Arbitration CAS 2006/A/1192 Chelsea Football Club Ltd. v. M., award of 21 May 2007

Panel: Mr Luc Argand (Switzerland), President; Mr Peter Leaver QC (United Kingdom); Mr Efraïm Barak (Israel)

Football
Breach of the employment contract without just cause
Standing to be sued
Dispute settlement system of the FIFA
Competence to impose sanctions

1. **A club is entitled to direct its appeal at a player in order to require him to accept the FIFA jurisdiction to rule on the issue of sanction and of compensation as the FIFA Regulations provide that every player must have a written contract with the club employing him and that the contract shall be subject to the rules of FIFA which are applicable to any dispute arising out of the breach of that contract by one of the parties.**

2. **Art. 42 of the FIFA Regulations and Circular no. 769 expressly distinguish, for jurisdictional purposes, between the "triggering elements" or "liability stage" of a claim and the "remedies" or "quantum" stage. The "triggering elements" of the dispute may be decided either by the DRC or by a national football tribunal provided that (a) that national tribunal is composed of "members chosen in equal numbers by players and clubs, as well as an independent chairman", and (b) both parties to the dispute agree to the national tribunal determining the triggering elements. Then it is the DRC alone that is exclusively competent to determine what sporting sanctions should be imposed and what financial compensation should be awarded.**

Chelsea Football Club Limited ("the Club" or "Chelsea") is an English Football Club, member of the Football Association Limited (FA) and of the Football Association Premier League Limited (FAPL), which affiliated with FIFA since 1905.

M. ("the Player") is a professional football player born on 8 January 1979.

On 12 August 2003, the Player was transferred from the Italian club AC Parma to Chelsea. The Player and the Club entered into a five-year employment contract dated 11 August 2003 and expiring on 30 June 2008.

On 1 October 2004, a targeted drug test was held on the Player by the FA. It was declared positive on 11 October 2004.

On 28 October 2004, the Club terminated the contract with the Player with immediate effect.

On 4 November 2004, the FA's Disciplinary Commission imposed a seven-month ban on the Player commencing on 25 October 2004. The FIFA Disciplinary Committee extended the sanction in order to obtain a worldwide effect by a decision dated 12 November 2004.

On 10 November 2004, the Player appealed against the Club's decision to terminate the employment contract. That appeal was, in the first instance, to the Board of Directors of the FAPL. A panel was appointed by the FAPL to consider the appeal. That panel met on 19 January 2005, by which time Chelsea had stated that it was intending to make a claim for compensation against M. At the hearing on 19 January 2005 the panel was informed of an agreement between Chelsea and M. as to the method of resolution of M.'s appeal and Chelsea's claim for compensation. The panel requested the parties to write a joint letter confirming the agreement. Where the context permits, references in this Award to "the dispute" are to be understood as references to both M.'s appeal and to Chelsea's claim for compensation.

By joint letter dated 26 January 2005, the Parties agreed to refer the "triggering element of the dispute", that is, the issue of whether M. had acted in breach of the employment contract with or without just cause or sporting just cause, to the Football Association Premier League Appeals Committee (FAPLAC).

By letter dated 4 February 2005, Chelsea informed FIFA as to the course it intended to take in relation to the dispute. In particular, the Club suggested that FIFA acknowledged the filing of the claim, opened proceedings and then adjourned them pending receipt of the FAPLAC decision. The letter made it clear that Chelsea was "formally" submitting "part of [its] contractual claim" to the FIFA Dispute Resolution Chamber (DRC). In the context of that letter it is clear that Chelsea was submitting to the DRC only that part of its claim that was dependent on there being a finding of breach of contract by M., that is, what sporting sanctions or disciplinary measures should be imposed on M. The FIFA Regulations for the Status and Transfer of Players provided that it was only the DRC that could impose those sanctions.

On 20 April 2005, FAPLAC decided that M. had committed a breach of contract without just cause within the protected period against Chelsea.

On 29 April 2005, M. lodged an appeal before the Court of Arbitration for Sport (CAS) against FAPLAC's decision. On 15 December 2005, CAS dismissed the Player's appeal (Award in the matter CAS/A/786).

On 11 May 2006, Chelsea applied to FIFA for an award of compensation against M. That application followed the 20 April 2005 decision and was consistent with the claim dated 4 February 2005. In particular, Chelsea requested that the DRC should award an amount of compensation in

favour of the Club following the established breach of contract committed by the Player without just cause.

On 26 October 2006, the DRC decided that it did not have jurisdiction to make a decision in the dispute between Chelsea and the Player and that the claim of Chelsea was therefore not admissible (the "FIFA Decision").

On 22 December 2006 Chelsea filed its statement of appeal against the FIFA Decision with CAS.

LAW

Jurisdiction and scope of the Panel's review

1. The jurisdiction of CAS, which is not disputed, derives from Article R47 of the Code and Article 60 and following of the FIFA Statutes. Furthermore, the CAS jurisdiction is explicitly recognized by the parties in their respective briefs and is further confirmed in the Order of Procedure which was duly signed by both parties. It follows that CAS has jurisdiction to decide on the present dispute.

2. With respect to its power of examination, the Panel observes that the present appeal proceeding is governed by the provisions of Articles R47 and following of the Code. In particular, Article R57 of the Code grants a wide power of examination as well as a full power to review the facts and the law. CAS may thus render a new decision in substitution for the challenged decision, either annulling the latter or sending the case back to the previous authority.

Applicable Law

3. Article R58 of the Code provides 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".

4. Pursuant to Article 60 para. 2 of the FIFA Statutes *"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".*

5. In the present matter, the Parties expressly agreed that their contractual relationship would be governed by English law.

6. However, the parties have not agreed on the application of any particular law as far as the procedural questions are at stake. Therefore, to that extent, the CAS Rules and the rules of FIFA, more specifically the Statutes and their regulations of enforcement, shall apply primarily. Additionally, in accordance with Article 60 of the FIFA Statutes, Swiss law will be applicable, if needed.

7. The parties disagree on the version of the FIFA Regulations applicable to the present dispute. The answer to this issue depends on when the claim was lodged for the first time with FIFA. Indeed, Article 26 of the 2005 FIFA Regulations, as amended by the FIFA Circular no. 995 dated 23 September 2005 but with a retroactive effect to 1 July 2005, reads as follows:

   1. Any case that has been brought to FIFA before these Regulations come into force shall be assessed according to the previous regulations.

   2. As a general rule, all other cases shall be assessed according to these Regulations, with the exception of the following:

      a. Disputes regarding training compensation

      b. Disputes regarding the solidarity mechanism

      c. Labour disputes relating to contracts signed before 1 September 2001.

      Any case not subject to this general rule shall be assessed according to the regulations that where [sic] in force when the contract at the centre of the dispute was signed, or when the disputed fact arose.

   3. Member Associations shall amend their regulations in accordance with Art. 1 to ensure that they comply with these Regulations and shall submit them to FIFA for approval by 30 June 2007. Notwithstanding this, each Member Association shall implement Art. 1 par. 3 (a) as from 1 July 2005.

8. Chelsea is of the opinion that the claim was first lodged before the DRC on 4 February 2005 and that the 2001 FIFA Regulations are therefore applicable. On his part, M. believes that the claim was first lodged before the DRC on 12 May 2006 and that the dispute should therefore be ruled in accordance with the 2005 FIFA Regulations.

9. On 4 February 2005, Chelsea wrote to FIFA *"pursuant to Article 42 of the FIFA Status Regulations and Article 16 of the FIFA Regulations Governing the Application of the Regulations for the Status and Transfer of Players (…) in order to formally submit part of the Club's Contractual Claim against the Player to the (…) [DRC]".*

   In its letter Chelsea informed FIFA extensively about the course it intended to give the proceedings in the contractual dispute opposing it to the Player and suggested that FIFA (i) acknowledged the filing of the claim, (ii) opened proceedings and then (iii) adjourned them pending receipt of the decision of FAPLAC. Furthermore Chelsea enclosed with its letter the statement of claim which it had lodged with FAPLAC on 1 February 2005, along with all its exhibits in one bundle.

10. Although FIFA did not send a formal response to that letter, it gave the procedure a 2005 reference number (Ref. No. 05-00176) and expressly accepted in its 26 October 2006 Decision that the claim was first submitted to FIFA on 4 February 2005.

11. The Panel considers that in its 4 February 2005 letter Chelsea clearly detailed the course it intended to give to the procedure and also clearly explained to FIFA what was exactly at stake between the Parties. Furthermore, it must be pointed out that the 1 February 2005 claim before FAPLAC which was submitted to FIFA as an enclosure to the letter, goes into considerable detail and explains very clearly the subject matter of the dispute. Moreover, it must also be taken into consideration that all facts occurred under the 2001 FIFA Regulations and that the parties had agreed on the course to give to the procedure while the 2001 FIFA Regulation were also still applicable.

12. The Panel is therefore satisfied that Chelsea clearly and unambiguously expressed its intention to lodge a claim before the DRC on 4 February 2005 and clearly presented the situation to the DRC at that precise moment in a formally acceptable way. This date must therefore be considered as the date when the matter was first brought to FIFA.

13. Therefore, the Panel holds that the 2001 FIFA Regulations are applicable to decide on this dispute.

Admissibility of the appeal

14. Chelsea's statement of appeal was filed within the deadline provided by Article 61 of the FIFA Statutes (as stated in the DRC Decision), that is, within 21 days after notification of said decision. It furthermore complies with all the other requirement of Article R48 Code.

15. Notwithstanding the above, M. believes that he has no standing to be sued in the present arbitration, that the appeal is therefore not admissible and that it should be dismissed entirely. Indeed, M. believes that the claim should have been directed solely against FIFA in accordance with the rule of Article 75 CC, which he considers applicable and which reads as follows:

"Every member of an association shall be entitled by force of law to challenge in court, within one month of his having gained knowledge thereof, resolution that he has not consented to and that violate the law or the articles of association" [translation by the Swiss-American Chamber of commerce].

16. The dispute between the parties originated when the employment contract, concluded on 11 August 2003, was breached on 28 October 2004.

17. Article 4 of the 2001 FIFA Regulations provides that *"1. Every player designated as non-amateur by his national association shall have a written contract with the club employing him. 2. (…). The contracts shall observe the laws applicable as well as the principle set out in FIFA regulations (…)".*

18. The employment contract was a contract between a club member of the FA, which in turn is a member of FIFA, and a professional player, and is, therefore, subject to the rules of FIFA, which are applicable to any dispute arising out of the breach of that contract by one of the parties.

19. In any event, the employment contract provides at Clause 3.1.9 that the Player must observe the "Rules", which include the FIFA regulations according to the definition of the "Rules" contained in Clause 1.1 of the contract. It follows, therefore, that if FIFA provides for a 2-stage jurisdiction system in case of a dispute arising out of the termination of a contract the dispute will be decided by that system, including that part which provides for the exclusive competence to decide on the amount of compensation to rest with the DRC. M. has to abide by that rule, as he and Chelsea had to abide by all of the provisions of the contract. Therefore, in raising a defence of lack of jurisdiction before FIFA, M. may have breached – once again – his contractual duties.

20. Accordingly, Chelsea was entitled to direct its appeal at M. in order to require him to accept the FIFA jurisdiction to rule on the issue of sanction and of compensation.

21. 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 M. does have standing to be sued.

22. It follows that the appeal is admissible.

Admissibility of the translations received after the response

23. The translation provided by Chelsea as an enclosure to its 27 March 2007 submissions on M.'s standing to be sued were provided on 12 April 2007, i.e. after M. had already sent his submission within the deadline stated by on CAS on the 27 March 2007 submissions. M., therefore, submitted that translations be not considered by the Panel.

24. Article R56 of the Code provides the following:

"Unless the parties agree otherwise or the President of the Panel orders otherwise on the basis of exceptional circumstances, the parties shall not be authorized to supplement their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the grounds for the appeal and of the answer".

25. The translated documents are simply extracts of doctrine and jurisprudence which have no impact on the understanding of the case and which were also freely accessible to M. and to the Panel. Therefore, it is not here a question of supplementing one's argument or producing further evidence. Such case law and legal literature could well have been provided at the hearing for the first time. It follows that no question arises as to the application of Article R56 of the Code, and the Panel sees no reason to disregard the documents and their translations.

Merits

26. Under Article 21 of the 2001 FIFA Regulations, where a party has been determined unilaterally to have breached his contract with the other party without just cause, compensation for the loss of the non-breaching party is payable, calculated as set out in Article 22.

27. The arbitration system by which any dispute as to either breach or sanction is to be decided is provided for in Article 42 of the 2001 FIFA Regulations, which is in the following terms:

> *"1. (…), a dispute resolution and arbitration system shall be established, which shall consist of the following elements:*
>
> *(a) (…).*
>
> *(b) (i) The triggering elements of the dispute (i.e. whether a contract was breached, with or without just cause, or sporting just cause), will be decided by the (…)* [DRC] *or, if the parties have expressed a preference in a written agreement, or it is provided for by collective bargain agreement, by a national sports arbitration tribunal composed of members chosen in equal numbers by players and clubs, as well as an independent chairman. (…).*
> *(ii) If the decision reached pursuant to (i) is that a contract has been breached without just cause or sporting just cause, the (…)* [DRC] *shall decide within 30 days whether the sports sanctions or disciplinary measures which it may impose pursuant to Art. 23 shall be imposed. This decision (…) can be appealed against pursuant to (c).*
> *(iii) Within the period specified in (ii), or in complex cases within 60 days, the (…)* [DRC] *shall decide any other issues related to a contractual breach (in particular, financial compensation). This decision (…) can be appealed against pursuant to (c).*
> *(…).*
>
> *(c) Appeals contemplated in (b) shall be brought before a chamber of the Arbitration Tribunal for Football (TAF) (…)* [CAS since 11 November 2002, see FIFA Circular no. 827 dated 10 December 2002]*, irrespective of the severity of any sanction or the amount of any financial award. (…)".*

28. On August 24, 2001, FIFA issued the Circular letter no. 769. In the preamble, it specified the following:

> *"(…) The new regulation* [i.e. the 2001 FIFA Regulations], *including a set of Application regulations, were adopted by FIFA's Executive Committee on 5 July 2001 in Buenos Aires. (…) This circular will summarize and explain the main points of the new regulation"* (emphasis added).

29. Circular no. 769 entered into force on September 1, 2001, i.e. on the same day as the 2001 FIFA Regulations and provides the following on the matter of dispute settlement:

> *"(…)*
>
> *a. Players and clubs have the choice to submit the triggering, contract-related elements of their disputes to national courts or to football arbitration (see art. 42.1 of the Basic Regulations). Whatever the choice they*

make, the sportive sanctions envisaged in the present regulations can only be imposed by FIFA bodies, notably the (…) [DRC]. Decisions of this Chamber are subject to appeal to (…) [CAS].

b. (…).

c. If a party chooses to have its dispute resolved through football arbitration, the triggering, contract-related elements of the dispute will be handled by FIFA's (…) [DRC] at the request of this party, unless both parties have agreed in writing or it is provided in a collective bargaining agreement not to submit this part of the dispute to FIFA's Chamber but rather to a national sportive arbitration tribunal. (…) (See Art. 42.1 (b) (i) of the Basic Regulations).

d. Whenever a dispute between a player and a club is put to football arbitration, and an unjustified contractual breach is found, FIFA's (…) [DRC] is exclusively competent to establish the consequences of this finding (notably, sportive sanctions, financial compensation), subject to appeal to (…) (TAF) [CAS]. (…). (See Art. 42.1 (b)(ii)-(v) of the Basic Regulations).

(…)".

30. Circular letter no. 769 summarizes and explains the main point of the basic regulations and is an admissible aid to construction as it reflects the understanding of FIFA and the general practice of the federations and associations belonging thereto (see CAS 2003/O/527).

31. Since the wording of Article 42 is very clear, and is supported by the text of Circular letter no. 769, the Panel considers that further interpretation of Article 42 is not necessary in order to have a clear understanding of the dispute settlement system provided for by FIFA under the 2001 FIFA Regulations.

32. The Panel, therefore, holds that Article 42 and Circular letter no. 769 expressly distinguish, for jurisdictional purposes, between the "triggering elements" or "liability stage" of a claim and the "remedies" or "quantum" stage:

- Under Article 42 para. 1 (b)(i), the "triggering elements" of the dispute – i.e. whether a contract was breached, with our without just cause or sporting just cause – may be decided either by the DRC or by a national football tribunal provided that (a) that national tribunal is composed of "members chosen in equal numbers by players and clubs, as well as an independent chairman", and (b) both parties to the dispute agree to the national tribunal determining the triggering elements. Once the triggering elements are duly decided they cannot be re-opened, other than by way of appeal under article 42 para. 1 (c).
- Once the triggering elements of the dispute have been considered and it has been determined that the respondent party was in unilateral breach of his/its contract without just cause, then it is the DRC alone that is exclusively competent to determine what sporting sanctions should be imposed under article 42 para. 1 (b)(ii) and what financial compensation should be awarded pursuant to article 42 para. 1 (b)(iii).

33. In the Panel's opinion this distinction is entirely appropriate, logical and practical:

- Indeed, the question whether a contract was breached is a combined question of fact and law, which may perfectly well be determined where the parties and the witnesses are located, and by a tribunal that may well consider and apply the law which governs the contractual relationship between the parties, which is, in this case, English law. The DRC, in contrast is not best suited to hear a lengthy factual dispute at a location removed from those persons involved.
- In contrast, the question of sporting sanction is a matter best left to the DRC, as only the DRC can effectively impose sporting sanctions that apply beyond the jurisdiction of the relevant national tribunal. Furthermore, the question of sporting sanction is a matter where it is essential that there is consistency worldwide, and it would be inappropriate for sporting sanctions to differ from nation to nation. This is also true as far as financial compensation is concerned. The DRC is the body that is best placed to impose an order of compensation that is capable of enforcement.

34. It also must be added that until his submission (i) before the DRC and (ii) the arbitral body before which this issue has come, M. appeared to embrace this understanding of the structure of Article 42 of the 2001 FIFA Regulations:

(i) He specifically agreed to this structure in the 26 January 2005 letter signed between the parties and proceeded on this basis until his 20 July 2006 written submission to the DRC, when he suddenly carried out a *volte face*.

In his 21 March 2005 response before FAPLAC he stated: *"In the event that it is determined that M. has unilaterally breached the Player Contract without just cause, it is common ground that any question of whether sports sanctions or disciplinary measures should be imposed upon M., or financial compensation awarded to CFC, is to be determined by (…)* [the DRC]*, pursuant to article 42 of the FIFA Status Regulations"*. The Player's representative also approved this approach in an email dated 20 April 2005 sent to the representative of FAPL after FAPLAC had issued its award. The Player's representative noted that *"it was not within the remit of the Committee to deal with compensation nor was it a matter argued at the hearing. The hearing was limited to deciding whether there was a triggering event, in which case any question of sanctions and/or compensation must go to the DRC"*.

The Panel has the clear impression that the sudden change of position adopted by the Player before the DRC was purely opportunistic.

(ii) FAPLAC also approved this interpretation. Moreover, rule K30 of the Rules of the FAPL expressly limits its jurisdiction to *"[t]he triggering elements of a dispute between a Club and Player of the description set out in Article 42 of the FIFA Regulations (…)"* and rule T1 provides that *"*[FAPLAC] *(…) shall determine the following matters: (…) 1.5. the determination under the rue provisions of rule K30 of the triggering elements of a dispute between a Club and a Player of the description set out in article 42 of the (…)* [2001 FIFA Regulations]*"*.

35. For all these reasons, the Panel rules that the two-stage procedure is perfectly admissible under Article 42 of the 2001 FIFA Regulations. Indeed, it is a procedure specifically provided for by FIFA. The Panel, therefore, rejects M.'s different construction.

36. In the present case, the Parties agreed on 26 January 2005, that the "triggering element" of their contractual dispute should be determined by FAPLAC, an independent arbitral tribunal that duly respected their mutual rights, in particular their right to be heard. In that sense, the parties duly respected the text of Article 42 para. 1 (b)(i) of the 2001 FIFA Regulations.

    FAPLAC found that the Player's behaviour did amount to a unilateral breach of his contract with Chelsea without just cause or sporting just cause within the meaning of Article 21 of the 2001 FIFA Regulations and that Chelsea was accordingly entitled to proceed to the DRC for an assessment of compensation. This decision was later confirmed by CAS in its 15 December 2005 Award (CAS 2005/A/876).

37. In accordance with Article 42 para. 1 (b) and (c), the DRC is now solely competent to determine what sporting sanction and/or financial compensation should be imposed upon the Player.

38. Therefore, the Panel holds that, at the second stage of the Article 42 procedure, the DRC does have jurisdiction to determine the appropriate sanction and/or order for compensation arising out of the dispute between Chelsea and M. M. is not entitled to object to the FIFA jurisdiction.

39. In light of the foregoing and in accordance with Article R57 of the Code, the Panel decides to annul the 26 October 2006 FIFA DRC Decision and to refer the case back to FIFA.

The Court of Arbitration for Sport rules:

1. The appeal filed by Chelsea Football Club against the decision rendered on 26 October 2006 by the FIFA Dispute Resolution Chamber is upheld;

2. The decision rendered on 26 October 2006 by the FIFA Dispute Resolution Chamber is set aside;

3. The matter is referred back to the FIFA Dispute Resolution Chamber which does have jurisdiction to determine and impose the appropriate sporting sanction and/or order for compensation, if any, arising out of the dispute between Chelsea Football Club and M.;

4. (…);

5. (…);

6. All other prayers for relief are dismissed.