "FIFA PSC") seeking a declaration that the Appellant did not owe the training compensation sum set out in the Confirmation Letter as follows:

> "[…]
>
> *7- The confirmation letter dated May 17, 2021 cannot be accepted as a decision.*
>
> *8- Procedural Rules art. 14 (4) stipulates the minimum aspects that a decision must contain.*
>
> *9- In this regard, the confirmation letter issued pursuant to art. 13 (3) does not contain nearly none of those aspects.*
>
> *10- The appeal procedure and the time limit are not either clearly stated in the confirmation letter.*

11- In light of the above-mentioned facts, the confirmation letter issued pursuant to art. 13 (3) of the Procedural Rules cannot be interpreted and considered as a final and binding decision that cannot be subject to a fair trial.

12- Without prejudice to the above-mentioned explanations, art. 13 of the Procedural Rules that stipulates that a party who fails to reject the proposal within the time limit would be deemed to accepted the proposal violated the Client's right to a fair trial and to be heard.

13- The requests and other relevant documents related to training compensations are communicated via TMS. However FIFA has not established any necessary structures (i.e. SMS, e-mail) to notify the parties about communicated documents via TMS.

14- Thus, the Client cannot be deemed to be notified properly about the claim against it. Therefore, the Client could not submit its response and any related evidences.

15- As presented in the Annex-2, the Respondent waived its right to receive any training compensation from the Client regarding the transfer of the player, Gentian Selmani and explicitly guarantees not to give objection or open legal case against the Client before FIFA, regarding training compensation.

16- The waiver clearly affects and reverses the outcome of the dispute on training compensation case with ref. nr. TMS 8220 and the Client must not be restrained from submitting such evidence due to the strict implementation of art. 13 of Procedural Rules.

17- The Swiss Supreme Court, in its precedents, underlines that the right to a fair trial of the party who cannot exercise the right to be heard due to procedural deficiencies and therefore cannot present effective evidences on the merits is violated.

[...]

20- In light of the above-mentioned facts and explanations, it is evident that the Respondent waived its rights to receive any training compensation from the Client regarding the transfer of the player, Gentian Selmani, and afterwards; applied FIFA most likely due to the lack of communication between the President of the Respondent and its employees who signed such documents related on the procedure with ref. nr. TMS 8220.

21- Art. 5 (2) of the Procedural Rules refers "All persons involved in legal application and adjudication processes shall act in good faith." We believe, at this stage, the Respondent will accept the legitimacy of the present claim, thus; will act in accordance with pacta sunt servanda and bona fides.

22- *Consequently, it shall be ruled that the Client does not have any obligation to pay EUR 120,000 plus interest as the training compensation regarding the said registration.*

[…]"

16. On 12 August 2021, the FIFA Administration, particularly the Head of Players' Status, wrote to the Appellant making reference to the Confirmation Letter and the fact that it was final and binding as at that date, as follows:

"[…] *we kindly refer Menemenspor to art. 13 par. 1 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (hereinafter: Procedural Rules), according to which, if a proposal is made by the FIFA administration, "the parties shall be informed that they have 15 days from receipt of FIFA's proposals to request, in writing, a formal decision from the relevant body, and that failure to do so will result in the proposal being regarded as accepted by and binding on all parties".*

To this end, we recall Menemenspor of the contents of our letter dated 21 April 2021 in the proceedings ref. TMS 8220, which stated that "A party that fails to respond to a proposal is deemed to have accepted it".

Bearing in mind the foregoing, we note no response was received from Menemenspor in connection with the proposal issued by the FIFA administration on 21 April 2021 on the cited proceedings, following which such proposal became binding on 6 May 2021 and a confirmation letter was sent to the parties on 17 May 2021.

Equally, we also refer Menemenspor art. 13 par. 3 of the Procedural Rules, according to which, where a proposal is accepted, "a) a confirmation letter shall be issued; b) the confirmation letter shall be considered a final and binding decision pursuant to the FIFA Regulations on the Status and Transfer of Players".

Consequently, we deem both that Menemenspor accepted the proposal of the FIFA administration and that the confirmation letter of 17 May 2021 is final and binding. Accordingly, the issue is res judicata and we do not appear to be in a position to further intervene in the matter.

[…]"

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

17. On 2 September 2021, the Appellant filed a Statement of Appeal with the Court of Arbitration for Sport (the "CAS") against the letter from the FIFA Administration on 12 August 2021 (Ref. FPSD-3269) (the "Appealed Decision"), pursuant to Article R48 of the CAS Code of Sports-related Arbitration (edition 2021) (the "CAS Code") naming Laçi and FIFA as the Respondents. In this Statement of Appeal, the Appellant requested

that the appeal be submitted to a Sole Arbitrator and requested a stay of the execution of the FIFA DC Decision.

18. On 8 September 2021, the CAS Court Office requested pursuant to Article R37 of the CAS Code that the Respondents file their position with regard to the Appellant's Request for Provisional Measures.

19. On 14 September 2021, the CAS Court Office circulated a copy of the Appellant's Appeal Brief, filed on 13 September 2021, and pursuant to Article R55 of the CAS Code, requested that the Respondents file their Answers within twenty days.

20. By letters dated 14 and 16 September 2021, the Second Respondent agreed to the appointment of a Sole Arbitrator, providing selected from the football list, to the use of English and requested that the time limit for the filing of its Answer to be set aside and fixed after the Appellant has paid the advance of costs, in accordance with Article R55 of the CAS Code.

21. On 16 September 2021, the CAS Court Office confirmed the deadline for the Second Respondent's Answer was set aside and the deadline would be fixed once the Appellant had paid its share of the advance of costs.

22. On 21 September 2021, the CAS Court Office noted the First Respondent's agreement to the use of English and the appointment of a Sole Arbitrator and also granted its request for a ten-day extension to file its Answer.

23. On 1 October 2021, the CAS Court Office circulated the Respondents' submissions in response to the Appellant's Request for Provisional Measures and invited the Appellant to provide its comments.

24. On 8 October 2021, the CAS Court Office circulated the Appellant's comments on the Respondents' submissions relating to its Request for Provisional Measures.

25. On 15 October 2021, the CAS Court Office invited the Respondents to submit their comments on the Appellant's request for a stay.

26. On 25 October 2021, the CAS Court Office circulated the Respondents' comments regarding the Appellant's request for a stay.

27. On 26 October 2021, the CAS Court Office confirmed the Appellant had paid the advance of costs and therefore set the deadline for the Second Respondent to file its Answer.

28. By way of second letter on 26 October 2021, the CAS Court Office circulated to the Parties a copy of the Order on Request for a Stay which dismissed the Request.

29. On 2 November 2021, the CAS Court Office circulated the Second Respondent's letter of 29 October 2021 regarding the admissibility of the appeal and requesting the bifurcation of the proceedings and invited the Appellant and First Respondent to provide

their comments. Further, the CAS Court Office suspended the deadline for the Second Respondent's Answer and also informed the Parties, pursuant to Article R54 of the CAS Code and on behalf of the Deputy President of the CAS Appeals Arbitration Division, that the arbitral tribunal appointed to decide the present matter was constituted by:

- Mr Edward Canty, Attorney-at-Law in Manchester, United Kingdom, as Sole Arbitrator

30. On 8 November 2021, the CAS Court Office circulated the First Respondent's comments on the admissibility of the appeal and request for bifurcation.

31. On 9 November 2021, the CAS Court Office circulated the Appellant's comments on the admissibility of the appeal and request for bifurcation and its request to consolidate these proceedings with another as yet unopened procedure.

32. On 19 January 2022, the CAS Court Office confirmed that the Appellant's request for consolidation with the now opened other procedure had been rejected.

33. On 21 February 2022, the CAS Court Office informed the Parties that the Second Respondent's request for bifurcation to address the admissibility of the appeal was granted, with the issue of the standing of the First Respondent to be addressed in the preliminary award, and requested the Parties to confirm whether or not they required a hearing limited to the question of admissibility to be held.

34. On 22 February 2022, the CAS Court Office provided a copy of the letter from the Second Respondent confirming it did not require a hearing to be held.

35. On 1 March 2022, the CAS Court Office circulated the other Parties' preferences, with the Appellant requesting that a hearing be held whilst the First Respondent indicating it did not require a hearing to be held. In addition, the First Respondent noted that the Second Respondent had been notified that the deadline for it to file its Answer had been suspended until after the question of admissibility is determined and asking that the First Respondent be entitled to also file its Answer at the same stage. The CAS Court Office indicated the Sole Arbitrator had decided to hold a hearing limited to the question of admissibility but to not allow the First Respondent to file its Answer after the preliminary award is issued, if appropriate, on the basis that the First Respondent had only requested a ten day extension to file its Answer and had failed to then file its Answer, with the only request to suspend the time limit until after the determination of the admissibility of the appeal to have come from the Second Respondent. Finally, given the Appellant had made further submissions on the admissibility of the appeal when asked to indicate if it required a hearing to be held, the Respondents were given the opportunity to comment on the same.

36. On 4 March 2022, the CAS Court Office, based on the Parties' availability, informed the Parties that the hearing would be held on 13 April 2022.

37. On 7 March 2022, the CAS Court Office circulated the Second Respondent's further comments on the admissibility of appeal filed on 4 March 2022.

38. On 8 March 2022, the CAS Court Office circulated the First Respondent's further comments on the admissibility of appeal filed on 7 March 2022.

39. Accordingly, on 13 April 2022, a hearing on the question of the admissibility of the appeal was held by video conference. At the outset of the hearing, the Parties confirmed that they did not have any objection as to the constitution and composition of the arbitral tribunal.

40. In addition to the Sole Arbitrator and Ms Sophie Roud, Counsel to the CAS, the following persons attended the hearing:

a) For the Appellant:

1) Mr Ali Topuz, Topuz Hukuk & Danişmanlik, Istanbul, Turkey

2) Mr Erdem Başgűl, Başgűl Avukatlik Bűrosu, Ankara, Turkey

3) Mr Meriç Bahçivanci, Başgűl Avukatlik Bűrosu, Ankara, Turkey

b) For the First Respondent:

1) Mr Jan Schweele, Berlin Sports Law, Berlin, Germany

2) Mr Thomás Prestes Bosak, Berlin Sports Law, Berlin, Germany

3) Mr André Oliveira Teodoro Lopes, Berlin Sports Law, Berlin, Germany

c) For the Second Respondent:

1) Mr Miguel Liétard Fernández-Palacios, Director of Litigation, Zurich, Switzerland

2) Ms Cristina Pérez González, Senior Legal Counsel, Zurich, Switzerland

41. No witnesses or experts were heard. A full opportunity was provided to the Parties to present their case in respect of the admissibility of the appeal, submit their arguments and answer the questions posed by the Sole Arbitrator and the respective Parties.

42. Before the hearing was concluded, the Parties expressly stated that they did not have any objection with the procedure adopted by the Sole Arbitrator and that their right to be heard had been respected.

43. The Sole Arbitrator confirms that he carefully heard, fully reviewed and took into account in his decision all of the submissions, evidence and arguments presented by the

Parties, even if they have not been specifically summarised or referred to in the present arbitral award.

IV. SUBMISSIONS OF THE PARTIES

44. The Second Respondent's various submissions which address issues of bifurcation and admissibility were contained in its letters dated 20 September 2021, 21 October 2021, 29 October 2021 and 4 March 2022 and, in essence, may be summarised as follows:

- The bifurcation of the proceedings is appropriate in the circumstances given the likely finding that the appeal is inadmissible and therefore the Respondents should not be put to the time and cost of filing their Answers addressing the merits which would likely prove to be unnecessary. The principle of *Kompetenz-Kompetenz* in which an arbitral tribunal has the power to decide on its own jurisdiction (Article 186 Swiss Private International Law Act (the "PILA") and Article R55 of the CAS Code) together with Article 182(2) of the PILA entitles the arbitrator to apply the provisions and principles it deems fit, result in a compelling argument for the bifurcation to consider the preliminary question of the admissibility of the appeal.

- The appeal is inadmissible because it was filed against a letter that cannot be considered as an appealable decision according to Article 58(1) of the FIFA Statutes.

- The CAS jurisprudence is consistent in terms of what constitutes a decision which can be appealed. The format is not determinative and therefore a letter can be considered a decision providing it satisfies the following; it must contain a ruling whereby the issuing body intends to affect the legal situation of the addressee or others, it must be intended to produce legal effects, and it must have '*animus decideni*' in that it must make a decision on a matter and simply communicating information which does not contain a 'ruling' cannot be considered a decision.

- The Appealed Decision does not contain any ruling, instead the only ruling between the Appellant and First Respondent is found in the Confirmation Letter and therefore it was that which the Appellant should have appealed before the CAS should it have wished to do so. By failing to do so, the Appellant should not be able to circumvent this by appealing what is simply an informative letter, which therefore renders the appeal inadmissible. The Appealed Decision is purely informative in reminding the Appellant that the Confirmation Letter was the final and binding ruling relating to the training compensation claim.

- The Appealed Decision did not intend to produce legal effects. It simply referred to the contents of the Confirmation Letter and did not set a period to pay the outstanding sums nor establish that it would be submitted to the FIFA DC for non-payment. Even if it could be suggested that simply by referring to the

contents of the Confirmation Letter produced legal effects, the Second Respondent highlights that the Appellant has chosen to appeal an informative letter to avoid making the payment set out in the Proposal Letter, which it did not object to, and confirmed as final and binding in the Confirmation Letter, which again the Appellant did not appeal before the CAS.

- The Appealed Decision does not have *animus decidendi*, in contrast to the Proposal Letter and Confirmation Letter which had the intention of deciding the training compensation claim, the Appealed Decision was a mere communication with simple information which did not aim to solve any issue. In particular, the Proposal Letter and Confirmation Letter offered the two clubs an amount to settle the training compensation dispute, granted them 15 days to accept or reject the proposal and finally confirmed the final and binding nature of such amount. Therefore, the matter was decided by the Proposal Letter and Confirmation Letter and the two clubs were notified of this on 17 May 2021; had the Appellant wanted to challenge what was set out in the Proposal Letter it should have done so within the 15 day limit and then had the Appellant wished to appeal the Confirmation Letter before the CAS, it should have filed an appeal within 21 days as from 17 May 2021. The Appealed Decision was simply a reminder that the only final and binding decision (the Confirmation Letter) had already been notified to the Appellant on 17 May 2021 and had become binding and no longer subject to review.

- Therefore, in the absence of a final decision, the requirements of Article 58(1) of the FIFA Statutes for an appeal to be lodged before CAS are not met and the appeal must be declared inadmissible.

- The CAS jurisprudence referred to by the Appellant is irrelevant to the case in hand and it is telling that it has failed to provide any meaningful analysis of the cases it had referred to and how they should be applied to the case in hand. Some refer to the fact that a letter can be deemed to be a decision, however this is not disputed; the relevant issue however is that the Appealed Decision does not contain the three elements set out above, and the cases referred to actually confirm that these elements are required. The Appellant suggests that the Second Respondent's actions were a denial of justice but this is a false premise; the Confirmation Letter met all elements required for a decision, but the Appellant failed to take any action, with the Appealed Decision being purely informative.

- Furthermore, the Appellant has consistently failed to address the arguments put forward by the Second Respondent with regard to the necessary elements to constitute a decision despite having been afforded several opportunities.

- Despite what the Appellant may suggest, the provisions of the Swiss Debt Enforcement and Bankruptcy Act (the "DEBA") are inapplicable and irrelevant given the appeal does not relate to any enforcement proceeding, whether in Switzerland or elsewhere. Indeed, the provisions of the DEBA do not allow for debt enforcement proceedings against debtors in foreign countries or debtors

who have assets in Switzerland but do not meet the requirements of Article 271(1) of the DEBA. In terms of the latter, a creditor must use the means of redress in the debtor's country unless the debt has a sufficient connection to Switzerland (e.g. the debtor owns a company in Switzerland or has domicile there and the debt is connected to Switzerland, the debt is guaranteed by Swiss property or the debtor owns property in Switzerland) but the Appellant has failed to justify or demonstrate that any of these provisions are applicable. The Appellant is domiciled in Turkey and there is no evidence to suggest the debt has any connection to Switzerland; therefore, not only is the DEBA inapplicable, but it is also irrelevant.

- If the matter were to be considered, the principle of *venire contra factum proprium* would be engaged, in the sense that by failing to object to the Proposal Letter within the time limit, the Appellant induced legitimate expectations on the Respondents that it had accepted the proposal.

- In conclusion, the requirements of Article 58(1) of the FIFA Statutes for an appeal to be lodged before the CAS are not met and the appeal will have to be declared inadmissible.

45. The First Respondent's various submissions which address issues of standing to be sued, bifurcation and admissibility were contained in its letters dated 30 September 2021, 8 November 2021 and 7 March 2022 and, in essence, may be summarised as follows:

- The First Respondent does not have standing to be sued in the present appeal because it has never been a party to the proceedings before the FIFA PSC (Reference number FPSD-3289) which culminated in the Appealed Decision.

- Given the Appealed Decision deemed the matter to be *res judicata* then the extent of the CAS jurisdiction is whether that decision is correct or not as opposed to making a decision on the underlying merits, despite the fact that the Appellant's Requests for Relief are directed at the merits (of a different decision). If the CAS disagrees with the Appealed Decision that it is inadmissible due to *res judicata* then CAS can only send the case back to the FIFA judicial bodies. Therefore, the First Respondent does not have standing to be sued because the issue of *res judicata* is one between just the Appellant and Second Respondent as per the Appealed Decision and cannot extend to the merits of the Confirmation Letter and/or the FIFA DC Decision.

- The First Respondent agreed with the request for bifurcation and that the appeal should be declared inadmissible for the same reasons as set out by the Second Respondent.

- The First Respondent maintained that the DEBA was not applicable to the present matter, for the same reasons, as set out by the Second Respondent despite the Appellant's attempts to argue that it was relevant.

- The Appealed Decision is not a decision from a legal perspective and therefore cannot be appealed to the CAS. The Appellant is simply seeking to appeal a final and binding earlier decision, for which it had failed to bring an appeal at the appropriate time. Therefore, the matter is *res judicata* and the Appellant should not be allowed to start a new procedure to remedy its own failure to present a timely appeal, which is supported by Swiss Law whereby the Appellant cannot benefit from its own negligence.

46. The Appellant's various submissions which address issues of standing to be sued, bifurcation and admissibility were contained in its letters dated 8 October 2021, 8 November 2021 and 28 February 2022 and, in essence, may be summarised as follows:

- The general principles as to whether a decision is an appealable decision are well established by CAS jurisprudence: it does not depend on the form it is issued, it must contain a ruling which affects the legal situation of the addressee or other parties and a ruling of a sports body refusing to deal with a request can be considered a decision.

- It was the FIFA DRC which had competence to determine the underlying issues, not the FIFA PSC however the Second Respondent refused to refer this to the FIFA DRC and by terminating the proceedings with the Appealed Decision this prevented the Appellant from remedying the situation before the competent body which affected the legal situation of the Appellant.

- The fact that the FIFA PSC determined in the Appealed Decision that the matter was *res judicata* was a decision it made based on the Appellant's legal arguments and therefore the Appealed Decision contains a ruling and is beyond simply informative. The Appealed Decision also constitutes legal effect because the Second Respondent refused to continue the proceedings yet offered no appeal opportunity, thereby leaving the Appellant no option but to bring an appeal before CAS.

- The Second Respondent has issued further guidance for the use of TMS on 26 October 2021 in which it confirms that clubs will receive a notification by email on each occasion that a response from a club to a claim in TMS is required, thereby acknowledging the deficiencies in the system at the time of the Appealed Decision such that the matter cannot be *res judicata* due to the procedural and structural deficiencies which violated the Appellant's right to be heard.

- The Second Respondent has failed to return the advance of costs paid by the Appellant when it filed its claim before the FIFA PSC, which also demonstrates that the Second Respondent exercised its judicial function by way of the Appealed Decision.

- Article 85a of the DEBA allows a debtor who is subject to an unjustified debt enforcement procedure and somehow failed to object to it in a timely manner to

be granted a negative declaratory relief from the courts. This provision is supported by Article 198 (f) of the Swiss Civil Procedure Code. There are clear similarities in the procedure set out in Article 13 of the Procedural Rules and the Swiss debt enforcement procedure in which a letter is issued by the relevant authority for acceptance or objection by the debtor without considering the merits; a failure to object in respect of the debt enforcement procedure still affords the debtor an opportunity to register its objection through Article 85a of the DEBA and the procedure and actions of the Second Respondent conflict with this. The issue is not *res judicata* and the Appealed Decision has a ruling and unjustly brought to an end the judicial process.

- Therefore, the request for bifurcation should be rejected because it is evident that the appeal is admissible. Further, the Appellant has filed an appeal against the FIFA DC Decision which shares similar facts and should lead to a consolidation of the proceedings such that the bifurcation request should be rejected to ensure the Appellant's right to be heard and right to a fair trial.

- The First Respondent has standing to be sued because it is personally affected by the disputed entitlement and the Appellant named it as a party to the dispute before the Second Respondent, but this was dismissed by the Appealed Decision.

V. JURISDICTION

47. 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.*"

48. The jurisdiction of CAS, which is not disputed, derives from Article 57(1) of the FIFA Statutes (2020 edition), which provides as follows:

"*FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, member associations, confederations, leagues, clubs, players, officials, intermediaries and licensed match agents.*"

49. Article 58(1) of the FIFA Statutes (2020 edition) 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.*"

50. Moreover, none of the Parties have contested the jurisdiction of CAS to render this Award on the standing to be sued and the admissibility of the appeal. Indeed, the Parties confirmed at the hearing that they accepted that CAS had jurisdiction.

51. It follows that CAS has jurisdiction to render this Award on the standing to be sued and the admissibility of the appeal.

VI. APPLICABLE LAW

52. Article 187 para.1 of the PILA provides the following:

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

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

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

54. Article 57.2 FIFA Statutes (2020 edition) provides as follows:

"*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.*"

55. The Sole Arbitrator is satisfied that primarily the various regulations of FIFA are applicable to the substance of the case and additionally Swiss law in subsidiary should it be necessary to fill any lacuna in the regulations of FIFA.

56. With regard to the Appellant's argument that the DEBA is applicable to these proceedings so as to demonstrate the admissibility of the appeal, the Sole Arbitrator is not convinced by this argument. It is clear that the application of DEBA relates to debt proceedings where there is sufficient connection to Switzerland and the debt. Not only is this lacking, in any event the scope of this appeal is not within the confines of debt enforcement proceedings (where there could be some applicability) but rather a different type of underlying proceedings resulting in the Appealed Decision.

VII. BIFURCATION

57. The Second Respondent filed a request for the bifurcation of the procedure on 29 October 2021 and requested that the Sole Arbitrator issued a Preliminary Award on the

admissibility of the appeal. The First Respondent agreed with the request (raising at the same time an objection to its standing to be sued) but the Appellant objected to it.

58. The Sole Arbitrator notes that the question of bifurcation is a matter of procedure which is governed by Article 182(1)-(2) of the PILA, as follows:

"*The parties may, directly or by reference to rules of arbitration, determine the arbitral procedure; they may also submit the arbitral procedure to a procedural law of their choice.*

If the parties have not determined the procedure, the arbitral tribunal shall determine it to the extent necessary, either directly or by reference to a statute or to rules of arbitration."

59. Article 188 of the PILA provides for the issuance of partial awards, as follows:

"*Unless the parties otherwise agree, the arbitral tribunal may render partial awards.*"

60. The CAS Code only addresses the issue of bifurcation in the context of its own competence (see Article R55(4) of the CAS Code: "*The Panel shall rule on its own jurisdiction.*") but not generally on other preliminary issues. In line with Article 182(2) of the PILA above, the Sole Arbitrator is entitled to apply principles directly or with reference to a law or rules of arbitration as he deems appropriate in the absence of any express provision in the CAS Code. The Swiss Code of Civil Procedure (the "SCCP") provides support for the ability to determine preliminary questions, particularly where in so doing, there would be a saving of time or costs. Article 125 of the SCCP states as follows:

"*In order to simplify the proceedings, the court may, in particular:*

a. limit the proceedings to individual issues or prayers for relief;
b. order the separation of jointly filed actions;
c. order the joinder of separately filed actions;
d. separate the counterclaim from the main proceedings."

61. The CAS jurisprudence is clear that such preliminary issues can be considered by way of a bifurcation process and in support, CAS 2019/A/6294 states as follows:

"*As a starting point, the Panel notes that the question whether or not to bifurcate proceedings in order to decide on a preliminary question is a procedural issue that is, in principle, governed in international arbitrations by Article 182 of the PILA. The Code, to which both Parties submitted, only deals with the question whether or not a Panel can bifurcate the proceedings in order to decide the preliminary question of its competence (Article R55 (4) CAS Code). However, the Code does not contain any provision on whether or not a Panel may bifurcate the proceedings in order to decide on other preliminary issues (be it on procedure or on the merits). In the absence of any specific provisions in the CAS Code, the Panel is entitled – according to Article 182 (2)*

PILA – to apply the provisions and principles either directly or by reference to a law or rules of arbitration it deems fit. The Panel is inspired by Article 125 lit. a of the Swiss Code of Civil Procedure ("CCP"). According thereto a court may "[i]n order to simplify the proceedings...limit the proceedings to individual issues or prayers for relief". The power of the court is directly connected to Article 237 CCP according to which a court "may issue an interim decision" (KuKo-ZPO/WEBER, 2md ed. 2014, Article 125 no. 3). When exercising its discretion according to Article 125 lit. a CCP, a court will take into account whether limiting the procedure to certain preliminary questions allows for a (substantial) saving of time or costs (CPC-HALDY, 2011, Article 125 no. 5). The view held here that an arbitral tribunal is entitled to issue decisions on preliminary questions is also backed by the legal literature according to which in the absence of an agreement by the parties the panel is vested with the power to issue interim of [sic] final awards. Such power is a particular aspect of the mandate of an arbitral tribunal to organise of the arbitral proceedings (POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, no. 725)."

62. The Sole Arbitrator is persuaded that the interests of procedural efficiency are compelling in his decision to allow the bifurcation of the proceedings to consider the admissibility of the appeal.

VIII. ADMISSIBILITY OF THE APPEAL

63. 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.*"

64. Article 58(1) of the FIFA Statutes (2020 edition) 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.*"

65. Article 58(2) of the FIFA Statutes (2020 edition) provides as follows:

"*Recourse may only be made to CAS after all other internal channels have been exhausted.*"

66. The Appealed Decision was issued on 12 August 2021 and the appeal was filed on 2 September 2021, which was therefore within the deadline of 21 days set by Article 58(1) of the FIFA Statutes (2020 edition). The appeal complied with all other requirements of Article R48 of the CAS Code, including the payment of the CAS Court Office fee.

67. Notwithstanding this, the First and Second Respondents dispute the admissibility of the appeal on the basis that the Appealed Decision could not be treated as an appealable decision as it lacked the necessary elements which constitute a decision and instead it was simply a letter of an informative nature.

68. The Sole Arbitrator has considered the terms of the Appealed Decision carefully and concludes that it is lacking in some of the required elements to categorise it as a decision.

69. It is clear that both the Confirmation Letter and the FIFA DC Decision each contain the necessary elements to be considered decisions for the purposes of any potential appeal, containing as they do final and binding decisions on the amount to be paid by the Appellant to the First Respondent, the interest rate applicable, the fine to be applied (in respect of the FIFA DC Decision) and the further consequences for any non-compliance. In that regard, both the Confirmation Letter and the FIFA DC Decision definitely affect the legal position of the Appellant and the First Respondent.

70. In contrast, the Appealed Decision does not contain a ruling which definitely affects their legal position; it simply records that the matter has already been determined, by way of both the Confirmation Letter and the FIFA DC Decision, and therefore is *res judicata*. This can properly be considered to be an informative letter as it maintains the situation and does not change the legal position of either party.

71. The fact remains that the Appellant failed to appeal, within these proceedings, against either the decision set out in the Confirmation Letter or the decision set out in the FIFA DC Decision and it must bear the consequences for such failure. Its lack of timely action, at least as regards the Confirmation Letter, should not be excused or remedied by an attempt to appeal against a letter which does not contain the essential elements of a decision; to allow this would artificially extend the deadline for an appeal to be lodged which runs contrary to the CAS jurisprudence.

72. This is supported by CAS 2017/A/5058 as follows:

> "*One cannot artificially extend the deadline to appeal a decision by continuously asking for reconsideration of such decision upon receipt of a rejection of the request for reconsideration.*"

73. The fact remains that the Appellant failed to take timely action to appeal either the Confirmation Letter or the FIFA DC Decision in these proceedings and as such, to allow an appeal in such circumstances would not only artificially extend the deadline for an appeal to be lodged, but this would also violate legal certainty and the doctrine of *venire contra factum proprium* which act to protect the Respondents in such circumstances, as explained in CAS 2008/O/1455 as follows:

"[...] *the doctrine, recognized by Swiss law, providing that where the conduct of one party has induced legitimate expectations in another party, the first party is estopped from changing its course of action to the detriment of the second party.*"

74. Accordingly, the failure on the part of the Appellant to take timely action has led to the legitimate expectation on the part of the Respondents that the decision set out in the Confirmation Letter has been accepted by the Appellant.

75. The CAS jurisprudence has approached the requirements for a decision in a consistent manner that it must be based on the content rather than the form of the document. This is shown in CAS 2017/A/5058 as follows:

"*68. The Panel endorses the definition of "decision" and the characteristic features of a "decision" identified in the CAS jurisprudence set out below:*

> *- "[t]he form of the communication has no relevance to determine whether there exists a decision or not. In particular, the fact that the communication is made in the form of a letter does not rule out the possibility that it constitutes a decision subject to appeal" (CAS 2008/A/1633 para. 31; CAS 2007/A/1251 para. 30; CAS 2005/A/899 para. 63; CAS 2004/A/748 para. 90).*
>
> *- "In principle, for a communication to be a decision, this communication must contain a ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties" (CAS 2008/A/1633 para. 31; CAS 2007/A/1251 para. 30; CAS 2005/A/899 para. 61; CAS 2004/A/748 para. 89).*
>
> *- "A decision is thus a unilateral act, sent to one or more determined recipients and is intended to produce legal effects" (CAS 2008/A/1633 para. 31; CAS 2004/A/748 para. 89; CAS 2004/A/659 para. 36).*
>
> *- "[a]n appealable decision of a sport association or federation "is normally a communication of the association directed to a party and based on an 'animus decidendi', i.e. an intention of a body of the association to decide on a matter (...). A simple information, which does not contain any 'ruling', cannot be considered a decision". (CAS 2008/A/1633 para. 32; BERNASCONI M., "When is a 'decision' an appealable decision?" in: RIGOZZI/BERNASCONI (eds), The Proceedings before the CAS, Bern 2007, p. 273)" (CAS 2015/A/4266, para. 51 of the abstract published on the CAS website).*"

76. The concept of a decision was considered in CAS 2015/A/4162, as follows:

"*The decisive criteria, thus, is whether or not the act in question impacts upon the legal situation of the Appellant. If that is the case (independent of what the intentions of the relevant sports organisation were), there must be access to justice for the person concerned.*"

77. In actual fact, the Appealed Decision simply sets out that the process in place for dealing with training compensation claims was followed by FIFA resulting in the issuing of the Confirmation Letter; the Appellant had the opportunity to appeal against that decision but failed to do so, and by virtue of that failure, FIFA is therefore not able to intervene in this way because the matter is deemed *res judicata*. Accordingly, this leads the Sole Arbitrator to consider that the letter of FIFA dated 12 August 2021:

i) is not a ruling which materially affects the legal situation of the parties (i.e. a decision), and
ii) does not constitute an absence of ruling where there should have been a ruling (i.e. denial of justice).

78. Therefore, the Sole Arbitrator finds, to his comfortable satisfaction, that the First and Second Respondents are correct that the Appealed Decision is not a decision which is capable of appeal before CAS, as a consequence of which the appeal is inadmissible.

79. It follows therefore, that should the Appellant have wished to appeal the underlying training compensation entitlement, its opportunity was to file an appeal within 21 days of either the Confirmation Letter or the FIFA DC Decision. However, its failure to do so in these proceedings, instead appealing against an informative letter which did not contain the essential elements of a decision (the Appealed Decision) means that such appeal is inadmissible.

80. For all of these reasons, the Sole Arbitrator therefore finds, in accordance with Article R51 of the CAS Code, that the appeal is inadmissible.

81. Given the conclusion that the appeal is inadmissible, it is therefore unnecessary to consider the question of the First Respondent's standing to be sued.

82. Finally, this conclusion makes it not necessary for the Sole Arbitrator to consider the other requests submitted by the Parties. Furthermore, all other claims or requests for relief are rejected.

IX. COSTS

83. Article R64.4 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.

84. 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.

85. In view of the fact that the First and Second Respondent's challenge to the admissibility of the appeal is successful, the Sole Arbitrator determines that the costs of the arbitration, in an amount that will be determined and served on the parties by the CAS Court Office, shall be borne in full by the Appellant.

86. Furthermore, pursuant to Article R64.5 of the CAS Code, for the reasons above, the Sole Arbitrator determines that the Appellant shall bear its own legal fees and other expenses incurred in connection with the present arbitration and shall pay the First Respondent CHF 3,000 (three thousand Swiss francs) as a contribution towards the legal costs and other expenses incurred in relation to these proceedings.

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TRIBUNAL ARBITRAL DU SPORT
COURT OF ARBITRATION FOR SPORT
TRIBUNAL ARBITRAL DEL DEPORTE

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Club Menemenspor on 2 September 2021 against the letter from the FIFA Administration on 12 August 2021 (Ref. FPSD-3269) is inadmissible.

2. The costs of the arbitration, to be determined and served on the parties by the CAS Court Office, shall be borne in their entirety by Club Menemenspor.

3. Club Menemenspor and FIFA shall bear their own legal fees and other expenses incurred in connection with these arbitration proceedings.

4. Club Menemenspor shall pay KF Laçi CHF 3,000 (three thousand Swiss francs) as a contribution towards the legal fees and expenses incurred in connection with these arbitration proceedings.

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

Seat of arbitration: Lausanne, Switzerland
Date: 9 September 2022

THE COURT OF ARBITRATION FOR SPORT

Edward Canty
Sole Arbitrator