Arbitration CAS 2008/A/1639 RCD Mallorca v. The Football Association (FA) & Newcastle United, award of 24 April 2009

Panel: Prof. Ulrich Haas (Switzerland), President; Mr. José Juan Pintó (Spain); Mr. Mark Hovell (United Kingdom)

Football
Transfer
Lis pendens *in the proceedings before the CAS*
Power of the CAS Panels to take amicus briefs into account without the consent of the parties
Standing to be sued as an issue of merits and not as an issue of admissibility
Purpose of Article 75 CC and standing to be sued

1. **There is no *lis pendens* within the meaning of Article 186(1*bis*) of the Swiss Private International Law Act if the proceedings before the national state courts and before the CAS do not have the same subject matter. What is more, even in the case of the same proceedings pending before the national State courts and the CAS, the CAS Panel has to have "considerable reasons" in order to suspend its proceedings.**

2. ***Amicus curiae* or *amicus* brief is an instrument allowing a non-party to a case to voluntarily offer special perspectives, arguments or expertise on a dispute, in order to assist the court in the matter before it. In absence of an express consent by the parties there are two sets of requisites for submissions of amicus briefs. The first is intrinsic of the arbitral process. According to it, arbitrators must find themselves empowered to accept *amicus* submissions. The second is extrinsic to the arbitral process, ie there must be *amici* with a vital interest in the subject matter. However, and since the CAS Code is silent on the issue whether or not the Panel may take *amicus* briefs into account without the consent of the parties, no power of the Panel to accept *amicus* briefs may be inferred from the provisions of the Code.**

3. **According to the jurisprudence of the Swiss Federal Tribunal, the prerequisite of the standing to be sued is to be treated as an issue of merits and not as a question for the admissibility of an appeal. In an appeal that is directed against a "wrong" Respondent because the latter has no right to dispose of the matter in dispute, the claim filed by the Appellant is admissible but without merit.**

4. **The purpose of Article 75 CC is to protect the individual in its membership related sphere from any unlawful infringements by the association. As a rule, the party having standing to be sued in matters covered by Article 75 CC is "only" the association. Pursuant to this, the appeal cannot be directed primarily against the members of the respective organ that has passed the decision or the members of the association. In principle however, an association has a certain margin of discretion when designing**

the conditions for an appeal against its internal decisions/resolutions. The rights and obligations resulting from membership in an association point in several directions, i.e. towards the association as such but also towards the other individual members. Disputes between members of an association can, therefore, not be excluded from the outset from the membership related sphere. This is all the more true in view of the fact that an association which settles disputes between its members in application of its own rules and regulations is of course (also) pursuing goals of its own and, hence, is also acting in a matter of its own.

Real Club Deportivo Mallorca, SAD ("RCD Mallorca" or "the Appellant") is a professional football club with its seat in Mallorca, Spain. It is affiliated to the Royal Spanish Football Federation (RFEF or "the Spanish FA"), a federation in turn affiliated to the Fédération Internationale de Football Association, the world governing body of football (FIFA).

Newcastle United FC ("Newcastle" or the "First Respondent") is a professional football club with its seat in Newcastle upon Tyne, England. It is affiliated to the Football Association.

The Football Association (FA or the "Second Respondent") was founded in 1863 and is the association responsible for organising and supervising football in England. The FA is a member of the Union des Associations Européennes de Football (UEFA) and of FIFA.

On 9 August 2005, the Appellant concluded an employment contract with the Argentinean footballer G. ("the Player"). The validity of this contract was set to expire on 30 June 2010.

By means of a letter addressed to the Appellant and dated 30 May 2008, the Player announced that he wished to render his services to another club than RCD Mallorca. On 1 July 2008, the First Respondent signed an employment contract with the Player valid from the date of signature until 30 June 2013. On this same date, the Appellant presented a claim before an ordinary Spanish court against the Player regarding the termination of the contractual relationship. The Appellant extended this claim to include the First Respondent on 4 July 2008.

Also on 1 July 2008, the FA sought to obtain the International Transfer Certificate (ITC) for the Player from the RFEF. As the Second Respondent did not receive a reply from the RFEF, it turned upon Newcastle's request to FIFA on 10 July 2008, requesting the international clearance for the Player.

On 14 July 2008, FIFA invited the RFEF to issue the ITC for the Player or, alternatively, to provide an explanation for its refusal. After expiry of the deadline set by FIFA, which had remained without a response by the RFEF, FIFA set a second and final deadline on 22 July 2008, ordering the RFEF to comply with the contents of its previous letter and setting the prospect for a decision by the Single Judge of the FIFA Players' Status Committee ("the Single Judge") based solely on the documents contained in the file.

In reply to this correspondence, the Appellant contacted FIFA on 23 July 2008, outlining that the Player was still legally bound to its club by means of an employment contract valid from 8 August 2005 until 30 June 2010. In addition, the Appellant announced that it had commenced legal proceedings against the Player and the First Respondent before the ordinary courts in Spain.

On 13 August 2008, the Single Judge passed a decision regarding the international clearance for the Player, so as to enable him to register with the First Respondent. The decision reads – *inter alia* – as follows:

> *"… on the basis of art. 23 par. 3 and Annexe 3 of the Regulations on the Status and Transfer of Players (hereinafter: the Regulations), as a general rule, [the Single Judge] was competent to deal with the present request for authoristation to provisionally register the player in question. Furthermore, the Single Judge stated that pursuant to art. 22 of the Regulations, the Spanish club was at liberty to refer the contractual employment-related dispute to a civil court. Yet, the ordinary Spanish court is competent to deal with the contractual dispute arisen between the parties involved as to the substance. But, it is only the Single Judge of the Players' Status Committee who is competent to hear disputes pertaining to the issuance of an ITC. In fact, such matters cannot be referred to ordinary courts (cf. art. 64 par. 2 of the FIFA Statutes)".*

With respect to the pending case before the ordinary Spanish court, the Single Judge:

> *"… was eager to emphasise that the present decision does not prejudice any decision of a competent body as to the substance of the contractual dispute".*

The Single Judge also considered the arguments put forward by the Appellant regarding an allegedly still existing contractual relationship with the Player. In this context, the Single Judge maintained:

> *"… the Spanish club does not appear to be genuinely interested in the services of the player anymore, but rather in financial compensation. In fact, from the documentation received from the Spanish club, it appears that the latter had not requested the return of the player to its team, but had, already before the initiation of the current proceedings, started further legal action against the player and the English club in front of an ordinary Spanish court".*

And:

> *"On a side note, and for the sake of good order only, the Single Judge recalled that by means of a letter dated 30 May 2008 addressed to the Spanish club the player had clearly expressed his wish to render his services to another club than to RCD Mallorca".*

On a final note, the Single Judge specified that:

> *"… the present decision regarding the authorisation for the provisional registration of the player is a provisional measure and, as such, without prejudice to any formal decision which the Dispute Resolution Chamber (DRC) or any other possibly competent deciding authority may be called to take as to the substance in the relevant contractual disputes between the player and the clubs concerned (NB: the matter is apparently already pending before ordinary courts in Spain) at a later stage. In particular, the DRC or any other competent deciding body would have to express itself on the questions if a breach of contract was committed by one of the parties*

concerned, whether with or without just cause, who is to be deemed responsible for the potential breach as well as on the possible consequences thereof, i.e. financial compensation and / or sporting sanctions".

Based on these considerations, the Single Judge decided to authorise the provisional registration of the Player with the First Respondent, with immediate effect.

By letter dated 26 August 2008, the Appellant filed its Statement of Appeal with the Court of Arbitration for Sport (CAS) against the decision rendered by the FIFA Single Judge. The appeal is directed against Newcastle and the FA.

On 1 September 2008, the CAS Court Office informed FIFA and the RFEF of the statement of appeal filed by the Appellant, specifying that the appeal is not directed at FIFA or the RFEF but that pursuant to Article R54 par. 4 and R41.3 of the Code of Sports-related Arbitration (the "Code"), they can file an application with CAS if they intend to participate as Interested Parties in the arbitration. To this end, FIFA and / or the RFEF would have to send their application within the time limit set for the Respondents' answers to the appeal. Alternatively, if FIFA and / or the RFEF chose not to be involved in the arbitration, they would only receive a copy of the final award, upon its notification to the parties.

The RFEF responded to the letter of the CAS Court Office on 3 September 2008, indicating that it would not file an application as Interested Party.

By letter dated 15 September 2008, the Appellant filed its Appeal Brief with the CAS.

On 17 September 2008, the Second Respondent approached the CAS Court Office with the request to be dismissed from the arbitration proceedings, outlining that it will abide by any decision taken by the Panel. Other than this, it has no further role to play in the arbitration process. The Second Respondent requested, however, to be copied into the documents exchanged in the appeal so that it can monitor the progress.

In response to the request, the CAS Court Office invited the Appellant to declare whether it wishes for the FA to remain a Respondent in the arbitration. In reaction thereto, the Appellant stated its comprehension for the position of the FA in this case and for the fact that the FA has no specific interest in the file. However, the Appellant underlined that it could not release the FA as a party from this procedure given the FA's role in the process initiated before FIFA and thus the necessity for it to continue being involved.

On 8 October 2008, the First Respondent filed its Answer Brief.

On 14 October 2008, FIFA communicated that it renounces to its right to intervene in the arbitration proceedings. With the same correspondence, FIFA filed - however – a submission entitled *"amicus curiae brief"*, which expanded its position on the dispute.

The CAS Court Office forwarded the correspondence received from FIFA to the parties, asking whether they would accept the *"amicus curiae brief"* presented by FIFA to be part of the file.

Whilst the First Respondent did not object to the *"amicus curiae brief"* to be taken on file, the Appellant underlined that FIFA has no part in the arbitration and is, thus, not entitled to file submissions in the present proceedings. However, the Appellant insisted that it would not have any objections if FIFA intervened in the proceedings as a respondent party.

With its correspondence of 31 December 2008, the Appellant requested that the Panel take a preliminary decision on FIFA's role in this procedure and on the admissibility of its *"amicus curiae brief"* before a hearing date is set. In addition, the Appellant demanded a second round of submissions, claiming that it had not been aware of the existence of many documents filed by the First Respondent in its Answer.

In reaction thereto, the First Respondent expressed its refusal for a second round of submissions, chiefly stating that there were no "exceptional circumstances" that would justify further submissions. The First Respondent also protested that the Appellant had failed to disclose the fact that it commenced proceedings before the Spanish Labour Courts on 22 September 2008, having done so only after the Single Judge decided on the Player's international clearance and that, if the Appellant is seeking compensation from a Spanish Labour Court, its claim must logically presuppose its acceptance of the Single Judge's decision to issue the provisional ITC for the player in the first place, permitting his registration with First Respondent. Consequently, the Appellant should suspend the proceedings before the Spanish Labour Courts or CAS, pending the determination of the other.

On 15 January 2009, the CAS Court Office informed the Parties that the Panel decided not to admit the *"amicus curiae brief"* submitted by FIFA on 14 October 2008 as part of the file, thus considering FIFA a non-party in the proceedings. The CAS Court Office further added that the grounds for this decision would be developed in the final award. The CAS Court Office also invited the parties to declare, within five days, whether or not they would wish to incorporate FIFA's statements as part of their own submissions.

The Appellant declined to incorporate FIFA's statements as part of its submissions on 22 January 2009. The First Respondent accepted FIFA's statements as an alternative and additional argument to its Answer Brief of 8 October 2008.

On 26 January 2009, the Panel invited the Appellant and the Second Respondent to send their comments, within a two-week deadline, regarding the statement of FIFA, which the First Respondent had decided to incorporate as part of its own submission. The CAS Court Office communicated that, upon receipt of the parties' positions, the Panel would issue a (preliminary) decision on the admissibility of the present case on the basis of the written submissions. At a later point, and if necessary, the Panel would deal with the Appellant's request for a second round of written submissions.

By letter dated 30 January 2009 the Appellant requested the Panel to ask FIFA for a complete copy of the file regarding the appealed decision. With correspondence dated 4 February 2009, the CAS Court Office, on behalf of the chairman of the Panel issued a respective order based on Article

R57(1) of the Code. With letter dated the same day FIFA submitted the file to the CAS Court Office, which in turn forwarded the file to the members of the Panel and the parties.

With letter dated 9 February 2009 the Appellant commented on FIFA's statements which the First Respondent had incorporated as part of its submissions.

On 27 March 2009 the CAS Court Office issued an Order of Procedure on behalf of the Panel which was signed by the Appellant and Newcastle.

The parties' positions may be summarized as follows:

In its Appeal Brief dated 15 September 2008 lodged against the decision of the Single Judge, the Appellant requests the CAS – *inter alia* – to,

(1) "declare that it is not within the FIFA jurisdiction the determination as to whether or not the player G. can be with NEWCASTLE UNITED, and, by that, the ITC cannot be an issue in this case".

(2) "Subsequently, in the case that the main request should be dismissed, … that the Panel revokes the decision taken and orders the Single Judge to pronounce the sporting sanctions against the CLUB, NEWCASTLE UNITED, as demanded by the article 2.6 of ANNEX 3 on the Regulations of the Status and Transfer".

In its Answer dated 8 October 2008, the First Respondent requests that *"the Appellant's appeal is dismissed and in particular that the Panel confirms that:*

(a) the Single Judge of the Players' Status Committee was competent to determine the issuance of the Player's ITC and his provisional registration with the First Respondent; and

(b) the Decision is upheld; and that

(c) all other grounds of the Appellant's appeal are dismissed".

In support of its request, the First Respondent contends in its Answer and in its letter dated 19 January 2009, by means of which it incorporated the FIFA statement of 14 October 2008, *inter alia,* that*:*

As announced by in its correspondence of 8 October 2008, the Second Respondent did not present a position nor put forward its arguments.

LAW

CAS Jurisdiction

1. The competence of CAS results from Article R47 of the CAS Code, which stipulates the following:

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

2. Article 63(1) of the FIFA Statutes reads:

   "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".

3. Decisions of the Single Judge cannot be appealed before any other legal body of FIFA (Art. 23(3) RSTP). Consequently, as all internal legal remedies have been exhausted, the conditions laid down in Article R47 of the CAS Code are met.

4. In addition, in the case at hand the parties have signed the Order of Procedure and have, thus, submitted to the competence of CAS. Finally, the Panel notes that the parties have not challenged the competence of CAS and, by this have also acknowledged the competence of CAS to deal with the present dispute.

Lis Pendens

5. In the present case there is no issue of *lis pendens*. The latter does not follow from the Lugano Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial matters from 16 September 1988 or the Council Regulation (EC) No 44/2001 of 22 December 2000 on the Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters, since both sets of rules do not deal with the competence and jurisdiction of arbitral tribunals. Instead, the question of *lis pendens* in the case at hand is governed by the Swiss Private International Law Act (PIL), since the CAS has its seat in Switzerland and at least one of the parties at the time of the conclusion of the arbitration agreement did not have its domicile or habitual residence in Switzerland (Art. 176(1) PIL). In respect of *lis pendens* the PIL provides in Article 186(1*bis*):

   "(1) The arbitral tribunal rules on its jurisdiction.

   (1bis) It rules on its jurisdiction irrespective of a claim based on the same subject matter between the same parties pending before another state court or arbitral tribunal, unless serious reasons demand for the proceedings to be suspended".

6. The Appellant claims in the case at hand that concurrent proceedings are pending before the Spanish courts involving the Player and the First Respondent. However, the proceedings before the Spanish courts and before this arbitral tribunal do not have the same subject matter. While the state court proceedings deal with the (contractual) consequences of a breach of a labour contract concluded between the Appellant and the Player the case presented by the Appellant before this arbitral tribunal deals - in essence – with the question whether or not FIFA is competent to issue a (provisional) ITC in relation to the Player. Since the subject matters before this arbitral tribunal and before the Spanish state courts differ the Panel has no grounds to further investigate the prerequisites of Article 186(1*bis*) PIL, since there is – from the outset – no issue of *lis pendens* here. Even if the Panel would have found that proceedings concerning the same subject matter were pending before the Spanish courts and CAS, the Panel is of the opinion that there are no "considerable reasons" within the meaning of Article 186(1*bis*) PIL to suspend the present proceedings.

The status of FIFA in the present proceedings

7. With its letter dated 14 October 2008, FIFA presented the Panel with a statement on this dispute, which it specified as *"amicus curiae"* brief. Contrary to the case CAS 2008/A/1517, the parties to the present proceedings have not unanimously accepted the *"amicus intervention"* by FIFA.

8. The Panel, therefore, was called to pass a decision on the principle of such a submission. Having considered the positions of both parties on the admissibility of the *"amicus curiae"* brief as well as FIFA's arguments, the Panel decided on 15 January 2009 not to admit it as part of the file for the following reasons:

9. Literally translated *"amicus curiae"* means *"friend of the court"*. The term *amicus curiae* or *amicus* brief describes an instrument allowing someone who is not a party to a case to voluntarily offer special perspectives, arguments or expertise on a dispute, usually in the form of a written *amicus curiae* brief or submission, in order to assist the court in the matter before it. It is exactly this (and only this) role that FIFA seeks to play in these proceedings.

10. *Amicus* participation has a tradition in common law countries, yet is less known in the civil law tradition (cf STUMPE F., SchiedsVZ 2008, 125, 127). On an international scale, *amicus* briefs are know in proceedings before the European Court of Human Rights (ECHR)[1] and in European Competition Law, where the cooperation between national courts and the European Commission is construed on an *amicus* basis[2]. In arbitration *amicus curiae* briefs have gained a certain degree of acceptance in disputes relating to international investments. In particular two decisions by NAFTA tribunals have received a high degree of attention in that respect (*Methanex* and *UPS*[3], cf. FRIEDLAND, The amicus role in international arbitration, in MISTELIS/LEW (eds), Pervasive Problems in international arbitration, 2006, p. 321 *et seq*.).

[1] Art. 36(2) ECHR. The provision, however, does not allow for unsolicited *amicus curiae* briefs.
[2] Cf. Art. 15 EC-Regulation 1/2003.
[3] NAFTA cases are available at www.naftaclaims.com.

Reasons put forward in favour of *amicus* participation are – *inter alia* – that proceedings affecting the pubic interest are not concluded collusively, unrepresented persons and the public interest are protected by *amicus* participation and that the transparency that goes along with *amicus* participation strengthens the confidence in the outcome of the arbitration process (cf. SHELTON, 88 AJIL [1994], p. 611, 612).

11. In absence of an express consent by the parties there are two sets of requisites for submissions of *amicus* briefs. The first is intrinsic of the arbitral process. According to it, arbitrators must find themselves empowered to accept *amicus* submissions. The second is extrinsic to the arbitral process, i.e. there must be *amici* with a vital interest in the subject matter.

12. On the first requirement – arbitral power to accept *amicus* submissions – the starting point must be the Code. Unlike for example ICSID-Arbitration Rules (Art. 37(2), cf. KREINDLER/SCHÄFER/WOLFF, Schiedsgerichtsbarkeit, 2006, marg. no 380) the CAS Code is silent on the issue, whether or not the Panel may take *amicus* briefs into account without the consent of the parties. In particular no power of the Panel to accept *amicus* briefs may be inferred from Article 57(1) 3rd sentence of the Code, since the *amicus* brief is not a part of the "file of the federation". The question, therefore, is whether the Panel may derive the respective power from Article 182(2) PIL. This provision states:

"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".

13. Article 182(2) PIL is only applicable, if *"the parties have not determined the procedure"*. In the case at hand the parties have referred the dispute to the CAS and, thus, have made a choice as to the applicable procedure, i.e. the CAS Code. The latter does not contain a *lacuna* in respect of *amicus* submissions which would make it necessary to fall back on Article 182(2) PIL. On the contrary, the Panel is of the view that – absent any express agreement of the parties to the contrary - the Code enumerates in an exhaustive manner all possible ways of participation in a proceeding before the CAS, i.e. as an appellant, a respondent, joinder or intervenor. In summary, therefore, the Panel holds that the Code as it stands now does not confer to the Panel the power to accept *amicus* briefs (submitted by non-parties).

14. Subsidiarily the Panel wants to point out that Article 182(2) PIL – even if it were applicable – does not oblige the Panel to accept non-solicited submissions by non-parties. The provision grants wide discretion to the Panel in determining the applicable rules of procedure. This discretion is not confined in the case at hand by a standing practice in international arbitration to accept unsolicited *amicus* briefs. On the contrary, the Panel is of the view that there is no general principle permitting written submissions by non-parties in private international arbitration. Even in state arbitration proceedings unsolicited *amicus* briefs are not admitted as a general rule in the absence of explicit rules allowing for it.

15. In addition, the Panel holds that *amicus* briefs tend – as in the case at hand – to support one party to the detriment of the other. Thus, *amicus* briefs interfere with the concept of two-party arbitration and may cause an imbalance between or an unequal treatment of the parties (cf.

STUMPE F., SchiedsVZ 2008, 125, 129). The Panel holds, therefore, that the discretion conferred on it by Article 182(2) PIL must be exercised with caution. *Amicus* briefs should only be accepted where their disadvantages are offset by their positive effects. This may be the case in proceedings demanding for greater transparency because of the public interest at stake. In the *UPS* case[4], for example the tribunal accepted *amicus* briefs as the matter in dispute dealt with a claim by a US company contending that a Canadian state monopoly unfairly limited its ability to compete in the Canadian express courier business. In this proceeding the *amicus* brief was filed by the Canadian Postal Workers Union and the Council of Canadians on the grounds that the UPS claim would harm the employment status of Canadian postal workers and the services provided to those who depended upon Canada Post. In the *Methanex* case, in which the *amicus* brief was equally accepted by the tribunal, the matter in dispute concerned an investor's claim for compensation because of an environmental regulation adopted by the state of California prohibiting the use of a fuel additive, which the claimant produced. The *amici* in this case were environmental groups, who argued that the investor's claim would have chilling effects on the willingness of state and federal governments to implement environmental legislation. The character of the arbitration proceedings which may be suited for *amicus* briefs is best described by the *Methanex* tribunal. The arbitral tribunal held[5]:

"There is an undoubtedly public interest in this arbitration. The substantive issues extend far beyond those raised by the usual transnational arbitration between commercial parties".

16. Appropriate cases that allow for *amicus* submissions to be taken into account without the consent of the parties are, thus, disputes that are likely to affect persons beyond those involved as parties. Only if there is a public dimension to the matter at stake the disadvantages incurred with amicus briefs may be compensated by its advantages. It does not come as a surprise, therefore, that *amicus* briefs so far have only been an issue in proceedings that affect the public, chiefly dealing with financial, environmental and human rights consideration. In the view of the Panel the case in dispute does not reach this threshold and, therefore, even if Article 182(2) PIL would allow for the acceptance of *amicus* briefs, there is no obligation to do so. The present case does not affect a public interest other than the one that this formation shall for the sake of good administration of justice apply the rules and regulations correctly.

17. In light of the above considerations the Panel, therefore, rejects FIFA's request for consideration of its *amicus curiae* brief.

The relief sought by the Appellant

18. The Appellant seeks as a primary relief a declaratory judgment by CAS that *"FIFA is not competent in order to authorize to the player … to be registered by other National association …"*. The purpose of this request is not quite clear to the Panel and, thus, has to be interpreted by it. A declaratory judgment that FIFA is not competent to authorize the registration of the Player

[4] *United Parcel Services v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae dated 17 October 2001.
[5] *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as "Amicus Curiae" dated 15 January 2001, para. 49.

with a new federation is of no legal interest to the Appellant as long as the ITC issued by FIFA remains in place. The Appellant's prayer for relief, therefore, only makes sense if it is directed against the decision of the Single Judge. The Panel, thus, interprets the Appellant's primary prayer for relief as seeking a judgment by the CAS that the decision by the Single Judge is unlawful and, hence, has to be set aside. It results from this interpretation that the Appellant's primary and subsidiarily sought reliefs pursue the same goal but for the fact that with the latter the Appellant – in addition – requests CAS to impose also sanctions upon the First Respondent.

Timeliness of the Appeal

19. The Appellant filed its appeal in time. According to Article R49 of the Code, the time limit for filing an appeal with CAS is 21 days, unless the regulations of the sports federation or association concerned provides for another time limit. Article 63(1) of the FIFA Statutes stipulates that the time limit for filing an appeal with CAS is also 21 days. The period begins to run upon receipt of the decision in question. In the present case the decision was served on the Appellant on 15 August 2008. The time limit therefore expires on 5 September 2008 with the consequence that the Appellant, with its letter dated 26 August 2008 filed its appeal in time.

Applicable Law

20. Article 187 of the PIL provides – *inter alia* – that *"the arbitral tribunal shall rule according to the law chosen by the parties or, in the absence of such a choice, according to the law with which the action is most closely connected"*. This provision establishes a regime concerning the applicable law that is specific to arbitration and different from the principles instituted by the general conflict-of-law rules of the PIL. In particular the provisions enables the parties to mandate the arbitrators to settle the dispute in application of provisions of law that do not originate in a particular national law, such as sports regulations or the rules of an international federation (cf. KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2006, marg. no. 597, 636 *et seq.*; POUDRET/BESSON, Droit comparé de l'arbitrage international, 2002, marg. no. 679; RIGOZZI A., L'arbitrage international en matière de sport, 2005, marg. no. 1177 *et seq.*).

21. According to the legal doctrine, the choice of law made by the parties can be tacit (Zürcher Kommentar zum IPRG/HEINI, 2nd ed. 2004, Article 187 marg. no. 11; BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, marg. no. 1269; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2006, marg. no. 609) and/or indirect, by reference to the rules of an arbitral institution (RIGOZZI A., L'arbitrage international en matière de sport, 2005, marg. no. 1172; KAUFMANN-KOHLER/STUCKI, International Arbitration in Switzerland, 2004, p. 118 *et seq.*). In agreeing to arbitrate the present dispute according to the Code the parties have submitted to the conflict-of-law rules contained therein, in particular to Article R58 of the Code (CAS 2006/A/1061, marg. no. 28 *et seq.*; CAS 2006/A/1141, marg. no. 61; CAS 2007/A/1267, marg. no. 41).

22. Article R58 of the Code provides that the Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate.

23. In the present case, the "applicable regulations" are the FIFA regulations, in particular the RSTP and the FIFA Statutes. In addition, i.e. subsidiarily, Swiss law applies to the dispute at hand. This follows from the applicable FIFA Statutes which refer to Swiss law. Article 62(2) of the FIFA Statutes provides:

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

24. The Appellant is of the view that in addition Spanish law applies to the case at hand. The Panel, however, does not share this view. First of all the applicable FIFA regulations, in particular the ones dealing with the issuance of the ITC by the FIFA organs (cf. Art. 23, 25 RSTP) do not contain a choice of law clause in favour of Spanish Law. Furthermore any (tacit or explicit) choice of law clause in the Player's contract is not binding on the Respondents, since they are not parties to the contract. Finally – according to Article R58 of the Code – Spanish law is neither the law of the country in which the federation which issued the challenged decision is domiciled nor does the Panel deem the application of Spanish law appropriate in the present case.

Standing to be sued

25. The First Respondent asks for the present appeal to be dismissed as it deems that it is directed at the wrong parties. It maintains that the Appellant did not designate FIFA as a respondent to this procedure and that, therefore, the Panel cannot consider the Appellant's requests for relief. In summary the First Respondent claims that neither it nor the Second Respondent have the standing to be sued with respect to the jurisdictional challenge and the challenge to the authorisation granted by the Single Judge.

A. Issue of merits or admissibility?

26. Upon examining the jurisprudence of the CAS it is not quite clear whether the prerequisite of the standing to be sued is to be treated as an issue of merit (eg. CAS 2008/A/1517, marg. no. 135) or of the admissibility of an appeal (eg. CAS 2006/A/1189, marg. no. 61 *et seq.*; CAS 2007A/1329-1330, marg. no. 32). In this case the Panel holds that an appeal that is directed against a "wrong" Respondent because the latter has no right to dispose of the matter in dispute, the claim filed by the Appellant is admissible but without merit. This tribunal sees itself comforted in its reasoning by the jurisprudence of the Swiss Federal Tribunal (cf. ATF 128 II 50, 55: *"Sur le plan des principes, il sied de faire clairement la distinction entre la notion de*

légitimation active ou passive (appelée aussi qualité pour agir ou pour défendre; Aktiv- oder Passivlegitimation), d'une part, et celle de capacité d'être partie (Parteifähigkeit), d'autre part. La légitimation active ou passive dans un procès civil relève du fondement matériel de l'action; elle appartient au sujet (actif ou passif) du droit invoqué en justice et son absence entraîne, non pas l'irrecevabilité de la demande, mais son rejet".)

B. No specific rules as to the standing to be sued in the FIFA regulations

27. According to Article 23 of the RSTP, a decision reached by the Single Judge may be appealed before the CAS. The provision does not specify, however against whom the appeal must be directed. Contrary to the decision CAS 2007/A/1403 marg. no. 49 *et seq*., this Panel holds that the same is true for the FIFA Statutes. In particular it does not follow from the wording in Article 62 *et seq*. of the FIFA Statutes that FIFA allows for cases to be resolved by CAS irrespective of the parties' standing to sue or to be sued. Therefore, the Panel comes to the conclusion that there is no specific provision in the FIFA regulations and that the question whether or not the Respondents have the standing to be sued must be derived from the subsidiariliy applicable Swiss law.

C. Standing to be sued according to Swiss law

28. Under Swiss law, a decision by an association like FIFA may be challenged pursuant to Article 75 of the Swiss Civil Code (CC). Under the heading *"protection of member's rights"*, the provision reads as follows:

"Any member who has not consented to a resolution which infringes the law or the articles of association is entitled by law to challenge such resolution in court within one month from the day on which he became cognizant of such resolution".

29. The purpose of this provision is to protect the individual in its membership related sphere from any unlawful infringements by the association (cf. ATF 108 II 15, 18). In view of this legislative purpose Article 75 CC is construed and interpreted in a broad sense (cf. ATF 118 II 12, 17 *et seq*.; 108 II 15, 18 *et seq*.; Handkommentar zum Schweizer Recht/NIGGLI, 2007, Art. 75 ZGB marg. no. 6 *et seq*.; HEINI/PORTMANN, Das Schweizer Vereinsrecht, Schweizerisches Privatrecht II/5, 2005, marg. no 278; Basler Kommentar ZGB/HEINI/SCHERRER, 3rd ed. 2006, Art. 75 marg. no. 3 *et seq*.; Berner Kommentar zum schweizerischen Privatrecht/RIEMER, 1990, Art. 75 marg. no. 7 *et seq*., 17 *et seq*.; FENNERS H., Der Ausschluss der staatlichen Gerichtsbarkeit im organisierten Sport, 2006, marg. no. 208). In particular the term "resolution" in Article 75 CC does not only refer to resolutions passed by the assembly of an association but, instead, encompasses any other (final and binding) decision of any other organ of the association irrespective of the nature of such decision (disciplinary, administrative, etc.) and the composition of said organ (one or several persons). In light of the foregoing the decision by the Single Judge dated 13 August 2008 must be interpreted as a "resolution" by FIFA in the terms of Article 75 CC.

30. The party having standing to be sued in matters covered by Article 75 CC is – according to the Swiss legal doctrine – "only" the association. Pursuant to this the appeal cannot be directed primarily against the members of the respective organ that has passed the decision or the members of the association (cf. Handkommentar zum Schweizer Recht/NIGGLI, 2007, Art. 75 ZGB marg. no. 5; Basler Kommentar ZGB/HEINI/SCHERRER, 3rd ed. 2006, Art. 75 marg. no. 21; Berner Kommentar zum schweizerischen Privatrecht/RIEMER, 1990, Art. 75 marg. no. 60). The question is, however, if there are exceptions to this rule.

31. BERNASCONI/HUBER try to limit the scope of application of Article 75 CC by restricting the protected membership related sphere. In their view Article 75 CC *"does not apply indiscriminately to every decision made by an association (…). Instead, one has to determine in every case whether the appeal against a certain decision falls under Art. 75 Swiss Civil Code, i.e. whether the prerequisites of Art. 75 of the Swiss Civil Code are met in a specific individual case. If, for example, there is a dispute between two association members (e.g. regarding the payment for the transfer of a football player) and the association decides that a club (member) has to pay the other a certain sum, this is not a decision which can be subject to an appeal within the meaning of Art. 75 Swiss Civil Code. (…) A dispute between two football clubs, i.e. two association members, therefore, is not a dispute which can be appealed against under Art. 75 Swiss Civil Code. The sports association taking a decision is not doing so in a matter of its own, i.e. in a matter which concerns its relationship to one of its members, rather it is acting as a kind of first decision making instance, as desired and accepted by the parties"*. (BERNASCONI/HUBER, Appeals against a Decision of a (Sport) Association: The Question of the Validity of Time Limits stipulated in the Statutes of an Association, SpuRt, 2004, Nr. 6, p. 268 *et seq*.). This idea to limit the notion of membership related dispute covered by Article 75 CC has been taken up by several CAS formations. The Panel in the case CAS 2006/A/1192 for example was called to settle a dispute between a player and its club for an alleged breach of the contract by the club. The dispute was decided at a first level by an organ of FIFA. When analyzing the applicability of article 75 CC to said decision by FIFA, the Panel stated that *"at any rate, the present matter is clearly not a membership related decision, which might be subject to Article 75 CC but a strict contractual dispute. Accordingly, the Panel holds that Mr. Mutu does have standing to be sued"* (marg. no. 41-48; see also CAS 2005/A/835&942, marg. no. 85 *et seq*.).

32. The Panel holds that an association – in principle – has a certain margin of discretion when designing the conditions for an appeal against its internal decisions/resolutions. The Panel has, however, doubts whether - in the absence of any specific rules in the statutes and regulations of a federation – it subscribes to the narrow interpretation given by BERNASCONI/HUBER to the notion "membership related dispute" (cf. also NETZLE S. SchiedsVZ 2009, 93 *et seq*.). A membership relation is not just one-dimensional. Instead, the rights and obligations resulting from membership in an association point in several directions, i.e. towards the association as such but also towards the other individual members. Disputes between members of an association can, therefore, not be excluded from the outset from the membership related sphere. This is all the more true in view of the fact that an association which settles disputes between its members in application of its own rules and regulations is of course (also) pursuing goals of its own and, hence, is also acting in a matter of its own. Ultimately, the question if and to what extent the opinion of BERNASCONI/HUBER should be followed can be left unanswered here, since the appeal filed by the Appellant does neither

fulfill the prerequisites of the principles laid down in Article 75 CC nor the conditions of the (supposed) exception to this rule.

33. The issuance of a provisional registration for a player with a national federation touches upon the relationship between FIFA and its members. It does not interfere with the relationship among clubs. The proceedings put in place to accord or refuse an ITC, in the Panel's view, are meant to protect an essential interest of FIFA. This is evidenced by the wording in Article 9 of the RSTP and Article 2 of the Annex to the RSTP. According to these rules, only the national federations are involved in the process of the issuance of the ITC. Furthermore, the new federation of the player has no claim of its own against the former federation to grant the ITC. Instead, if the former federation does not deliver the ITC the issuance of the ITC lies in the sole competence of FIFA.

34. Furthermore, in exercising its exclusive competence FIFA does not act like a court of first instance in a dispute between its members. Instead, when assuming the competences conferred on it according to the RSTP FIFA is exercising an administrative function and, thus, having an impact on the rights and duties of its individual members in the sense of Article 75 CC. The mere fact that several (and not just one) member is affected by FIFA's administrative act does not change the nature of the "appealed decision". If one applies the principles laid down in Article 75 CC to the case at hand then the dispute must be considered to be a membership related dispute with the consequence that it must (also) be directed against FIFA.

D. Application of Article 75 CC to Article 62 et seq. *of the FIFA Statutes*

35. The last question that remains to be solved is whether the principles enshrined in Article 75 CC must be applied *mutatis mutandis* to Article 62 *et seq.* of the FIFA Statutes. The Panel holds that this is the case. The purpose of Article 62 *et seq.* of the FIFA Statutes is to confer to CAS the competence to decide the dispute *in lieu of* the otherwise competent (Swiss) Courts. Since, however, the CAS assumes comparable functions as state courts it is hardly conceivable why the question as to which party has standing to be sued should – absent any specific rules in the Statutes to the contrary – be answered differently for state court proceedings and for arbitral proceedings.

E. Summary

36. Summoning up the Panel holds that neither the First nor the Second Respondent have standing to be sued in respect of the primary request filed by the Appellant and that, therefore, the appeal must be dismissed insofar. The same is true for the secondary relief sought by the Appellant. Also the motion to amend or to supplement an (administrative) decision by an organ of a federation must – like the request to set aside such decision - be directed against the "proper" party, i.e. FIFA. Since the Appellant failed to comply with this, also the motion for secondary relief must be dismissed.

37. Since it is the responsibility of the Appellant to fulfil the prerequisites of an appeal the Panel sees no duty on the part of FIFA to cure the omissions by the Appellant by stepping into this procedure as an intervenor. The Panel, therefore, sees no issue of *venire contra factum proprium* on FIFA's side in the case at hand.

Mission of the Panel

38. The mission of the Panel follows, in principle, from Article R57 of the Code, according to which the Panel has full power to review the facts and the law of the case. Furthermore, Article R57 of the Code provides that the Panel may issue a new decision which replaces the decision challenged or may annul the decision and refer the case back to the previous instance. Furthermore, Article R57(2) provides that the Panel may – after consulting the parties – decide not to hold a hearing if it deems itself sufficiently well informed. The panel advised the parties by letter and in the order of procedure that it will decide on the preliminary issues without holding a hearing. These issues which were first raised in FIFA's *amicus curiae* brief and which form the basis of this decision where extensively debated between the parties in their written submission. Since these preliminary issues – irrespective of whether they touch upon the admissibility or the merits of these proceeding – do only relate to legal and not to factual questions an in light of the fact that the parties have signed the order of procedure this Panel deems itself sufficiently informed to decide the case without holding a hearing.

The Court of Arbitration for Sport rules:

1. The appeal filed by Real Club Deportivo Mallorca, SAD on 26 August 2008 against the decision issued by the FIFA Single Judge of the Players' Status Committee on 13 August 2008 is dismissed.

(…)