



Arbitration CAS 2009/A/1881 E. v. Fédération Internationale de Football Association (FIFA) & Al-Ahly Sporting Club, partial award on *lis pendens* and jurisdiction of 7 October 2009

Panel: Prof. Massimo Coccia (Italy), President; Mr Olivier Carrard (Switzerland); Prof. Ulrich Haas (Germany)

Football

Modification of the motions for relief in the Appeal Brief

*Cumulative conditions to trigger the *lis pendens* exception*

Difference between the concept of “pendency” and that of “jurisdiction”

Serious reasons to require the stay of the arbitral proceedings

Purpose of Art. 22 RSTP

Submission to the jurisdiction of the FIFA

Validity of clauses “by reference” to confer jurisdiction to the CAS

1. Article R51 of the CAS Code does not preclude an appellant from modifying in the Appeal Brief the motions for relief put forward in the Statement of Appeal. The practice of the CAS has consistently repudiated any excessive formalism and has allowed parties to modify their motions for relief on condition that the principle of equal treatment of the parties and their right to be heard be preserved. When, in compliance with Article R55 of the CAS Code, the respondent files its answer after the Appeal Brief, it cannot be affected by the appellant’s variation of his motions for relief.
2. Paragraph 1bis of Article 186 LDIP requires to stay arbitral proceedings only if three conditions are cumulatively met: (i) the arbitration and the civil lawsuit must be between the same parties and must concern the same matter; (ii) the lawsuit before the State court must be “already pending” (“*déjà pendante*”) when the arbitration claim is lodged with the CAS; and (3) the party raising the exception of *lis pendens* must prove the existence of “serious reasons” (“*motifs sérieux*”) requiring the stay of the arbitral proceedings.
3. The concept of “pendency” must be kept distinct from the concept of “jurisdiction”. Accordingly, a party may well file a “conditional” claim to the CAS in order to safeguard its rights with regard to jurisdiction but this filing inevitably determines the procedural “pendency” (which is indeed unconditional) of the arbitration. In other terms, a party has the right to lodge an appeal to the CAS with the sole purpose of asking a panel to suspend the arbitration and decline its jurisdiction. However, even merely asking such panel to adjudicate these preliminary issues in its favour, the party has nonetheless instituted the procedure for the appointment of the arbitrators and has asked the panel to deal with those preliminary issues, thus determining inexorably the pendency of the arbitration from the date of the filing.

4. In order to demonstrate the existence of “serious reasons”, the appellant must prove that the stay is necessary to protect his rights and that the continuance of the arbitration would cause him some serious inconvenience. The mere argument that there is a possibility that the State court may come up with a different decision than that of the CAS is not a serious reason, as the possibility of conflicting decisions is present in every case of parallel proceedings involving an arbitration tribunal and a civil court. If one were to accept this argument, the arbitral proceedings would end up being always suspended, which is manifestly not the legislative aim of Article 186 para. 1bis LDIP.
5. Article 22 of the 2008 FIFA Regulations for the Status and Transfer of Players (RSTP) must be considered as an offer by FIFA to provide players and clubs a forum to hear and solve disputes concerning international transfers. By submitting a request for the release of an International Transfer Certificate (ITC), players and/or clubs accept the offer and agree to refer their case to FIFA in accordance with FIFA rules.
6. Article 22 lit. a RSTP clearly links the request for and the issuance of an ITC to the possible imposition by FIFA of “*sporting sanctions or compensation for breach of contract*”. Therefore, when resorting to FIFA, the player and/or the club knowledgeably accepts the FIFA rules and the competence of FIFA not only to issue an ITC but also to look into the substance of the matter and decide on sporting sanctions and on compensation for breach of contract. It would be an extraordinary case of *venire contra factum proprium* if the player and/or the club were allowed to submit to the rules and authority of FIFA with respect to the ITC and to reject such rules and authority with respect to the other side of the same coin, i.e. the dispute concerning the status of the player as a free agent or not at the moment of signing the contract with the club, and the disciplinary consequences thereof.
7. When signing a contract whose annexes include, among the documents that he has expressly declared to have knowledge of and to pledge to respect, the FIFA Statutes and the FIFA Regulations, a player explicitly and unreservedly acknowledges that he has acquainted himself with the documents which contain the rules establishing the competence of the DRC and the arbitral jurisdiction of the CAS. As stated by the Swiss Federal Tribunal, the “*reference need not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause*”.

E. (the “Appellant” or the “Player”) is an Egyptian football player born in 1973. He is a goalkeeper who has played most of his professional career (1996-2008) for the Egyptian team Al-Ahly Sporting Club. He played for some time in 2008 and 2009 for the Swiss team FC Sion, after a disputed transfer which gave rise to the present case. In July 2009 he returned to Egypt joining the team Ismaily Sporting Club. He has successfully experienced on various occasions the international club

competitions African Champions League, African Super Cup and FIFA Club World Championship. He has been international more than a hundred times with the Egyptian national team, winning three times the African Cup of Nations and taking part in the FIFA World cup qualifiers and in the 2009 FIFA Confederations Cup.

The Fédération Internationale de Football Association (FIFA; the “First Respondent”) is the world governing body for the sport of football, having its headquarters in Zurich, Switzerland.

Al-Ahly Sporting Club (“Al-Ahly” or the “Second Respondent”) is a professional football club in Egypt. It is affiliated to the Egyptian Football Association.

On 1 January 2007, the Player and Al-Ahly signed an employment contract effective until the end of the 2009-10 season.

On 14 February 2008, a meeting took place in Cairo between, amongst others, the Player, representatives of Al-Ahly and representatives of the Swiss professional club known as “FC Sion”, with a view to negotiating the possible transfer of the Player from Al-Ahly to FC Sion. Apparently, no document of any kind was signed at the end of the meeting. FC Sion and the Player claim that a verbal arrangement on the transfer was reached whereas Al-Ahly denies such alleged circumstance.

On 15 February 2008, the Player and FC Sion signed an employment contract effective until the end of the 2010-11 football season.

On 27 February 2008, FC Sion sent by fax an urgent letter to FIFA invoking the FIFA Regulations on the Status and Transfer of Players (the “FIFA Transfer Rules”) and requesting the issuance of an International Transfer Certificate (ITC) to allow the Player to be registered for FC Sion with the Swiss Football Association. The Player himself signed the letter at the bottom, explicitly agreeing to its contents and sharing the request submitted to FIFA. In fact, the Player signed the following declaration at the bottom of the FC Sion’s letter to FIFA: “*Signé le 27 février 2008 pour accord, pour valoir exactitude des informations contenues et pour valoir confirmation qu’il est impossible pour le joueur d’envisager un retour au pays. E.*”.

On 4 April 2008, the Player’s counsel wrote to FIFA on behalf of his client insisting on the issuance of the ITC and threatening to resort to civil courts in the absence of such issuance. He also stated as follows in order to object to any possible arbitration proceedings: “*les divers [sic] clauses arbitrales ne sont pas opposables à mon client car elles ne remplissent pas les conditions juridiques nécessaires. Aussi sont-elles, formellement, par les présentes, récusées*”.

On 11 April 2008, the Single Judge of the FIFA Players’ Status Committee (the “Single Judge”) upheld the request jointly submitted by FC Sion and the Player and issued a provisional ITC, authorising the Swiss Football Association to provisionally register the Player and allowing him to play for FC Sion with immediate effect. The Single Judge emphasised that the decision was “*without prejudice and pending the outcome of a contractual labour dispute between the player and the Egyptian club as to the substance of the matter, which would have to be dealt with by the Dispute Resolution Chamber. In particular, the Chamber would have to express itself on the questions if a breach of contract was committed by one or both of the*

parties, whether with or without just cause as well as on the possible consequences thereof, i.e. financial compensation and/or sporting sanctions” (page 5 of the Single Judge’s decision).

On 12 June 2008, Al-Ahly lodged a claim with FIFA against the Player and FC Sion for, respectively, breach of contract and inducement to breach of contract, requesting FIFA to impose sanctions on them and to grant a pecuniary compensation in favour of Al-Ahly.

On 16 April 2009, the FIFA Dispute Resolution Chamber (the “DRC”) rendered a decision (the “Appealed Decision”) which adjudged FC Sion and the Player to have been in breach of the FIFA Transfer Rules which prevent a player who has entered into a written contract of employment with a club from signing a contract with a foreign club without having obtained the prior written consent of his current club or without just cause. On the basis of the FIFA Transfer Rules, the DRC imposed on the Player a sanction of four months ineligibility in official matches and an obligation to pay EUR 900,000 to Al-Ahly. Other sanctions were imposed to FC Sion, which was also held jointly and severally liable for the payment of the above mentioned compensation.

The Appealed Decision was notified to the Player on 29 May 2009.

On 18 June 2009, the Player filed an appeal with the Court of Arbitration for Sport (CAS) against the Appealed Decision, requesting an interim stay of the effects of the Appealed Decision and contesting the jurisdiction of the CAS. The Player submitted that in his opinion no arbitration clause in favour of FIFA and/or CAS met the necessary legal requirements to be applied to him. The Player specified that, in this context, he was submitting an appeal to the CAS only “*pour la sauvegarde de ses droits, de manière, entre autres, à respecter le délai de 21 jours*”.

On 29 June 2009, the Player filed a civil law suit with the District Court of Zurich (“*Bezirksgericht Zürich*”; the “Zurich Court”) against FIFA and Al-Ahly contesting the Appealed Decision and requesting its annulment (“*Anfechtung/Feststellung der Ungültigkeit*”) on the basis of Article 75 of the Swiss Civil Code (“CC”).

On 6 July 2009, the Zurich Court dismissed the Player’s application for *ex parte* interim measures (the so-called “*superprovisorische Massnahmen*” or super-provisional measures). The procedure is currently pending.

On 10 July 2009, the Player submitted his Appeal Brief, confirming his jurisdictional objection and requesting a preliminary award on jurisdiction in accordance with Article 186, third paragraph, of the Swiss Private International Law Act (“LDIP”). The Player requested also that, in any event, the CAS arbitration procedure be suspended on account of *lis pendens* until the Zurich Court determines whether it has jurisdiction to decide the dispute.

On 4 August 2009, FIFA submitted its Answer Brief stating *inter alia* that “*the jurisdictional objection contained in the player’s Appeal Brief should be rejected without further consideration*” and that “*the player’s request for a stay is exclusively designed to delay, if not disrupt, the arbitration*”, thus requesting to reject both Player’s requests.

On 7 August 2009, Al-Ahly submitted its Answer Brief, stating *inter alia* that the Appellant's jurisdictional objection "after having received direct advantages through the interim measures is a clear situation of venire contra factum proprium, that does not deserve any legal protection" and that the "request of the Player regarding the jurisdiction of the CAS shall therefore be rejected in full". With regard to the *lis pendens* issue, Al-Ahly stated *inter alia* that the "Player has lodged the Statement of Appeal on 18 June 2009 [...]. On 29 June 2009 the Player started with the procedure before the civil court of Zurich [...], the CAS has therefore been seized by the Player before the civil court of Zurich and the request for a stay of the Player shall therefore be dismissed".

On 18 September 2009, the CAS Court Office communicated to the parties that the Panel, deeming itself to be sufficiently well informed with the parties' written submissions, had determined to adjudicate the preliminary issues of jurisdiction and *lis pendens* without holding a hearing, in accordance with Article R57 of the CAS Code.

LAW

1. In view of the above, this partial award is concerned solely with the issues of jurisdiction and of *lis pendens* in relation to the procedure CAS 2009/A/1881.

Power of the Panel to Decide on Its Own Jurisdiction and *Lis Pendens*

2. First of all, the Panel observes that this case involves an Egyptian athlete as Appellant and an Egyptian club as Second Respondent, i.e. two parties that are neither domiciled nor habitually resident in Switzerland. This arbitration procedure is thus clearly governed by Chapter 12 of the LDIP, in accordance with Article 176 thereof.
3. Then, the Panel finds that from the outset the Player has contested the CAS's jurisdiction to adjudicate this case on the merits and has asked to stay the present arbitral proceedings until the Zurich Court decides on its jurisdiction.
4. It is true, as the Respondents point out, that the Player's motions for relief set forth in his Statement of Appeal did not make specific reference to those two preliminary issues, but it is also true that the Player made it immediately clear that he did not feel bound by any arbitration clause and that he was going to file a claim in a civil court (see *supra*).
5. In any event, in the Panel's view, Article R51 of the CAS Code does not preclude an appellant from modifying in the Appeal Brief the motions for relief put forward in the Statement of Appeal. The practice of the CAS has consistently repudiated any excessive formalism and has allowed parties to modify their motions for relief on condition that the principle of equal treatment of the parties and their right to be heard be preserved. The Panel observes that in the present case, in compliance with Article R55 of the CAS Code, the Respondents filed their

Answers after the Appeal Brief (see *supra*) and, therefore, could not be affected by the Appellant's variation of his motions for relief.

6. This said, the Panel observes that both the jurisdiction of an international arbitral tribunal sitting in Switzerland to decide on its own jurisdiction – the “*Kompetenz-Kompetenz*” or “*compétence-compétence*” – and the authority to do it vis-à-vis an exception of *lis pendens* are regulated by Article 186 LDIP, which reads as follows in its French text:

“1 *Le tribunal arbitral statue sur sa propre compétence.*

1bis *Il statue sur sa compétence sans égard à une action ayant le même objet déjà pendante entre les mêmes parties devant un autre tribunal étatique ou arbitral, sauf si des motifs sérieux commandent de suspendre la procédure.*

2 *L'exception d'incompétence doit être soulevée préalablement à toute défense sur le fond.*

3 *En général, le tribunal arbitral statue sur sa compétence par une décision incidente”.*

Unofficially translated in English, Article 186 LDIP would read as follows:

“1 *The arbitral tribunal shall rule on its own jurisdiction.*

1bis *It shall decide on its own jurisdiction without regard to proceedings having the same object already pending between the same parties before a State court or another arbitral tribunal, unless serious reasons require a stay of the proceedings.*

2 *The objection of lack of jurisdiction must be raised prior to any defence on the merits.*

3 *In general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision”.*

7. The Panel remarks that the recently introduced paragraph 1bis of Article 186 LDIP – an amendment adopted on 6 October 2006 and entered into force on 1 March 2007 – makes clear that an international arbitral tribunal sitting in Switzerland is allowed to decide on its own jurisdiction even if a lawsuit between the same parties and involving the same matter is pending before a State court.
8. In the Panel's view, paragraph 1bis of Article 186 LDIP would require this Panel to uphold the Athlete's *lis pendens* exception and, thus, to stay these arbitral proceedings only if three conditions were cumulatively met:
- (i) the first is an objective test: the arbitration and the civil lawsuit must be between the same parties and must concern the same matter.
 - (ii) the second test is also objective: the action before the State court must have been brought prior to the action before the CAS or, in other terms, the lawsuit before the State court must be “already pending” (“*déjà pendante*”) when the arbitration claim is lodged with the CAS;
 - (iii) the third test allows consideration of subjective elements but it must rest on solid grounds: the party raising the exception of *lis pendens* must prove the existence of “serious reasons” (“*motifs sérieux*”) requiring the stay of the arbitral proceedings.

9. With regard to the first test, on the basis of the documents on file attesting that the Player has summoned before the Zurich Court both FIFA and Al-Ahly to obtain the annulment of the Appealed Decision, the Panel has no doubt that the present arbitration and the lawsuit before the Zurich Court involve the same parties and the same cause of action with regard to the same matter. The first condition is thus met.
10. With regard to the second test, the Panel notes that the Athlete lodged his Statement of Appeal with the CAS on 18 June 2009 (see *supra*) appointing an arbitrator from the CAS list and setting this arbitration in motion under the terms of Article 181 LDIP, whereas the civil action before the Zurich Court was filed eleven days later, on 29 June 2009, as attested by the same civil Court at paragraph 2 of its resolution dated 6 July 2009:
“Mit Eingabe vom 29. Juni 2009 reichte der Kläger beim hiesigen Gericht Klage ein betreffend ‘Anfechtung/Feststellung der Ungültigkeit des Beschlusses der FIFA Dispute Resolution Chamber vom 16. April 2009’” (emphasis added).
11. The Player argues that the proceedings before CAS were not truly pending first, because the arbitral claim was only filed in order to safeguard his rights and under the condition that the Zurich Court would not accept jurisdiction. However, the Panel is of the opinion that the concept of “pendency” must be kept distinct from the concept of “jurisdiction”. Accordingly, in the Panel’s view, a party may well file a “conditional” claim to the CAS in order to safeguard its rights with regard to jurisdiction but this filing inevitably determines the procedural “pendency” (which is indeed unconditional) of the arbitration. In other terms, the Player had the right to lodge his appeal to the CAS with the sole purpose of asking the Panel to suspend the arbitration and decline its jurisdiction. However, even merely asking the Panel to adjudicate the preliminary issues in his favour (i.e. requesting that the CAS suspend the proceedings and, in any event, decline jurisdiction), the Player has nonetheless instituted the procedure for the appointment of the arbitrators and has asked the Panel to deal with those preliminary issues, thus determining inexorably the pendency of the arbitration from the date of the filing. This Panel’s construction is in line with Article 181 LDIP, under which the arbitration is pending “*dès le moment [...] que l’une des parties engage la procédure de constitution du tribunal arbitral*” (i.e. “*from the moment [...] one of the parties institutes the procedure for the appointment of the arbitral tribunal*”).
12. Accordingly, the Panel finds that the second condition is not met because the CAS is the court first seized of the matter and, thus, the civil proceedings before the Zurich Court were not “already pending”.
13. With regard to the third test, the Panel is of the view that, in order to demonstrate the existence of “serious reasons”, the Appellant should prove that the stay is necessary to protect his rights and that the continuance of the arbitration would cause him some serious inconvenience. The Panel, having considered all aspects of the *lis pendens* objection, finds that it is not satisfied that the Player has discharged the burden on him of demonstrating that the stay of these arbitral proceedings is compelled by “serious reasons”.

14. Indeed, the Appellant merely stated that the serious reasons would be related to the fact that he is challenging the jurisdiction of the CAS and to the possibility that the Zurich Court may come up with a different decision than that of the CAS. In the Panel's view, these are manifestly not serious reasons. Indeed, such situations would arise in every case of parallel proceedings involving an arbitration tribunal and a civil court, where necessarily there is at least one party who objects to the arbitral jurisdiction and where the possibility of conflicting decisions is always present. If one were to accept this argument, the arbitral proceedings would end up being always suspended, which is manifestly not the legislative aim of the recent amendment to Article 186 LDIP (notoriously a pro-arbitration amendment prompted by the legal uncertainty created by the Swiss Federal Tribunal's *Fomento* decision of 14 May 2001, 4P.37/2001).
15. The Panel also finds no support for the Player's position in the ILA Recommendations, given that paragraph 3 states that, where the parallel proceedings are pending before a court of the jurisdiction of the place of the arbitration (as is the case here), in deciding whether to proceed with the arbitration the arbitral tribunal should merely "*be mindful of the law of that jurisdiction, particularly having regard to the possibility of setting aside of the award in the event of conflict between the award and the decision of the court*".
16. It is obvious that this Panel is mindful of Swiss law and is aware that an erroneous decision on the issue of jurisdiction could eventually lead to the annulment of the award under para. 2 lit. b of Article 190 LDIP. However, specifically because this Panel is mindful of Swiss law, it is this Panel's duty to comply with the will of the Swiss legislator and proceed with this arbitration unless all three conditions of para. 1bis of Article 186 LDIP are met.
17. Accordingly, as the *lis pendens* objection fails to meet the second and third conditions under para. 1bis of Article 186 LDIP, the request submitted on behalf of the Athlete must be dismissed. The Panel thus determines to proceed with this arbitration notwithstanding the parallel procedure pending before the Zurich Court.
18. It follows that this Panel has the authority to decide the issue of its own jurisdiction and, in accordance with para. 3 of Article 186 LDIP, it may adjudicate this preliminary issue by means of a partial award.

The jurisdiction of the CAS

19. The Panel notes that the dispute brought to the attention of FIFA, and now of CAS, was triggered by the fact that on 15 February 2008 FC Sion and the Player signed an employment contract and on 27 February 2008 jointly asked FIFA to issue an ITC that would allow the international transfer of the Player from the Egyptian Football Association to the Swiss Football Association. Indeed, pending the outcome of the final decision of the DRC on the substance of the matter, the FIFA Single Judge issued on 11 April 2008 a provisional ITC, allowing the Player to be registered as a professional footballer with the Swiss Football Association and to perform his services for FC Sion.

20. The Panel notes also that the authority of FIFA to deal with the matter derived from the fact that the Player wished to transfer from an Egyptian club to a Swiss club, thus falling within the scope of application of the FIFA Regulations on the Status and Transfer of Players, in the version entered into force on 1 January 2008 (hereinafter “FIFA Transfer Regulations”), whose Articles 1, para. 1, and 9, para. 1, so read in the relevant parts:

“These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations” (emphasis added);

“Players registered at one association may only be registered at a new association once the latter has received an International Transfer Certificate (hereinafter: ITC)”.

21. Had the Player wished to transfer from Al-Ahly to another Egyptian club, he would not have needed an ITC and the authority to deal with the matter would have rest solely with the Egyptian Football Association, as acknowledged by Article 1, para. 2, of the FIFA Transfer Regulations:

“The transfer of players between clubs belonging to the same association is governed by specific regulations issued by the association concerned”.

22. However, as international transfers may take place only through an ITC, and as the Egyptian Football Association was not willing to spontaneously release the ITC because it deemed the Player to be still contractually bound to Al-Ahly, FC Sion and the Player jointly brought the matter to attention of the relevant FIFA bodies, whose *potestas iudicandi* on any such disputes is based on Article 22 of the FIFA Transfer Regulations:

“Without prejudice to the right of any player or club to seek redress before a civil court for employment-related disputes, FIFA is competent to hear:

- a) *disputes between clubs and players in relation to the maintenance of contractual stability (articles 13-18) where there has been an ITC request and a claim from an interested party in relation to said ITC request, in particular regarding the issue of the ITC, sporting sanctions or compensation for breach of contract; [...]*”.

23. In the Panel’s view, such provision must be considered as an offer by FIFA to provide players and clubs a forum to hear and solve disputes concerning international transfers. By submitting on 27 February 2008 – without any reservation whatsoever – their joint request for the release of the ITC to register the Player with the Swiss Football Association, the Player and FC Sion accepted the offer and agreed to refer their case to FIFA in accordance with FIFA rules. Indeed, they were even successful in the interim stage of the procedure, when they obtained the issuance of the provisional ITC.

24. The Panel remarks that the above quoted lit. a of Article 22 of the FIFA Transfer Regulations clearly links the request for and the issuance of an ITC to the possible imposition by FIFA of “*sporting sanctions or compensation for breach of contract*”. In this connection, the Panel finds that the Player himself was well aware of the FIFA rules and sanctions because the letter to FIFA of

27 February 2008, that he signed “*pour accord*” and “*pour valoir exactitude des informations contenues*”, cited various provisions of the FIFA Transfer Regulations – such as articles 5, 9, 11, 13, 14, 16, and annex 3 – and put forward the following statement:

“comment imaginer sinon qu’un joueur de l’expérience de E. signe un contrat au FC Sion valable dès le 15 février 2008, [...] s’il n’y était pas expressément autorisé par son ancien club? Malgré ses dénégations, Al-Ahly ne pourra faire croire à personne qu’un joueur de 35 ans, international accompli, puisse prendre le risque de se voir suspendre par la FIFA (ce qui à son âge signifierait la fin de sa carrière) pour un contrat en Suisse” (emphasis added).

25. Accordingly, in the Panel’s opinion, when the Player resorted to FIFA he knowledgeably accepted the FIFA rules and the competence of FIFA not only to issue an ITC (as FIFA did on 11 April 2008) but also to look into the substance of the matter and decide on sporting sanctions and on compensation for breach of contract (as FIFA subsequently did on 16 April 2009).
26. The Respondents are right in pointing out that it would be an extraordinary case of *venire contra factum proprium* if the Player were allowed to submit to the rules and authority of FIFA with respect to the ITC and to reject such rules and authority with respect to the other side of the same coin, i.e. the dispute concerning his status as a free agent or not at the moment of signing the contract with FC Sion and the disciplinary consequences thereof.
27. The Panel is of the view that the clear wording of Article 22 of the FIFA Transfer Regulations and the application of the general principle of law “*cuius commoda, eius et incommoda*” (meaning that the one who seeks and obtains a benefit must also take the possible burdens coming with that benefit) inexorably lead to the result that FIFA had the competence to deal with the matter and issue both the decision of 11 April 2008 and the Appealed Decision of 16 April 2009.
28. In the Panel’s opinion, the fact that the Player on 4 April 2008 specifically indicated to FIFA that he contested the validity of any arbitration clause in favour of FIFA has no relevance whatsoever, because the Player did not withdraw his request to obtain an ITC and, when he obtained it on 11 April 2008, he started playing for FC Sion, thus accepting the benefit granted by FIFA (the “*commoda*”) and the related burdens deriving from possible disciplinary measures (the “*incommoda*”).
29. Nor is of any relevance the Player’s argument that no reference to FIFA rules can be found in the employment contract with the Egyptian club Al-Ahly, because this is not an employment-related dispute concerning solely the two Egyptian counterparts but, rather, an international transfer-related dispute concerning also the Swiss club FC Sion and the two Football Associations involved in the registration of the Player. The Panel observes that the difference between the two types of dispute is clearly set forth in the first paragraph of Article 22 of the FIFA Transfer Regulations (see *supra* at 22).
30. The Panel thus finds that FIFA had the *potestas iudicandi* to issue the Appealed Decision in accordance with FIFA rules.

31. In the Panel's view, it necessarily follows that the CAS has appellate jurisdiction to decide the present dispute, in accordance with Article R47 of the CAS Code, Articles 62 and 63 of the FIFA Statutes and Article 24 of the FIFA Transfer Regulations.
32. Article R47, first paragraph, of the CAS Code so reads:

"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".
33. The statutes and regulations of FIFA indeed provide, in accordance with the quoted Article R47 of the CAS Code, that an appeal may be brought to CAS against the decision of its bodies.
34. Pursuant to Article 62 of the FIFA Statutes:
 1. *FIFA recognises the independent Court of Arbitration for Sport (CAS) with headquarters in Lausanne (Switzerland) to resolve disputes between FIFA, Members, Confederations, Leagues, clubs, Players, Officials and licensed match agents and players' agents.*
 2. *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"*.
35. Pursuant to the first two paragraphs of Article 63 of the FIFA Statutes:
 1. *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.*
 2. *Recourse may only be made to CAS after all other internal channels have been exhausted"*.
36. Pursuant to the relevant part of Article 24 of the FIFA Transfer Regulations:

"Decisions reached by the Dispute Resolution Chamber or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)".
37. The Panel also notes that Article 64, paragraph 2, of the FIFA Statutes makes clear that the arbitral jurisdiction of the CAS for decisions taken by FIFA bodies is granted on an exclusive basis, ruling out the jurisdiction of State courts:
 2. *Recourse to ordinary courts of law is prohibited unless specifically provided for in the FIFA regulations"*.
38. The Panel remarks that the Player, in addition to knowing and invoking the FIFA rules to his benefit (see *supra* at 23-24) and playing on several occasions in FIFA competitions (see *supra* at para. 0), expressly acknowledged in the letter to FIFA of 27 February 2008 that he was at the time an experienced player with an extensive international career (*"un joueur de l'expérience de*

E.”, “*international accompli*”, *supra* at para. 24). It also goes without saying that he has been registered for many years with the Egyptian Football Association and then with the Swiss Football Association, which are both members of FIFA and bound by FIFA rules.

39. Accordingly, in the Panel’s view, the Player’s pretensions to being considered unaware of the FIFA rules and of the CAS’s jurisdiction referred to therein are wholly implausible. By his recourse to FIFA under the FIFA Transfer Regulations, without entering any reservation regarding the CAS arbitration clause included in the FIFA rules which he was invoking, the Player signified his consent to that arbitration clause. The Panel takes comfort from the fact that its view on this issue is consistent with the opinion rendered by the Swiss Federal Tribunal on a similar issue in the *Stanley Roberts v. FIBA* case:

“The appellant therefore, by his recourse to the Appeals Commission under those Internal Regulations, without entering any reservation regarding the arbitration clause of which he was aware, signified his consent to that clause. This is confirmed by the fact that by lodging the appeal he was implicitly applying for a general permit to play and the respondent was therefore also entitled to assume from this that he would recognize its rules, with which he was familiar” (Judgment of 7 February 2001, 4P.230/2000, unofficial translation in REEB M. (ed.), Digest of CAS Awards II, 808, at 812).

40. On the basis of the above, the Panel has no doubt in finding that the Player willingly submitted to FIFA rules and procedures, thus squarely accepting FIFA rules providing for the competence of the FIFA bodies and for the exclusive jurisdiction of the CAS on appeal from the decisions of those bodies.
41. In addition, the Panel notes as well that in the Player’s contract with FC Sion dated 15 February 2008, which was a triggering element of the international transfer-related dispute (see *supra* at 19), both parties clearly accepted:

“de se soumettre au pouvoir juridictionnel des organes compétents de la SFL, l’ASF, l’UEFA, et la FIFA, en cas de violation des dispositions statutaires et réglementaires” (article 39, para. 2, of the contract between the Player and FC Sion, emphasis added);

and pledged:

“à respecter les statuts, règlements et directives de l’ASF, de la SFL, de l’UEFA et de la FIFA ainsi que ceux du club et à s’y soumettre. Les documents principaux sont indiqués dans l’annexe 1. 2. Le joueur confirme avoir eu l’occasion de prendre connaissance, avant la signature du présent contrat, des documents susmentionnés, qui sont à sa disposition au secrétariat/bureau du club” (article 41, paras. 1-2, of the contract between the Player and FC Sion, emphasis added).

42. The Panel observes that Annex 1 to the Player’s contract with FC Sion includes, among the documents that he has expressly declared to have knowledge of and to pledge to respect, the FIFA Statutes and the FIFA Transfer Regulations, i.e. the documents which contain the rules establishing the competence of the DRC and the arbitral jurisdiction of the CAS.
43. The Panel is of the view that, as the contract with FC Sion has been the basic factor of the Player’s violation of FIFA Rules found by the DRC, the Player’s acceptance of the FIFA rules

and of the disciplinary authority of FIFA, contained in the contract with FC Sion, would also be sufficient in itself to justify the *potestas indicandi* of FIFA and, as a consequence, the appellate jurisdiction of the CAS.

44. The Panel thus dismisses the Player's objection as to the validity of the CAS arbitration clauses "by reference" included in the FIFA rules (*supra* at paras. 34-36). Indeed, in signing his contract with FC Sion, the Player explicitly and unreservedly acknowledged that he had acquainted himself with the FIFA Statutes and Transfer Regulations, i.e. with the documents containing the arbitration clause in favour of the CAS. As the Swiss Federal Tribunal stated in the above quoted *Stanley Roberts v. FIBA* judgment of 7 February 2001, the "*reference need not explicitly cite the arbitration clause, but may include by way of general reference a document containing such a clause*" (4P.230/2000, unofficial translation in REEB M. (ed.), Digest of CAS Awards II, 808, at 811).
45. The Panel thus concludes on the basis of all of the above that the CAS has exclusive jurisdiction to hear this dispute on appeal from the Appealed Decision. As a consequence, the jurisdictional objection submitted by the Player fails.
46. The Panel will thus continue on the merits the present arbitration proceedings jointly with the parallel procedure CAS 2009/A/1880 FC Sion c. FIFA & Al-Ahly Sporting Club.

The Court of Arbitration for Sport rules:

1. The request by the Appellant E. to stay the present arbitration TAS 2009/A/1881 E. v. FIFA & Al-Ahly SC on grounds of *lis pendens* is dismissed.
2. The jurisdictional objection submitted by E. is dismissed.
3. The CAS retains jurisdiction to adjudicate on the merits the appeal submitted by E. against the decision dated 16 April 2009 of the FIFA Dispute Resolution Chamber.
4. (...).