Arbitration CAS 2020/A/6694 Bursaspor KD v. Henri Gregoire Saivet, award of 4 August 2020

Panel: Prof. Ulrich Haas (Germany), President; Mr João Nogueira Da Rocha (Portugal); Mr François Klein (France)

Football
Breach of the employment contract
Formation of the CAS panel
Standing to be sued

1. **Even if the parties have agreed in the employment contract to submit any dispute to a CAS sole arbitrator, they may, however, change the agreement at any point in time before the constitution of the CAS panel or the nomination of the sole arbitrator. If the appellant in its Statement of Appeal specifically requested the appointment of a three-member panel and the respondent did not object to this request, rather nominating an arbitrator in accordance with Article R53 of the CAS Code, there is a new agreement by the Parties that supersedes the clause of the employment contract.**

2. **It appears questionable whether a player has standing to be sued with respect to the consequences imposed in an employment-related dispute by the FIFA Dispute Resolution Chamber in case of non-compliance with its decision. The rules and regulations of FIFA are silent on the appropriate defendant of a decision taken by a sports association. This lacuna must be filled by Swiss law. However, also the relevant provision in Swiss law, Article 75 of the Swiss Civil Code (SCC), is not absolutely clear in this matter. The provision is first and foremost aimed at a challenge directed against the resolution of a general assembly. It is uncontested that in such circumstances the appeal must be directed against the association. It is equally uncontested that Article 75 SCC also applies *mutatis mutandis* to decisions of other organs of an association. However, if an organ other than the general assembly has issued a decision, CAS jurisprudence requires to take a nuanced approach in order to determine what party has standing to be sued. The question must be resolved on the basis of a weighting of the interests of the persons affected by said decision. The question, thus, is who is best suitable to represent and defend the will expressed by the organ of the association. Which entity is best suited to defend the will expressed by the organ of the association will depend on the role assumed by the latter. If the latter acted in an adjudicatory capacity, i.e. by resolving a dispute between other parties (so-called horizontal disputes), standing to be sued will rest with the party that avails itself of the binding effect of the decision. If, on the contrary, the organ of the association assumed an administrative or disciplinary role instead (so-called vertical disputes) and its interests are at stake, then the party having standing to be sued is the association. A request *"to cancel all sanctions"* is directed against the administrative function of the organ of the association with respect to the (future) enforcement of its decision. Therefore, the only entity with standing to be sued is FIFA.**

I. THE PARTIES

1. Bursaspor KD (the "Club" or the "Appellant") is a Turkish professional football club with seat in Bursa, Turkey. It is a member of the Turkish Football Federation ("TFF"), which is affiliated with the *Union des Association Européennes de Football* ("UEFA") and the *Fédération Internationale de Football Association* ("FIFA").

2. Mr Henri Gregoire Saivet (the "Player" or the "Respondent"), born on 26 October 1990, is a professional football player of French nationality.

II. FACTUAL BACKGROUND

3. The dispute in these proceedings revolves around a decision rendered by the FIFA Dispute Resolution Chamber ("FIFA DRC"). The decision of 5 November 2019 ("the Decision") concerns an employment-related dispute between the Club and the Player. The FIFA DRC found that the Club is, *inter alia*, liable to pay to the Player overdue payables in the total amount of EUR 277,200.00.

4. Below is a summary of the relevant facts and allegations based on the Parties' written submissions, the file before the Court of Arbitration for Sport ("CAS") and the content of the hearing that took place via video-conference on 13 May 2020. References to additional facts and allegations found in the Parties' written and oral submissions, pleadings, and evidence will be made, where relevant, in connection with the legal analysis that follows. While the Panel has considered all the facts, allegations, legal arguments, and evidence submitted by the Parties in the present proceedings, it refers in its award only to the submissions and evidence the Panel deems necessary to explain its reasoning.

A. Background facts

5. On 24 August 2018, the Club and the Player entered into an employment contract ("the Contract") for a fixed period of time from 16 August 2018 until 31 May 2019.

6. The Contract contains the following relevant provisions for the case at hand:

> *"**2018-2019 Football Season***
>
> *The Club shall pay to the Player total amount of total € 900,000,00 net during the term of the Contract.*
>
> *This total amount of € 900,000,00 net shall be paid as follows:*
>
> - *31 August 2018: € 90,000,00*
> - *30 September 2018: € 90,000,00*
> - *31 October 2018: € 90,000,00*

- *30 November 2018: € 90,000,00*
- *31 December 2018: € 90,000,00*
- *31 January 2019: € 90,000,00*
- *28 February 2019: € 90,000,00*
- *31 March 2019: € 90,000,00*
- *30 April 2019: € 90,000,00*
- *31 May 2019: € 90,000,00*

[…]

In addition to these payments, player will be

- *Paid extra 800€ for his accommodation per month […]".*

7. On 14 January 2019, the Player provided a written default notice to the Club granting a minimum deadline of 15 days for the unpaid salaries in the amount of EUR 184,000.00 (2 salaries of EUR 90,000.00 and 5 monthly accommodation allowances). In the following, the Club failed to respond to the default notice.

8. On 11 June 2019, the Player put the Club a second time in default of payment of the amount of EUR 277,200.00 corresponding to 3 monthly salaries (February – April 2019) and 9 monthly accommodation allowances (August 2018 – April 2019), setting a 10-day time limit for the Club to fulfil its financial obligation to the Player. The Club did not make any payment in this regard.

III. PROCEEDINGS BEFORE THE FIFA DISPUTE RESOLUTION CHAMBER

9. On 27 June 2019, the Player lodged a claim before the FIFA DRC against the Club, which was amended on 12 July 2019, for payment of overdue payables in the amount of EUR 277,200.00 (3 salaries of EUR 90,000.00 for the months February 2019 – April 2019 and 9 accommodation allowances for the months August 2018 – April 2019).

10. On 5 November 2019, the FIFA DRC partially accepted the Player's claim, issuing the operative part of its decision, which reads as follows:

"1. The claim of the Claimant, Henri Gregoire Saivet, is partially accepted.

2. The Respondent, Bursaspor Kulubu, has to pay to the Claiment overdue payables in the amount of EUR 277,200 as overdue payables, plus 5% interest p.a. until the date of effective payment as follows:

a. 5% p.a. on the amount of EUR 800 as from 1 September 2018;

b. 5% p.a. on the amount of EUR 800 as from 1 October 2018;

c. 5% p.a. on the amount of EUR 800 as from 1 November 2018;

d. 5% p.a. on the amount of EUR 800 as from 1 December 2018;

e. 5% p.a. on the amount of EUR 800 as from 1 January 2019;

f. 5% p.a. on the amount of EUR 800 as from 1 February 2019;

g. 5% p.a. on the amount of EUR 90,800 as from 1 March 2019;

h. 5% p.a. on the amount of EUR 90,800 as from 1 April 2019;

i. 5% p.a. on the amount of EUR 90,800 as from 1 May 2019.

3. Any further claim of the Claimant is rejected.

4. A reprimand is imposed on the Respondent.

[…]

*7. In the event that the amount plus interest due in accordance with point III/2. above is not paid by the Respondent **within 45 days** as from the notification by the Claimant of the relevant bank details to the Respondent, the Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

8. The ban mentioned in point III.7. above will be lifted immediately and prior its complete serving, once the due amounts are paid.

*9. The Respondent is ordered to pay a fine in the amount of CHF 40,000. The fine is to be paid **within 45 days** of notification of the present decision **to FIFA** to the following bank account […].*

10. In the event that the amount due in accordance with point III./2. above plus interest is still not paid by the end of the ban of three entire and consecutive registration periods, the present matter shall be submitted, upon request, to FIFA´s Disciplinary Committee for consideration and a formal decision".

11. The decision with grounds was notified to the Parties on 17 December 2019 (the "Appealed Decision").

IV. THE PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

12. The proceedings before CAS can be summarised in their main parts as follows:

13. On 6 January 2020, the Appellant filed an appeal against the Appealed Decision with the CAS against the Respondent in accordance with Article R48 of the Code of Sports-related Arbitration

(2019 edition) (the "CAS Code"). The Appellant nominated Mr João Nogueira Da Rocha, Attorney-at-law in Lisbon, Portugal, as arbitrator. It further requested a 15-day extension of the deadline to file its Appeal Brief.

14. On 13 January 2020, the CAS Court Office acknowledged receipt of the Appellant's Statement of Appeal. It further invited the Respondent to comment by 17 January 2020 on the Appellant's request for an extension of the deadline to file its Appeal Brief. In addition, the CAS Court Office advised the Parties that said deadline was suspended until further notice from the CAS Court Office.

15. On 16 January 2020, the Appellant filed its Appeal Brief in accordance with Article R51 of the CAS Code.

16. On 17 January 2020, the Respondent objected to the Appellant's request for an extension of the deadline to file its Appeal Brief.

17. In the same correspondence, the Respondent nominated Mr François Klein, Attorney-at-law in Paris, France, as arbitrator.

18. On 20 January 2020, the CAS Court Office informed the Parties that the Appellant filed its Appeal Brief on 16 January 2020 in accordance with the deadline provided for in Article R51 of the CAS Code. The Respondent's objection in that regard was thus deemed moot.

19. On 27 January 2020, the CAS Court Office informed the Parties that *"FIFA renounced its right to request its possible intervention in the present arbitration proceedings"*.

20. On 4 February 2020, the Respondent filed his Answer further to Article R55 of the CAS Code.

21. On 17 February 2020, the CAS Court Office, on behalf of the Deputy President of the CAS Appeals Arbitration Division, informed the Parties that the Panel appointed to decide the dispute-at-hand was constituted as follows:

President:	Mr Ulrich Haas, Professor in Zurich, Switzerland
Arbitrators:	Mr João Nogueira Da Rocha, Attorney-at-law in Lisbon, Portugal Mr François Klein, Attorney-at-law in Paris, France

22. On 19 February 2020, the CAS Court Office informed the Parties that the Panel, after consultation with the Parties, had decided to hold a hearing in this matter further to Article R57 of the CAS Code.

23. On 2 March 2020, the CAS Court Office informed the Parties that the hearing would be held on 13 May 2020 at the Office of the CAS Anti-Doping Division in Lausanne, Switzerland.

24. On 17 March 2020, the CAS Court Office requested the Parties to sign and return the Order of Procedure ("OoP") by 6 April 2020.

25. On 23 March 2020, the CAS Court Office acknowledged receipt of the Appellant's payment of the totality of the advance of costs for this proceeding.

26. On 24 March 2020, the Appellant returned the signed OoP.

27. On 25 March 2020, the Respondent returned the signed OoP.

28. On 30 March 2020, the Appellant requested that the hearing and the deadline to provide a list of the attendees for the hearing be postponed due to the COVID-19 pandemic.

29. On 31 March 2020, the CAS Court Office informed the Parties on behalf of the Panel that the hearing remained scheduled for 13 May 2020 and that the hearing would be held either in-person in Lausanne or by video-conference. In addition, the Parties were granted a new deadline of until 30 April 2020 to provide the names of the respective hearing attendees.

30. On 1 April 2020, the Respondent agreed with the directions given by the CAS Court Office.

31. On 2 April 2020, the CAS Court Office acknowledged receipt of the Respondent's 1 April 2020 letter and noted that the Respondent did not raise any objection as to the possibility that the hearing be held by video-conference.

32. On 28 April 2020, the CAS Court Office informed the Parties further to Articles R44.2 and R57 of the CAS Code that the hearing would be held by video-conference on 13 May 2020 and invited the Parties to provide the names of the respective attendees by 1 May 2020. Furthermore, the CAS Court Office provided the Parties with the opportunity to test the video-conferencing system (Cisco Webex) on 6 May 2020.

33. On 30 April 2020, the Appellant advised the CAS Court Office that it would be represented at the hearing by Mr Selin Kirkmikil, Attorney-at-law.

34. On 1 May 2020, the CAS Court Office *inter alia* invited the Parties to provide an email address and phone number for each hearing attendee, as well as noted that the Parties had failed to state whether they were available for the 6 May 2020 technical test of the video-conferencing system.

35. Also on 1 May 2020, the Respondent provided the name of his hearing attendee for the hearing and the coordinates requested by the CAS Court Office.

36. On 5 May 2020, the Appellant informed the CAS Court Office that *"we have waived our request for a hearing and we will not be able to attend the hearing"*. No reasons were provided for the Appellant's unavailability.

37. Also on 5 May 2020, the CAS Court Office invited Respondent to comment on the Appellant's 5 May 2020 letter by 6 May 2020.

38. On 6 May 2020, the Respondent requested that the hearing be maintained.

39. On 7 May 2020, the CAS Court Office informed the Parties that the hearing would take place

as scheduled on 13 May 2020 by video-conference and that the technical video-conference test between the CAS Court Office and the Parties would take place on 8 May 2020.

40. On 11 May 2020, the Appellant reiterated that it *"will not be able to attend the hearing"*, however again failing to provide any reasons for this.

41. Also on 11 May 2020, the CAS Court Office informed the Parties that the Panel had already considered the Appellant's previous request and rejected it, and referred the Parties to the Panel's decision to hold the hearing via video-conference on 13 May 2020 at 9:30 am CET.

42. On 13 May 2020, the hearing was held via video-conference. The hearing was attended – besides the members of the Panel and Ms Kendra Magraw (CAS Counsel) – by Mr Aydin Doganay, Attorney-at-law, on behalf of the Respondent.

V. SUBMISSIONS OF THE PARTIES

43. This section of the Award does not contain an exhaustive list of the Parties' contentions, its aim being to provide a summary of the substance of the Parties' main arguments. In considering and deciding upon the Parties' claims in this Award, the Panel has accounted for and carefully considered all of the submissions made and evidence adduced by the Parties, including allegations and arguments not mentioned in this section of the Award or in the discussion of the claims below.

A. The Appellant's Position

i. Salary and accommodation allowance

44. On 6 January 2020, in its Statement of Appeal, amended in its Appeal Brief of 16 January 2020, the Appellant requested as follows:

> *"1. To accept and cancel the Decision rendered by the FIFA DRC.*
>
> *2. To cancel the Decision which states that the Club has to pay in the amount of [sic] EUR 277,200 with %5 interest, the Club has to pay in the amount of CHF 40,000 as a fine and to cancel all the sanctions against the Appellant which decided in the said decision.*
>
> *3. To condemn the Respondent to the payment of the whole CAS administration costs and Arbitrators' fees".*

45. The Appellant's submissions in support of its Appeal against the Decision may be summarised as follows:

46. The Appellant submits that it has made a payment of the amount of EUR 360,000 as follows:

- EUR 90,000.00 on 3 October 2018
- EUR 90,000.00 on 6 December 2018

- EUR 90,000.00 on 21 December 2018
- EUR 90,000.00 on 7 February 2019
- EUR 90,000.00 on 21 March 2019
- EUR 90,000.00 on 5 April 2019

47. In addition, the Appellant is of the view that the overdue payables are less than EUR 277,200.00. The Contract came into force only on 16 August 2018. As a consequence, the Respondent is only entitled to accommodation allowance for the month of August in the amount of EUR 400, i.e. accommodation allowance for half a month.

ii. Transfer ban

48. The Appellant further submits that the transfer ban for three entire and consecutive registration periods in case of non-payment of the amount of EUR 277,200.00 is disproportionate and will cause irreparable damages to the Appellant.

B. The Respondent's Position

49. In his Answer dated 4 February 2020, the Respondent filed the following prayers for relief:

> *"1.1 To dismiss the Appellant for all of its requests;*
>
> *1.2 To fully confirm the Decision rendered by the DRC, specifically condemn the Appellant to pay to the Respondent the overdue payables in the amount EUR 277,200 plus 5% interstest p.a. from the 1 September 2018 regarding the accommodation allowances and 1st March 2019 for the salaries until the date of effective payment.*
>
> *1.3 To state that the Appellant shall be condemned to pay any and all costs of the present arbitrational proceedings as well as any eventual further costs and expenses for witnesses and experts;*
>
> *1.4 To condemn the Club to pay all attorney's fees of the Player for an amount of CHF 15,000".*

50. The Respondent's submission – in essence – can be summarised as follows:

51. Under the Contract the Appellant must pay a total amount of EUR 900,000.00 net. The Parties agreed on ten monthly instalments in the amount of EUR 90,000.00 payable on the last day of each month from August 2018 until May 2019. In addition, the Parties agreed upon a monthly accommodation allowance of EUR 800.00 for the same period.

52. The Appellant has failed to fulfill its financial obligations towards the Respondent under the Contract. The Appellant has not paid salaries for the months of February to April 2019, corresponding to overdue payables of EUR 270,000.00 (3 x EUR 90,000.00). Furthermore, the Appellant has not paid accommodation allowances for the months of August 2018 to April 2019, corresponding to overdue payables of 7,200.00 (9 x EUR 800.00). The Respondent is

further entitled to 5% interest p.a. on both salary and accommodation allowance.

53. With regard to the accommodation allowance for the month of August 2018, the Respondent submits that the Contract of 24 August 2018 does not state that only half of the accommodation allowance is to be paid. Accordingly, the Respondent is entitled to the payment of an accommodation allowance of EUR 800.00 for August 2018.

54. The Respondent further objects to the Appellant's argument of any irreparable damage for the Appellant based on the Appealed Decision. The Appellant has recruited at least 19 players in the 2019 summer transfer window and received, at least, EUR 3,500,000.00 through transfer fees.

VI. JURISDICTION

55. Article R47 paragraph 1 of the CAS Code provides as follows:

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

56. Clause 9 of the Contract reads as follows:

> *"Any dispute arising from or related to the present Contract will be submitted exclusively to the Court of Arbitration for Sport in Lausanne, Switzerland, and resolved definitely in accordance with the Code of sports-related arbitration. The Panel will consist of one arbitrator. The language of arbitration will be english".*

57. Article 58(1) FIFA Statutes (2019 edition) states as follows:

> *"Appeals against final decisions passed by FIFA's legal bodies and against decisions passed by confederations, member associations or leagues shall be lodged with CAS within 21 days of receipt of the decision in question".*

58. In addition, Article 24(2) of the FIFA Rules on the Status and Transfer of Players ("RSTP") (2019 edition) reads – in its pertinent parts – as follows:

> *"Decisions reached by DRC or the DRC judge may be appealed before the Court of Arbitration for Sport (CAS)".*

59. The Appealed Decision is a decision passed by a legal body of the FIFA. Thus, the above prerequisites are fulfilled. Furthermore, the Parties have not objected to CAS jurisprudence and have signed the OoP without reservation. It follows that CAS has jurisdiction to decide on the present dispute.

VII. ADMISSIBILITY

60. Article R49 of the CAS Code provides as follows:

> *"In the absence of a time limit in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for the appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders her/his decision after considering any submission made by the parties".*

61. Article 58(1) FIFA Statutes provides for a time limit of 21 days to file an appeal. This deadline is also referred to in the Decision, which provides as follows:

> *"The statement of appeal must be sent to the CAS directly within 21 days of receipt of notification of this decision […]".*

62. The Appealed Decision was notified to the Appellant on 17 December 2019. The Appellant filed its Statement of Appeal on 6 January 2020. Consequently, the appeal was filed within the prescribed deadline of 21 days and is therefore admissible.

VIII. OTHER PROCEDURAL ISSUES

A. Formation of the Panel

63. The arbitration clause contained in the Clause 9 of the Contract provides that a sole arbitrator shall be competent to decide the case. In the case at hand a three-member panel has been constituted to decide the case. It does not follow from this, however, that the arbitral tribunal to decide this case was irregularly constituted. Article R50 of the CAS Code provides as follows:

> *"The appeal shall be submitted to a Panel of three arbitrators, unless the parties have agreed to a Panel composed of a sole arbitrator or, in the absence of any agreement between the parties regarding the number of arbitrators, the President of the Division decides to submit the appeal to a sole arbitrator, taking into account the circumstances of the case, including whether or not the Respondent pays its share of the advance of costs within the time limit fixed by the CAS Court Office".*

64. It is true that the parties agreed to a sole arbitrator in the Contract. The parties may, however, change the agreement at any point in time before the constitution of the panel or the nomination of the sole arbitrator. The Appellant in its Statement of Appeal specifically requested the appointment of a three-member panel. The Respondent did not object to this request, rather stating in his letter dated 17 January 2020 that:

> *"In addition, in accordance with Article R53 of the … [CAS Code], the Respondent kindly ask you to nominate Mr François Klein … as arbitrator".*

65. It is recalled that Article R53 of the CAS Code provides:

> *"Unless the parties have agreed to a Panel composed of a sole arbitrator or the President of the Division considers that the appeal should be submitted to a sole arbitrator, the Respondent shall nominate an arbitrator within ten days after receipt of the statement of appeal. In the absence of a nomination within such time limit, the President of the Division shall make the appointment".*

66. By referring to Article R53 of the CAS Code, also the Respondent – implicitly – agreed to submit the present case to a three-member panel. Thus, there is a new agreement by the Parties that supersedes Clause 9 of the Contract. Finally, the Panel also takes note of the OoP duly signed by the Parties, in which they again confirmed their wish that the dispute be decided by a panel constituted of three arbitrators.

B. The Appellant's Default

67. Even though Appellant originally requested a hearing to be held in this matter and agreed to the hearing being held by video-conference, it failed to participate in the hearing. The hearing date had been set well in advance. No reasons were provided by the Appellant why it was unable to attend the hearing. Article R44.5(3) of the CAS Code provides:

> *"If any of the parties, or its witnesses, has been duly summoned and fails to appear at the hearing, the Panel may nevertheless proceed with the hearing and deliver an award".*

68. The Panel sees no reason to depart from the above rule and, thus, proceeds with delivering the award.

IX. APPLICABLE LAW

69. Article R58 of the CAS Code provides the following:

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

70. Article 57(2) of the FIFA Statutes sets forth as follows:

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

71. Consequently, the Panel will apply the rules and regulations of FIFA, particularly the FIFA Regulations on the Status and Transfer of Players, and Swiss law on a subsidiary basis.

X. MERITS

72. The relevant questions to be addressed by the Panel are the following:

a. Does the Appellant have overdue payables to the Respondent and, if so, to what amount?

b. Are the disciplinary sanctions imposed against the Appellant by the FIFA DRC unreasonable and disproportionate?

A. Overdue Payables

73. The Appellant has not contested that it had to pay 10 instalments in the amount of EUR 90,000.00 each to the Respondent. It is equally uncontested that the Appellant failed to pay three of these instalments for the months of February 2019 until April 2019 in the amount of EUR 270,000.00.

74. The Appellant takes issue with the monthly accommodation allowances. According to the Appellant, FIFA awarded the Player the full accommodation allowance in the amount of EUR 800.00 for the month of August 2018. The Appellant states that since the Contract only *"started on 16.08.2018 … the August accommodation shall have been paid in %50. It is not acceptable for the Club, while the Player only resident for 15 days, to pay whole amount of August"*.

75. The Contract provides for an allowance of EUR 800 per month. The Contract states Clause 2 (titled "CONTRACT PERIOD") that the starting date is 16 August 2018 and that the Contract expires on 31 May 2019. The contract period, thus, is 9.5 months. Even if one were to agree with the Appellant's argument that for the month of August 2018, only half of the allowance is due, the overall amount would be greater than EUR 7,200.00 (= 9 x EUR 800).

76. It clearly follows from this that Appellant's argument is without the slightest merit and that the Appealed Decision must be upheld.

B. The Disciplinary Sanction

77. The Appellant takes issue with the Item No. 7 of the operative part of the Appealed Decision, which states:

> *7. In the event that the amount plus interest due in accordance with point III/2. above is not paid by the Respondent* ***within 45 days*** *as from the notification by the Claimant of the relevant bank details to the Respondent, the Respondent shall be banned from registering any new players, either nationally or internationally, up until the due amount is paid for the maximum duration of three entire and consecutive registration periods (cf. art. 24bis of the Regulations on the Status and Transfer of Players).*

78. The legal basis of Item No. 7 of the operative part of the Appealed Decision is to be found in Article 24bis of the FIFA RSTP, which provides:

(1) "When instructing a party (a club or a player) to pay another party (a club or a player) a sum of money

(outstanding amounts or compensation), the Players' Status Committee, the DRC, the Single Judge or the DRC judge (as the case may be) shall also decide on the consequences of the failure to pay the relevant amounts in due time.

(2) Such consequences shall be included in the findings of the decision and will be the following:

against a club, a ban from registering any new players, either nationally or internationally, up until the due amounts are paid. The overall maximum duration of the registration ban, including possible sporting sanctions, shall be of three entire and consecutive registration periods".

79. It appears questionable whether the Respondent has standing to be sued with respect to the consequences imposed by the FIFA DRC in case of non-compliance. The matter of the standing to be sued is an issue of the merits (*CAS 2016/A/4602*; *CAS 2013/A/3047*; *CAS 2008/A/1639*):

> *"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"* (*CAS 2008/A/1639*).

80. The rules and regulations of FIFA are silent on the appropriate defendant of a decision taken by a sports association. This lacuna must be filled by Swiss law (see *supra* para. 71). However, also the relevant provision in Swiss law, Article 75 of the Swiss Civil Code ("SCC"), is not absolutely clear in this matter. The provision states:

> *"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 of learning thereof".*

81. The above provision is first and foremost aimed at a challenge directed against the resolution of a general assembly. It is uncontested that in such circumstances the appeal must be directed against the association (cf. RIEMER, BK-ZGB, Art. 75 no. 60). It is equally uncontested that Article 75 SCC also applies *mutatis mutandis* to decisions of other organs of an association. In the case-at-hand, the organ in question is the FIFA DRC. However, if an organ other than the general assembly has issued a decision, CAS jurisprudence requires to take a nuanced approach in order to determine what party has standing to be sued. In order to determine the appropriate party with standing to be sued, the panel in *CAS 2015/A/3910* applied the following formula:

> *"In view of all of the above, the Panel holds that […] the question of standing to be sued […] must be resolved on the basis of a weighting of the interests of the persons affected by said decision. The question, thus, is who […] is best suitable to represent and defend the will expressed by the organ of the association"* (para. 138).

82. Which entity is best suited to defend the will expressed by the organ of the association will depend on the role assumed by the latter. If the latter acted in an adjudicatory capacity, i.e. by resolving a dispute between other parties (so-called horizontal disputes), standing to be sued will rest with the party that avails itself of the binding effect of the decision. If, on the contrary,

the organ of the association assumed an administrative or disciplinary role instead (so-called vertical disputes) and its interests are at stake, then the party having standing to be sued is the association.

83. In the case-at-hand, the FIFA DRC has assumed the role of an adjudicatory body insofar as it decided the contractual dispute between the Parties. It decided in an administrative function with respect to the (future) enforcement of the Appealed Decision. Insofar as the Appellant directs its appeal against the administrative role assumed by the FIFA DRC, the only entity with standing to be sued is FIFA. Consequently, the Respondent is not the proper party. Thus, the Appellant's request *"to cancel all sanctions"* must be dismissed.

84. On a strictly subsidiary basis, the Panel notes that even if the Respondent had standing to be sued with respect to the issue of disciplinary sanctions, it would dismiss the Appellant's appeal. The submissions of the Appellant that a transfer ban by FIFA in case of non-compliance with its contractual obligations would be *"disproportionate"* and *"cause irreparable harm"* are completely unsubstantiated.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Bursaspor Kulübü Dernegi on 16 January 2020 against Henri Gregoire Saivet is dismissed.

2. (…).

3. (…).

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