Arbitration CAS 2008/A/1633 FC Schalke 04 v. Confederação Brasileira de Futebol (CBF), award of 16 December 2008

Panel: Mr. José Juan Pintó Sala (Spain), President; Mr. Michele Bernasconi (Switzerland); Mr. Rui Botica Santos (Portugal)

Football
Release of Players for the Men's Olympic Football Tournament Beijing 2008
Conditions for the qualification of a decision as an appealable decision before CAS
Purely informative letter not prejudicing any future decision on the matter

1. **The existence of a decision does not depend on the form in which it is issued and thus a communication made in the form of a letter may also constitute a decision subject to appeal before CAS. A communication intending to be considered a decision shall contain a unilateral ruling sent to one or more recipients and tending to affect the legal situation of its addressee or other parties. If a body refuses without reasons to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way for an appeal against the absence of a decision. A decision from FIFA or one of its juridical bodies not to open a disciplinary procedure – or the mere absence of any reaction – must therefore be considered as a decision which is final within FIFA. It is thus subject to an appeal with CAS. There can also be a decision where the body issues a ruling as to the admissibility or inadmissibility of a request, without addressing the merits of such request.**

2. **It is not considered as a decision appealable before CAS a letter which does not contain any formal decision of a body of FIFA, but only an opinion of the administration of the latter, so long as it has a purely informative character and does not prejudice any decision which could be taken in the future by any deciding body of FIFA in the matter in question or in a similar matter: so long as FIFA is stating in its letters that it is not in a position to intervene in the matter submitted by the Club in the way it has been submitted, but leaves the door open to deal with the case if appropriately filed before its bodies, this does not constitute a situation of strict and final denial of justice eventually challengeable before CAS.**

FC Schalke 04 ("Club" or the "Appellant") is a German football club with seat in Gelsenkirchen (Germany), affiliated to the German Football Association.

Confederação Brasileira de Futebol (CBF or the "Respondent") is a national football association with its seat in Rio de Janeiro (Brazil) and is affiliated to the Fédération Internationale de Football Association (FIFA).

The elements set out below are a summary of the main relevant facts, as established by the Panel on the basis of the written submissions of the parties and the exhibits produced. Additional facts may be set out, where relevant, in the legal considerations of the present award.

On 7th July 2008 the CBF communicated to the German Football Association that, amongst others, the player Marcio Rafael Ferreira de Souza "Rafinha" ("Player"), who at that time rendered his professional football services for the Club and was aged below 23 years, had been selected by the Brazilian national football team taking part in the Olympic Games to be celebrated in Beijing in August 2008 (OG), and asked to the mentioned association to make the Club aware of it so that the Player was released to such purpose.

On 11th July 2008 the Club opposed the CBF's petition to release the Player for the OG on the basis of the following grounds:

> *"In accordance with Article 1 ss. 1 of Annex 1 to the FIFA Regulations on the Status and Transfer of Players ("RSTP") we are obliged to release a registered player to the representative team of the country for which the player is eligible to play on the basis of his nationality if they are called up by the association concerned.*
>
> *Rafinha is a Brazilian national, FC Gelsenkirchen-Shalke 04 e.V. ("Schalke") in the Club with which Rafinha is registered, CBF is the association concerned and the facsimile received via DFB and referenced above is understood by Schalke as CBF´s call to release Rafinha to the team representing Brasilia during the XXIX Olympic Tournament – Beijing 2008.*
>
> *Schalke however is only obliged to release its players in accordance with Article 1 ss. 2 of Annex 1 RSTP if the release is requested (a) for matches listed in the coordinated international match calendar and (b) for all matches for which a duty to release players exists on the basis of a special decision by the FIFA Executive Committee.*
>
> *With regards to alternative (a), please find attached this facsimile the up to date list of matches in the coordinated international match calendar of FIFA. On this list none of the matches for which CBF is requesting the release of the player is listed. In accordance with Article 1 ss. 3 of the Annex 1 to RSTP it is not compulsory to release players for matches scheduled on dates not listed in the coordinated international match calendar.*
>
> *Finally, we have not received a special decision by the FIFA Executive Committee providing for the obligation of Schalke to release Rafinha for the matches listed in your facsimile referenced above".*

Also on 11th July 2008 the CBF asked the German Football Association to inform the Club about its obligation to release the Player for the OG in the following terms:

> *"About this matter, the FIFA Executive Committee, during the meeting of 14th March clarified that "there is no doubt about the release of players under the age of 23, which is obligatory", as indicated in the official statement.*

Recently this statement was reinforced through the FIFA web-page.

Therefore we kindly ask you to inform the Club F.C. Shalke 04 that the player Marcio Rafael Ferreira de Souza (Rafinha) should be released to participate in OLYMPIC TOURNAMENT".

On 17th July 2008 the German Football Association informed the CBF about the fact that in its understanding, the Club was not obliged to release the Player for the OG. The content of such communication is self-explanatory:

"Thank you very much for your fax dated 11 July 2008. In this fax you ask us to intervene concerning the refusal from our affiliated club FC Schalke 04 to release the player Rafinha for the Olympic Tournament Beijing 2008.

You may rest assured that we understand your request to send the strongest national team to the Olympic Tournament. Nevertheless, we do not see any legal basis for an obligation to release the player.

According to Art. 1 par. 2 of Annexe 1 of the Regulations on the Status and Transfer of Players, the release of players for international duties is mandatory for matches on dates listed in the coordinated match calendar. Besides, the FIFA Executive Committee can establish a mandatory release by a separate resolution. Neither condition is given in this case.

We are aware that FIFA in principle supports the release of players younger than 23 in view of the importance of the Olympic Tournament and on the basis of customary law. Bearing that in mind we have forwarded a copy of FIFA´s statement dated 16 July 2008 to our affiliated club FC Schalke 04. We have asked Schalke 04 to verify if a release on a voluntary basis is possible".

Also on 17th July 2008 the CBF communicated to the Club the flight details of the Player for his incorporation into the Brazilian national team in the OG.

On 21st July 2008 the Club's legal advisor sent a letter to the Player stating the following:

*"On behalf and in the name of FC Gelsenkirchen-Schalke 04 e.V ("**Schalke 04**"), we hereby inform you to have been instructed by Schalke 04 to notify you of your committed breach of the employment contract concluded between you and Schalke 04 on 27 March 2007 by not leaving for the training camp of Schalke 04´s professional football team in Stegersbach, Austria with the team today and participating in the training conducted there, even though Schalke 04 has requested your participation.*

This breach of your employment contract also puts you in breach of Art. 13 of the FIFA Regulations for the Status and Transfer of Players "Respect of Contract" by not honouring and respecting the employment contract with Schalke 04.

Further, due to your non-compliance with the rules of your International Federation, FIFA, according to section 41, Eligibility Code of the Olympic Charter, you are no longer eligible for participation in the Olympic Games Beijing 2008. We have been instructed to inform CBF and IOC according and pursue Schalke 04´s interest with FIFA Dispute Resolution Chamber as well as CAS.

In § 2 of the employment contract you have agreed to provide Schalke 04 with all your vigour and sportive capability without limitation. In particular, you have agreed to take part in all matches and training camps, trainings, meetings with players and all other events serving the preparation of matches and competitions.

According to § 6 of the employment contract a contractual penalty is due when such breach of contract occurs. From the available penalties Schalke 04 will impose the same fine of EUR […] on you for every individual case of breach of contract. Such individual case, amongst others listed in § 2 of the employment contract, is every day of training you are missing.

To avoid further contractual penalties, Schalke 04 strongly suggests and requests you to join the team, in its training camp in Stegersbach, Austria as soon as possible, but at the least by the end of the day tomorrow. A translation of this letter into the Portuguese language will be provided for your convenience as soon as possible".

On 22nd July 2008 the Player left Germany to join his national team in Beijing.

On the same date the Club's legal advisor asked the CBF to issue a written declaration committing itself to:

- *refrain from enticing, requesting or otherwise exerting pressure on the Player by communicating directly or indirectly, public or non-public, regardless by which means or form of communication, with the Player aiming to make the Player participate in the Olympic Games without Schalke´s release of the Player from his obligations arising from his employment agreement and*
- *release the Player from any request or duty to participate in the Olympic Games as member of the national Brazilian football team".*

and warned the CBF that unless such declaration was received before 23rd July 2008 at 12:00, the Club would commence proceedings before the FIFA Players´ Status Committee (PSC) so that:

a) It was declared that:
   1) *The Player is in breach of Art. 13 `Respect of Contract´ of RSTP by his non-compliance with the terms of his employment agreement with Schalke since he did not follow Schalke request to join the training camp of Bundesliga team on July, 21 2008; and*
   2) *CBF has actively enticed the Player to violate Art. 13 of RSTP and continues to do so, by requesting from the Player to participate in the XXIX Olympic Tournament – Beijing 2008 – (Olympic Games) as a member of the Brazilian Olympic Football Team without release of the Player by Schalke;*

b) CBF was ordered to:
   1) *refrain from enticing, requesting or otherwise exerting pressure on the Player by communicating directly or indirectly, public or non-public, regardless by which means or form of communication, with the Player aiming to make the Player participate in the Olympic Games without Schalke release of the Player from his obligations arising from the employment agreement;*
   2) *release the Player from any request or duty to participate in the Olympic Games; and*
   3) *pay a sum of money in Euro to FIFA as a measure of sanction or alternatively to order any other measure or sanction PSC determines to be appropriate in due consideration of the circumstances.*

On 23rd July 2008 FIFA issued Circular 1153 which relevant terms read as follows:

"Release of Players for the Men's Olympic Football Tournament Beijing 2008.

We refer to the above mentioned issue, which has apparently led to a certain amount of confusion as to whether players have to be released for Men's Olympic Football Tournament Beijing 2008. [...]

Regarding the release of players under the age of 23, the football family has always agreed that these players shall be released for the Men's Olympic Football Tournament. This principle has always been accepted in the past and never called into question.

In this respect, please note that according to article 1 paragraph 2 of the Annexe 1 of the Regulations on the Status and Transfer of Players, the release of players for international duties is mandatory for matches on dates listed in the coordinated international match calendar.

However, the Men's Olympic Football Tournament Beijing 2008 was deliberately not officially included in the coordinated international match calendar. This is based on the fact that the introduction of the Men's Olympic Football Tournament would not be congruent with the said calendar. Due to its unique character, the Men's Olympic Football Tournament has always been internationally treated differently. However, this does not mean that there is not release obligation for the relevant clubs.

In view of the importance of Men's Olympic Football Tournament for the entire sporting movement in general and football in particular, and given the specific nature of the event, as well as on the basis of customary law, the release of players below the age of 23 has therefore always been mandatory for all clubs. The same principle shall apply for Beijing 2008.

In fact, it would appear to be against the spirit of the Olympic regulations to hinder players under the age of 23, who are actually the core of the squads participating in the Men's Olympic Football Tournament, to take part in the final phase of the event.

For the avoidance of doubt, please be informed that the release of players over the age of 23 (i.e. the three out-of-quota players who are eligible for the final phase of the Men's Olympic Football Tournament) is not compulsory, but as always, we appeal for solidarity within the football family".

On 29th July 2008 the Emergency Committee of FIFA issued the following statement:

"The Emergency Committee was contacted to deliberate about the obligation of clubs to release their under 23 aged players for the Olympic Football Tournaments, since this issue apparently led to a certain amount of confusion in connection with the Olympic Men Football Tournament Beijing 2008.[...]

In addition the FIFA Emergency Committee also confirmed referring to the longstanding and undisputed practice existing since 1988, that the application of customary law is justified.

Finally, the Emergency Committee unanimously concluded that an obligation for clubs to release their players for the Olympic Football Tournament exists. Congruously, the same applies for the Olympic Men Football Tournament Beijing 2008".

On 6th August 2008 an award in the cases CAS 2008/A/1622, 1623 & 1624 FC Schalke 04, Werder Bremen & FC Barcelona v. FIFA concerning the release of certain players for the OG was rendered. With regard to the Club, this award stated that:

"The Appellant FC Schalke 04 has no legal obligation to release the Player Márcio Rafael Ferreira de Souza alias "Rafinha" for the Olympic Football Tournament 2008 in Beijing".

On the same date the Club made an offer to CBF by virtue of which it would release the Player to play in the OG in exchange of the payment of certain amounts and the subscription of certain insurances. The CBF did not respond to this offer.

On 11th August 2008 the Club filed a claim before FIFA against the CBF asking for the following:

> *"1) Defendant is prohibited forthwith from engaging, let it be by preparatory training or during tournament matches, Márcio Rafael Ferreira de Souza alias Rafinha ("**Player**") as a member of the Brazilian Olympic National Football Team during the XXIX Olympic Tournament – Beijing 2008 – (**Olympic Games**);*
>
> *2) Defendant is ordered to release the Player from any call-up or duty to participate as a member of the Brazilian Olympic National Football Team during the Olympic Games and to send the Player back to the Claimant immediately;*
>
> *3) As a sanction, the Defendant has to pay for every calendar day Defendant is engaging, let it be preparatory training or during tournament matches, the Player as a member of the Brazilian Olympic National Football Team during the Olympic Games and not releasing the Player from any call-up or duty in violation of the prohibition, a net amount of EURO […] to the charitable foundation "Schalke hilft" gemeinnützige Gesellschaft mit beschränkter Haftung (geGmbH) and impose appropriate further sanctions to discipline the Defendant; and*
>
> *4) As a sanction, the Defendant has to pay for every calendar day Defendant has engaged, let it be preparatory training or during tournament matches, the Player as a member of the Brazilian Olympic National Football Team since July 23, 2008 and until the prohibition as applied for by Claimant under No. 1 has been finally decided, the net amount of EURO […] to the charitable foundation "Schalke hilft" gemeinnützige Gesellschaft mit beschränkter Haftung (geGmbH) and impose appropriate further sanctions to discipline the Defendant".*

On 12th August 2008 FIFA sent to the Club a letter signed by FIFA's Head of Legal Affairs and FIFA's Head of Player Status, in which it was stated that FIFA was not in a position to intervene in the matter submitted by the Club:

> *"[…] Considering the contents of your correspondence, it appears that the requests made by the club FC Schalke 04 against the CBF are without exception based on the presumption that the Brazilian player Márcio Rafael Ferreira de Souza ("Rafinha"), by staying with the Brazilian U23-Association team at the Men´s Olympic Football Tournament in Beijing, is in breach of his employment related duties towards the club FC Schalke 04.*
>
> *However, neither is such a breach of contract established by a final and binding decision of any possible competent deciding body, nor do you seem to be intending to lodge a claim against the player in question for breach of contract by means of your current correspondence.*
>
> *Consequently, and as an employment contract may create rights and obligations only inter partes, as a general rule, a claim based on the alleged breach of an employment contract cannot be made against a third party that is not party to the employment contract concerned. Such third-party effect is not vindicable.*
>
> *Furthermore, we understand that you base your claim also on provisions of the Regulations on the Status and Transfer of Players related to the late return of a player after a rightful release for international duties. The relevant provisions are not meant to be applied in cases where an obligation to release the player does not exist.*

In view thereof, we do not appear to be in a position to intervene on behalf of FC Schalke 04 in the present matter.

We thank you for taking note of the above and trust in your understanding of the situation".

In light of the above mentioned, on 12th August 2008 the Club filed an appeal before CAS against the mentioned letter of FIFA (which the Club considered and called a "decision"), requesting the CAS to set it aside and to grant the Club the pleadings made before FIFA the day before, which were reproduced *mutatis mutandis* before CAS.

On 14th August 2008 the Club filed its appeal brief in which it requested CAS to render an award in the following terms:

"I. The decision of FIFA PSC not to render a decision is set aside.

*II. By engaging, let it be by preparatory training or during tournament matches, Márcio Rafael Ferreira de Souza alias Rafinha (**Player**) as a member of the Brazilian Olympic National Football Team during the XXIX Olympic Tournament – Beijing 2008 – (**Olympic Games**) Respondent violated FIFA Rules and Regulations.*

III. As sanction for the violation of FIFA Rules and Regulations the Respondent is ordered to pay for every calendar day since July 21, 2008 and until the date on which then Player resumes service with Appellant an amount in EURO's to be determined by CAS and payable to the charitable foundation - "Schalke hilft" gemeinnützige Gesellschaft mit beschränkter Haftung (geGmbH),Gelsenkirchen Deutschland – due upon expiry of the third day since the decision in this matter was announced to the parties.

IV. As compensation the Respondent is ordered to pay for every calendar day since July 21, 2008 and until the date on which the Player resumes service with Appellant to Appellant the amount of EURO's […] due upon expiry of the third day since the decision in this matter was announced to the parties.

V. The costs of the proceedings shall be borne by the Respondent.

VI. The legal and other costs incurred in connection with this arbitration shall be born by the Respondent".

On 1st September 2008 CBF filed its answer to the appeal, in which it (i) requests CAS, as preliminary issue, not to admit the appeal as in its view, the letter of FIFA of 12th August 2008 is not a decision that can be appealed before CAS, and (ii) in any case opposes to the merits of the appeal.

On 4th November 2008 FIFA declared not to be interested in intervening in the present proceedings. Notwithstanding this, FIFA pointed out that the letter in which the Club grounded its appeal was not a decision of the FIFA bodies but a mere letter of the administration of FIFA of informative nature, which implies that the appeal is inadmissible according to article R47 of the CAS Code of Sports-related arbitration (CAS Code):

In this respect, we would like to underline that contrary to the wording of your aforementioned correspondence, the subject of the present appeal in question is not to be considered as a decision of a body of FIFA, but as a letter of the administration of FIFA, which has purely informative and non-prejudicing content. As a matter of fact, the letter at stake does not contain any formal decision of a body of FIFA, but only an opinion of the administration of the latter, and its contents have a purely informative character that do not prejudice any decision which could be taken in the future by any deciding body of FIFA in this or in a similar matter.

Consequently, and considering art. R47 par. 1 of the Code, according to which "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS" (emphasis added), the present appeal cannot be considered as admissible and therefore must be rejected, as it is not directed against a formal decision of FIFA.

LAW

Applicable law

1. Article R58 of the CAS Code states the following:

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

2. Article 62.2 of the FIFA Statutes states the following:

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

3. According to the mentioned provisions, FIFA rules and additionally Swiss Law are applicable to this case.

4. Therefore the Panel considers that the present dispute shall be resolved according to FIFA rules and additionally to Swiss Law.

5. The admissibility of an appeal before CAS shall be examined in light of article R47 of the CAS Code, which reads as follows:

   "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body. An appeal may be filed with the CAS against an award rendered by the CAS acting as a first instance tribunal if such appeal has been expressly provided by the rules applicable to the procedure of first instance". [Emphasis added]

6. This article clearly stipulates that the appeals before CAS shall be lodged against a decision of a federation, association or sports-related body.

7. The same general principle is gathered in article 63.1 of the FIFA Statutes, which states that:

"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question".

8. In the present case the admissibility of the appeal filed by the Club is being challenged on the basis of considering that the letter which the Appellant considers as being the appealable decision (i.e. the FIFA's letter dated 12th August 2008) is not a decision.

9. In view of such challenge the Panel shall determine if the letter of FIFA dated 12 August 2008 shall be considered an appealable decision or not.

10. For such purpose the Panel deems convenient to firstly recall the jurisprudence of CAS regarding the concept of "decision".

The general principles that can be extracted from CAS jurisprudence in this respect are mainly the following:

a) The existence of a decision does not depend on the form in which it is issued. For instance, in the awards of the cases CAS 2005/A/899 & 2007/A/1251 it is stated that:

"[…] the form of a 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". [Emphasis added]

b) A communication intending to be considered a decision shall contain a ruling tending to affect the legal situation of its addressee or other parties. This position is held, among others, in the following awards:

- CAS 2005/A/899 & 2007/A/1251:

  "In principle, for a communication to be a decision, this communication must contain ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties". [Emphasis added]

- CAS 2004/A/659:

  "35. The Panel has thus to consider if the letter of 5 July 2005 constitutes a decision in the sense of the code, susceptible to an appeal to the CAS, which is a necessary condition to the jurisdiction of the CAS to rule in the present matter.

  36. According to the definition of the Federal Tribunal, "the decision is an act of individual sovereignty addressed to an individual, by which a relation of concrete administrative law, forming or stating a legal situation, is resolved in an obligatory and constraining manner. The effects must be directly binding both with respect to the authority as to the party who receives the decision". (cf. ATF 101 Ia 73).

  A decision is thus an unilateral act, sent to one or more determined recipients and is intended to produce legal effects". [Emphasis added]

- CAS 2004/A/748:

  "In light of the above CAS precedents, the Panel finds that the IOC President's letter of 23 September 2004 contained in fact a clear statement of the resolution of the disciplinary procedure against Mr Hamilton. That statement had the additional effect of resolving the matter in respect of all interested parties: "the Disciplinary Commission [...] is being dissolved, and the IOC will not be pursuing sanctions regarding this matter". As a consequence of this ruling, the anti-doping case against Mr Hamilton was closed and Mr Hamilton could retain his gold medal; at the same time the other competitors (and in particular Mr Ekimov and Mr Rogers) could not benefit from the possible disqualification of Mr Hamilton. In other words, the legal situations of the addressee and of the other concerned athletes were materially affected. [Emphasis added]

  It seems also evident from the text of the letter (the "IOC hereby informs you" and "the IOC will not be pursuing sanctions") that the IOC President intended such communication to be a decision issued on behalf of the IOC.

  Accordingly, the Panel has no hesitation in finding that the IOC President's letter dated 23 September 2004 – without taking position on whether this Presidential action was within his powers or not – is a true "decision" of the IOC (hereinafter referred to as the "Decision of 23 September 2004") and, thus, can be appealed under Art. R47 of the Code".

c) A ruling issued by a sports-related body refusing to deal with a request can be considered a decision under certain circumstances. This principle has been recognised, among others, in the following awards:

- CAS 2007/A/1251:

  "The Panel finds that by responding in such manner to ARIS' request for relief, FIFA clearly manifested it would not entertain the request, thereby making a ruling on the admissibility of the request and directly affecting ARIS' legal situation. Thus, despite being formulated in a letter, FIFA's refusal to entertain ARIS' request was, in substance, a decision". [Emphasis added]

- CAS 2005/A/994:

  "As this Panel already stated in its decision of 15 July 2005, if a body refuses without reasons to issue a decision or delays the issuance of a decision beyond a reasonable period of time, there can be a denial of justice, opening the way for an appeal against the absence of a decision (CAS/A/899; see also CAS award of 15 May 1997, published in Digest of CAS Awards 1986-1998, p. 539; see also Jan Paulsson, Denial of justice in international law, Cambridge University Press, New York 2005, pp. 176-178). […] [Emphasis added]

  A decision from FIFA or one of its juridical bodies not to open a disciplinary procedure – or the mere absence of any reaction – must therefore be considered as a decision which is final within FIFA. It is thus subject to an appeal with CAS. […] [Emphasis added]

  According to Swiss case law, there can be a denial of justice (so-called "substantive" denial of justice - déni de justice matériel") even after a decision has been issued, if such decision is arbitrary, i.e. constitutes a very serious breach of a statutory provision or of a clear and undisputable legal principle, or when it seriously offends the sense of justice and equity". [Emphasis added]

- CAS 2005/A/899:

  "In principle, for a communication to be a decision, this communication must contain ruling, whereby the body issuing the decision intends to affect the legal situation of the addressee of the decision or other parties. However, there can also be a decision where the body issues a ruling as to the admissibility or inadmissibility of a request, without addressing the merits of such request". [Emphasis added]

11. Based on the above, the Panel believes that an 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"*. (BERNASCONI M., When is a 'decision' an *appealable* decision?, in: RIGOZZI/BERNASCONI (eds.), The Proceedings before the CAS, Bern 2007, p. 273).

12. The Panel shall therefore consider these general principles and apply them to the present case.

13. In the referred task the Panel deems important to check the content of the following exhibits produced to the CAS file:

A) The letter of FIFA dated 12 August 2008 itself, which relevant part reads as follows:

"Considering the contents of your correspondence, it appears that the requests made by the club FC Schalke 04 against the CBF are without exception based on the presumption that the Brazilian player Márcio Rafael Ferreira de Souza ("Rafinha"), by staying with the Brazilian U23-Association team at the Men´s Olympic Football Tournament in Beijing, is in breach of his employment related duties towards the club FC Schalke 04.

However, neither is such a breach of contract established by a final and binding decision of any possible competent deciding body, nor do you seem to be intending to lodge a claim against the player in question for breach of contract by means of your current correspondence.

Consequently, and as an employment contract may create rights and obligations only inter partes, as a general rule, a claim based on the alleged breach of an employment contract cannot be made against a third party that is not party to the employment contract concerned. Such third-party effect is not vindicable.

Furthermore, we understand that you base your claim also on provisions of the Regulations on the Status and Transfer of Players related to the late return of a player after a rightful release for international duties. The relevant provisions are not meant to be applied in cases where an obligation to release the player does not exist.

In view thereof, we do not appear to be in a position to intervene on behalf of FC Schalke 04 in the present matter".

B) The letter of FIFA to CAS dated 4 November 2008 intending to justify the inadmissibility of the present appeal, which pertinent part reads as follows:

"[…] the subject of the present appeal in question is not to be considered as a decision of a body of FIFA, but as a letter of the administration of FIFA, which has purely informative and non-prejudicing content. The letter at stake does not contain any formal decision of a body of FIFA, but only an opinion of the administration of the latter, and that its contents have a purely informative

character that do not prejudice any decision which could be taken in the future by any deciding body of FIFA in this or in a similar matter. Consequently, and considering art. R47 par. 1 of the Code, according to which "An appeal against the decision of a federation, association or sports-related body may be filed with the CAS" (emphasis added), the present appeal cannot be considered as admissible and therefore must be rejected, as it is not directed against a formal decision of FIFA".

14. It appears from the letter of 12 August 2008 that FIFA indeed declares that it is not in a position to intervene in the case, which *prima facie* and in abstract could be understood as an absence of decision (or as a refusal to deal with a request) likely to be appealed before CAS according to the above examined CAS jurisprudence.

15. However the Panel understands that such a simplistic position cannot be held in the present case if a careful and accurate interpretation of the entire contents and considerations of the mentioned letter (and of the letter of 4 November 2008) is made.

16. The Panel is of the opinion that in the referred letters of 12 August and 4 November 2008, FIFA does not close the possibility of dealing with the case concerning the departure of the Player from the Club's discipline to take part in the OG with his national team. To the contrary, FIFA expressly recognises in its letter of 4 November 2008 that the contents of the letter of 12 August *"do not prejudice any decision which could be taken in the future by any deciding body of FIFA in this or in a similar matter"*.

17. In other words, the Panel understands that in the mentioned letters, FIFA is not stating that there is no other recourse for the Club within FIFA to deal with the consequences derived from the Player having left his Club to join his national team in Beijing, or that the Club must submit its claims and petitions arising from it before another body or institution. If this were the case, it could be possibly contended that a ruling affecting the legal situation of the Club (i.e. a decision, or rather a "non-decision") exists. In the Panel's opinion, what FIFA is actually stating in these letters is that it is not in a position to intervene in the matter submitted by the Club in the way it has been submitted, but leaves the door open to deal with the case if appropriately filed before its bodies. And this, in the Panel's view, makes the difference with a situation of strict and final denial of justice eventually challengeable before CAS.

18. The above mentioned grounds lead the Panel to consider that the letter of FIFA dated 12 August 2008:

    i) is not a ruling materially affecting 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).

19. It is true that FIFA declares in the referred letter that it is not in a position to intervene on behalf of the Club in the matter as submitted by it, but in the Panel's view, and as expressly acknowledged by FIFA, the Club is not at all prevented from instituting the appropriate legal proceedings before FIFA to exercise any rights and actions derived from the fact of the Player having left the Club to join his national team to take part in the OG. Rather, the letter of

FIFA dated 12 August 2008 does simply *inform* the Appellant that FIFA seems not to be in position to intervene yet, but may be in such a position once Appellant has followed the procedure available to it.

20. Therefore the letter of FIFA dated 12 August 2008 is not a decision. Based on article R47 of the CAS Code and on article 63.1 of the FIFA Statutes the present appeal shall be declared inadmissible.

21. This conclusion, finally, makes it not necessary for the Panel to consider the other requests submitted by the parties to the Panel. Furthermore, all other prayers for relief are rejected.

The Court of Arbitration for Sport rules:

1. The appeal filed by FC Schalke 04 with regard to the letter of FIFA dated 12 August 2008 is inadmissible.

2. All other prayers for relief are dismissed.

3. The arbitration procedure CAS 2008/A/1633 FC Schalke 04 v. Confederaçao Brasileira de Futebol is removed from the CAS roll.

(…)